



**Munje v County Assembly of Tana River & 2 others; Majimbo & 2 others (Interested Parties) (Petition E005 of 2023) [2024] KEELRC 698 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 698 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
PETITION E005 OF 2023**

**M MBARŪ, J  
MARCH 21, 2024**

**BETWEEN**

**ISALIAH NDISI MUNJE ..... PETITIONER**

**AND**

**THE COUNTY ASSEMBLY OF TANA RIVER ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR, COUNTY GOVERNMENT OF TANA RIVER 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF TANA RIVER ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**GEORGIADIS A. MAJIMBO ..... INTERESTED PARTY**

**DANIEL WANDERA ..... INTERESTED PARTY**

**ABDULLAHI HUSSEIN ..... INTERESTED PARTY**

**JUDGMENT**

1. In petition filed on 5th October 2023, the petitioner is seeking the following orders;
  - a. A declaration do issue that the decision of the 1<sup>st</sup> respondent to issue vetting notice in favour of the interested party when the petition is still in office and without issuing any form of communication to the petitioner or according him fair hearing offends article 10, 27, 41, 47, 50 and 236 of [the constitution](#) and is thus unconstitutional, null and void.
  - b. A declaration be issued that the unlawful constructive removal of the petitioner as County Attorney is unlawful on account of violation of article 41, 47, 50 and 236 of [the constitution](#).



- c. An order of judicial review do issue, quashing the decision of the 2<sup>nd</sup> respondent to nominate the interested party as County Attorney without according the petitioner due hearing and formal dismissal process.
- d. A declaration be issued directing the 3<sup>rd</sup> respondent to pay the petitioner all the monies due to him in from of salaries and remuneration from 11<sup>th</sup> October 2022 to 11 October 2023.
- e. As an alternative to prayer (d), the Governor of Tana River County, having engaged the legal services of the petitioner through a letter of appointment dated 11<sup>th</sup> October 2023 be compelled to pay the petitioner all the monies owed to him in form of salaries and/or consultancy or his general legal services for the period between 11<sup>th</sup> October 2023 to 11 October 2028.
- f. As a further alternative to prayer (d) and (e), the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be compelled to compensate the petitioner for the period he served as the acting County Attorney on the strength of the letter of appointment dated 11<sup>th</sup> October 2022.
- g. As a further alternative to prayer (d), (e) and (f), the court be pleased to declare the petitioner as having been validly appointed as the acting County Attorney for the County Government of Tana River by the 2<sup>nd</sup> respondent and that he be compensated for the period between 11<sup>th</sup> October 2023 to 11<sup>th</sup> October 2028.
- h. A declaration be issued that the actions of the respondents are in contravention of the petitioner's fundamental freedoms secured and guaranteed by article 27, 28, 41, 47 and 50 of [\*the constitution\*](#).
- i. A permanent injunction do issue restraining the respondent from interfering with petitioner's exercise of his function as County Attorney Tana River. Alternatively, the respondents be compelled to compensate the petitioner for his services.
- j. An order of permanent injunction do issue against the respondents either by themselves or any persons acting under their authority from further advertising, receiving applications, conducting interviews with regard to the office of the County Attorney until the lapse of the petitioner's tenure in office.
- k. A permanent injunction restraining the respondent or any person acting under their authority restraining them or any person acting under their authority from any way removing the petitioner from office as the County Attorney, County government of Tana River, during his terms.
- l. The respondents be deemed to have breached the terms and conditions of the contract by frustrating tits performance and be condemned to pay the salary as per group T, emoluments and other benefits due to the petitioner from his date of employment until the end of his tenure.
- m. General damages for violation of the petitioner's constitutional rights at Kshs. 30,000,000.
- n. The respondents be and are hereby directed to bear the costs of this petition jointly and severally.
- o. This court be pleased to grant such further Order or Orders as may be just and appropriate.



- p. Alternatively, and order do and hereby issued that the respondents pay the petitioner a sum of Kshs. 16,000 for loss of income and for salary due to the unjustified and premature removal from office.

## Petition

2. The petition is that by dint of Section 31 of the County Attorney Act, the petitioner is the County Attorney, County Government of Tana River, the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent is established under Article 177 of *the constitution*. The 2<sup>nd</sup> respondent is the governor of the 3<sup>rd</sup> respondent. The 1<sup>st</sup> interested party is the nominated County Attorney scheduled to be sworn in on 12 October 2023. The 2<sup>nd</sup> and 3<sup>rd</sup> interested parties and adults.
3. The petitioner is an Advocate of the High Court of Kenya with over 10 years experience and qualified to hold the office of County Attorney. The 2<sup>nd</sup> respondent pursuant to Section 31 of the Office of the County Attorney Act appointed the petitioner to the position of County Attorney for the 3<sup>rd</sup> respondent through letter dated 10 October 2022 for 6 years as required under Section 6 of the County Attorney Act.
4. Before the appointment, the petitioner served the 3<sup>rd</sup> respondent as the Legal Advisor to the 2<sup>nd</sup> respondent. He presided over the swearing-in of the governor pursuant to the provisions of the Assumption of Office of the Governor Act, 2019.
5. It was the petitioner's legitimate expectation that upon his appointment, he was entitled to receive a salary and allowance as per the stipulations of the Salaries and Remuneration Commission (SRC). It was on this basis that he declined to take up various employment positions that had been offered to him by other potential employers including the position of legal Advisor in the County of Siaya and that of County Attorney in the County of Homa Bay and the national Government, most of which have since been taken up.
6. The petitioner was surprised when the 3<sup>rd</sup> respondent instructed the 2<sup>nd</sup> respondent. stopped his salary and allowances prompting him to file Malindi ELRC Petition No. E003 of 2022 – Isaiah Ndisi Munje v The County Government of Tana River & Others. Upon discussion and agreement with the 2<sup>nd</sup> respondent, the petitioner withdrew the petition through a Notice of Withdrawal dated 1<sup>st</sup> December 2023. The 2<sup>nd</sup> respondent promised to reinstate the petitioner's salary but has refused to do so.
7. The petitioner noted the 1<sup>st</sup> respondent's advertisement indicating that the 1<sup>st</sup> interested party had been nominated by the 2<sup>nd</sup> respondent to the position of County Attorney and his vetting was scheduled for 12 October 2023. Considering the illegal conduct of the respondent violating his rights, he filed this petition to protect his rights under articles 47 and 50 for lapse of due processes and breach of his right to fair administrative action and the right to be heard before an adverse action is taken against him.
8. The petitioner, being a public officer, any action against him including removal from office must be done in compliance with the County Government Act read together with the County Attorney Act and *the constitution*. Article 236(2) of *the constitution* provides that a public officer should not be dismissed, removed from office, demoted in rank, or subjected to disciplinary action without due process of law. Being a public officer under the 3<sup>rd</sup> respondent, the actions of the respondents of vetting the 1<sup>st</sup> interested party as the County Attorney without revoking or recalling the petitioner's letter of appointment issued by the 2<sup>nd</sup> respondent is unconstitutional. There was a failure to inform the petitioner of his removal from office before the vacancy announcement which amounted to a violation of his constitutional rights under Article 47 of *the Constitution*.



9. The actions of the respondent to announce a vacancy and call for applications for the post of county Attorney while the petitioner was still in office is unconstitutional and violated Section 4 of the Fair Administrative Actions Act. The act of withholding the petitioner's salary and allowances from October to date violated Article 27(1) of *the Constitution* which provides the right to equal protection before the law and benefit. Presenting the 1<sup>st</sup> interested party for vetting for the position of County Attorney with full knowledge that the 2<sup>nd</sup> respondent had issued a letter of appointment to the petitioner without communicating this decision to the petitioner was unfair, devoid of procedure, illegal, and unconstitutional.
10. The respondents had no power to remove the petitioner from office without giving him a fair hearing or giving him notice hence violating Article 236 of *the constitution*. The petitioner had already been offered a letter of appointment by the Governor to the position of County Attorney for 6 years. Upon his transition to this office, the petitioner had a legitimate expectation to serve the full term of his appointment. Article 236(2) of *the Constitution* allowed him to hold office without removal unless otherwise subjected to disciplinary action. The actions of the respondent denied the petitioner his right to fair administrative action and was a further act of discrimination to the extent that he was removed from office using a vacancy announcement, a procedure not recognized by law, without being heard and hence denied equal protection and benefit of the law.
11. The petition is also that the petitioner was denied access to information contrary to Article 35(1) of *the constitution* which is a violation of his right to fair labour practices under Article 41 of *the constitution*. As the County Attorney and member of the executive committee, the petitioner was not paid his salary and allowances. The petition should be allowed as prayed.
12. The petitioner is supported by the Supporting Affidavit of the petitioner and on the grounds that the 2<sup>nd</sup> respondent, through a letter dated 10 October 2022 appointed him as the County Attorney for 6 years. prior to this, he served as the legal advisor to the 2<sup>nd</sup> respondent. He was surprised when the fiancé department of the 3<sup>rd</sup> respondent stopped payment of his salary on instructions from the 2<sup>nd</sup> respondent. He filed Malindi ELRC Petition E003 of 2022 and the matter was withdrawn upon a promise that the petitioner's salary would be reinstated but this was not done.
13. The petitioner aver that he was surprised to notice the vetting of the 1<sup>st</sup> interested party on 12 October 2023 as the County Attorney despite holding the position. This was in breach of his rights under *the constitution* and the law. He had not been recalled or removed from his office in accordance with Article 236 of *the constitution*. In *Mundia Njeru Getria v Embu County Government & 3 Others* [2013] eKLR the court held that removal from office is a drastic step and should be done in accordance with the law. The respondents are regulated under *the constitution*, the law, and particularly the County Government Act. The procedures to remove a County Attorney through a vacancy announcement or in any manner is contrary to Section 13 of the County Attorney Act and hence illegal. Removal from office must be procedural as held in *Margaret Lorna Kariuki v Embu County Government* [2015] eKLR and the orders sought in the petition should be issued.
14. In his Supplementary Affidavit, the petitioner aver that he applied for the position of County Attorney, he was shortlisted and the 2<sup>nd</sup> respondent appointed him on 11 October 2022 to the position. Through a letter dated 6 November 2022, the petitioner complained to the 2<sup>nd</sup> respondent about the delay in submitting his name to the 1<sup>st</sup> respondent for vetting, and any non-compliance was occasioned by the Governor. The petitioner had no mandate to submit his name to the County Assembly.
15. There was deliberate refusal and omission by the 2<sup>nd</sup> respondent to submit the petitioner's name to the County Assembly and the stoppage of his salary in July 2022 while his employment as legal advisor



- subsisted. The 2<sup>nd</sup> respondent was appointed for a second term and he continued to serve as legal advisor and the appointed as County Attorney through a letter dated 11 October 2022.
16. Even in a case where the contract as legal advisor lapsed on 9 August 2022 with the general elections, the contract was renewed by implication and terminated when the 2<sup>nd</sup> respondent appointed him as County Attorney on 11 October 2022.
  17. The Court of Appeal in *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR and *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR set the legal threshold for determining constructive termination where the employer is in breach of the employment contract. In refusing to submit his name to the County Assembly for vetting, the intention was to terminate his employment as a legal advisor.
  18. The 3<sup>rd</sup> respondent was served with a Court Order through a letter dated 31 October 2023 directing parties to maintain the status quo and it is not disputed that the 1<sup>st</sup> respondent went ahead with vetting and submitted the 1<sup>st</sup> interested party's name for vetting. The 3<sup>rd</sup> respondent violated the Court Order and should purge the contempt and be punished.
  19. 1<sup>st</sup> respondent and 3<sup>rd</sup> interested party the County Assembly of Tana River and the County Assembly Clerk in reply to the petition is that the petitioner is not the County Attorney by dint of Section 31 of the office of the County Attorney Act and was only employed by the 2<sup>nd</sup> respondent as legal advisor for the period of 2017 to 2022. Section 4 of the Office of the County Attorney Act establishes in each county the office of the County Attorney in consultation with the County Public Service Board. Section 5(1) provides that the County Attorney should be appointed with the approval of the County Assembly and Section 5(2) provides that a person qualified for the position must meet the requirements of Chapter 6 of *the constitution*. Section 31 of the Office of the County Attorney Act provides that a person employed by the County Public Service Board to the office of County Attorney must meet the qualifications set for this office.
  20. The petitioner was an employee of the 2<sup>nd</sup> respondent as a legal advisor and his appointment failed to meet the due process of the law which required him to be nominated by the governor and be approved by the County Assembly in accordance with Section 5(1) of the Office of the County Attorney Act.
  21. On 9 August 2023, the 2<sup>nd</sup> respondent nominated the 1<sup>st</sup> interested party for the position of County Attorney and forwarded the name to the 1<sup>st</sup> respondent for consideration. On 30 October 2023, the clerk to the 1<sup>st</sup> respondent placed the notification in the public of the intention of the County Assembly committee on appointments to conduct approval hearings as required under Article 196 of *the constitution* and Section 7(5) of the *Public Appointments (County Assemblies Approval) Act* which allows public participation. Through public notice, the clerk to the 1<sup>st</sup> respondent informed the 1<sup>st</sup> interested party of the nomination by the 2<sup>nd</sup> respondent on 30 October 2023 and asked him to appear for vetting on 12 October 2023. He attended and went through vetting.
  22. On 6 November 2023 the 3<sup>rd</sup> respondent was served with a court order and Order (5) directed parties for completeness, parties shall maintain the status quo.
  23. On 14 November 2023, the County Assembly Committee on Appointments tabled its report for adoption by the 1<sup>st</sup> respondent on the approval for the position of County Attorney. The report was adopted but the nominee was rejected.
  24. The 1<sup>st</sup> respondent having received the name of the nominee was mandated to conduct approval hearings and make recommendations within 21 days as provided in Section 9(1) of the *Public*



*Appointments (County Assemblies Approval) Act*. By the time the petitioner served the 1<sup>st</sup> respondent with the Court Order, the process of approval had commenced.

25. On 22 November 2023, the 2<sup>nd</sup> respondent nominated the 2<sup>nd</sup> interested party for the position of County Attorney and forwarded the name to the 1<sup>st</sup> respondent for approval and is yet to act on the nomination. The 1<sup>st</sup> respondent never received a nomination or approved the petitioner for the position of County Attorney as required under Section 5 of the Office of the County Attorney Act and the alleged appointment through letter dated 11 October 2022 is null and void. The provisions of Section 31 of the Office of the County Attorney Act do not apply in favour of the petitioner since at the time the Act came into effect, he was the legal advisor. The reliefs sought in the petition cannot be issued and a declaration should be issued that the letter dated 11 October 2022 is illegal and invalid and the petition be dismissed with costs.
26. In reply, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the Replying Affidavit of Victoria Tumaini the Secretary to the County Public Service Board of Tana River County government, and aver that there is capacity to reply on behalf of the respondents.
27. Tumaini avers that the petition revolves around the purported removal of the petitioner as the former Legal Advisor from office. The petitioner describes himself as the County Attorney under the provisions of Section 13 of the Office of the County Attorney but in the case of *The Governor, County of Vihiga v Evans Muswahili Ladtema & Others Civil Appeal No.53 of 2021 (Kisumu)* the Court of Appeal held that Section 13 of the Office of County Government Act does not transition a Legal Advisor or a Director of Legal Affairs into the office of County Attorney. In this regard, the petitioner lacks standing to file this petition.
28. Tumaini aver that the purported letter of appointment dated 11 October 2022 stands revoked. The appointment of the petitioner never took effect. The 2<sup>nd</sup> respondent was hoodwinked by the petitioner on the interpretation of Section 31 of the Office of County Attorney Act. The only appointment of the petitioner recognized by the 3<sup>rd</sup> respondent was in his capacity as Legal Advisor through a letter of appointment dated 20 November 2017.
29. The petitioner did not preside over the swearing-in of the 2<sup>nd</sup> respondent. This was presided over by a Judge. The petitioner was a member of the Assumption of Office of the Governor Committee in his capacity as legal Advisor.
30. Since the letter dated 10 October 2022 was revoked, the petitioner cannot claim to have had any legitimate expectation. The respondents are strangers to the job offers alluded to by the petitioner and they have no relationship with the petition.
31. The petitioner has not been honest with the court. It is not the stoppage of salary that prompted the filing of Malindi Petition No. E003 of 2022. The petition was filed following an advertisement by the 3<sup>rd</sup> respondent calling for applications for the position of County Attorney. Petition E003 of 2022 is dated 14 September 2022 and filed on 18 September 2022. By this time, the purported appointment of the petitioner as County Attorney through a letter dated 10 October 2022 had not been issued. His employment as Legal Advisor had ended in August 2022 hence not an employee of the 3<sup>rd</sup> respondent. His last salary was earned in August 2022 and prorated for days worked.
32. Tumaini aver that the petitioner fraudulently obtained interim orders in Malindi Petition E003 of 2022 which stopped the process of appointment of County Attorney for the 3<sup>rd</sup> respondent. The process resumed after he withdrew his petition culminating in the appointment of the 1<sup>st</sup> interested party.



33. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not discuss with the petitioner about reinstatement of his salary leading to him withdrawing his petition in Malindi Petition No. E003 of 2022. There is no agreement or minutes for any discussion. Any agreement or consent should have been recorded in court before the petitioner withdrew his petition. There is no suit filed by the petitioner on the grounds that his salary was stopped. His petitioner relates to the nomination of the 1<sup>st</sup> interested party.
34. The advertisement by the 1<sup>st</sup> respondent was done in line with applicable law. Before the advertisement, the 2<sup>nd</sup> respondent had nominated the 1<sup>st</sup> interested party to the position of County Attorney pursuant to the provisions of Section 5 of the Office of County Attorney Act through a notice dated 9 August 2023. Such nomination was lawful and did not violate the petitioner's rights as alleged.
35. The petitioner never ascended to the office of County Attorney of the 3<sup>rd</sup> respondent based on Section 31 of the Office of the County Attorney Act and never complied with Section 5 thereof hence he was not a County Attorney as alleged. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not violate their rights as claimed.
35. Tumaini aver in reply to the petition that the petitioner has a history of litigation against the respondents. He was employed as the Legal Advisor on 20 November 2017 to serve until the term for the Governor comes to an end or when he ceases to hold that office; whichever comes earlier. The term of the Governor came to an end in August 2022 during the August General Elections. The petitioner's employment came to an end by reason of effluxion of time in August 2022. His employment with the respondents ceased and another Legal Advisor was appointed to take his former office.
36. In September 2022, the Tana River Public Service Board advertised a vacancy in the Office of the County Attorney through notice. This triggered the petitioner to file Malindi Petition E003 of 2022 alleging that he was the County Attorney and that the advertisement purported to constructively dismiss him from office.
37. On 18 September 2022, the court in Malindi Petition E003 of 2022 directed the petitioner to serve the application for hearing on 22 September 2022. No interim orders were issued. The respondents were not served
38. Tumaini aver that the petitioner took advantage of the transitional period at the 3<sup>rd</sup> respondent after the August 2022 General Elections when he purported to appoint advocates in Malindi Petition No. E003 of 2022 where he was the petitioner. He appointed his advocates and those of the respondent. He acted in bad faith, fraudulently, and with the sole intent of hoodwinking the court to grant interim orders against the respondents.
39. The petitioner has appointed both advocates for his case and the respondents, this explains why both advocates consented to injuncting the respondents when the matter came up on 22 September 2022 and stopping the advertisement for the position of County Attorney or forcing the petitioner from vacating office pending hearing of his petition.
40. Later, the petitioner filed a contempt of court application dated 11 November 2022. He avers in his Supporting Affidavit that on 9 November 2022 through emails sent to Maurice Osano, Rashid Omar, Victoria Tumaini, and Mwanajuma Hirbae he reminded them of his reinstatement to the office by the 3<sup>rd</sup> respondent, and following court orders of 23 September 2022 they have failed to comply and failed to pay his due salary to force him to leave his employment. The petitioner copied this email to his advocates to take action, Messrs. Muga & Associates Advocates who had been appointed to act for the respondents in Malindi Petition No. E003 of 2022.
41. The respondents noted the adverse orders and actions by the appointed advocates and decided to appoint the firm of Messrs. Shisanya & Company Advocates to represent them since they were



strangers to the appointment of the firm of Messrs. Munga & Associates Advocates. This is the reason why the petitioner opted to withdraw his petition.

42. Tumaini aver that the respondents believe that during the transition as the 1<sup>st</sup> respondent, the petitioner prepared a letter dated 10 October 2022 appointing himself County Attorney. He caused the letter to be signed by the 2<sup>nd</sup> respondent. In drafting the letter, he relied on Section 31 of the County Attorney Act at the heart of this petition. Upon learning of this letter, the 2<sup>nd</sup> respondent revoked the fraudulent appointment. The petitioner's appointment as Legal Advisor ended in August 2022 and was not renewed or extended. On 3 and 4 April 2023 the 2<sup>nd</sup> respondent issued statements to the effect that the petitioner was not an employee of the respondents.
43. Under Section 31 of the County Attorney Act, the Court of Appeal has done an interpretation in *The Governor, County of Vihiga v Evans Muswahili Ladtema & Others Civil Appeal No.53 of 2021 (Kisumu)* and held that the position of Legal Advisor does not transition to County Attorney upon the end of the governor's tenure. Section 31(2) of the Office of County Attorney Act is that persons holding the office of County Attorney cease with the term of the governor.
44. Section 5 of the Office of County Assembly Act gives the process and procedure to be followed for one to be a County Attorney. The petitioner has not gone through the mandatory process and he was lawfully not appointed to the position. The petitioner was not contracted by the 3<sup>rd</sup> respondent after August 2022. The nomination of the 1<sup>st</sup> interested party did not in any way violate his rights and all the remedies sought in the petition cannot be issued and the petition against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should be dismissed with costs.

#### **Written Submissions**

45. The parties attended and agreed to address the petitioner by way of written submissions and further to attend and make oral highlights.
46. The petitioner submitted that through a letter dated 10 October 2022, the 2<sup>nd</sup> respondent appointed him as County Attorney in accordance with Sections 5, 6, and 31 of the Office of County Attorney Act but the 1<sup>st</sup> respondent has not approved his nomination as the 2<sup>nd</sup> respondent failed to submit his name for vetting which is construed as constructive dismissal. Article 27 of *the Constitution* prohibits discrimination. The 1<sup>st</sup> respondent and 3<sup>rd</sup> interested party rushed to the assembly for vetting of the 1<sup>st</sup> interested party which was rejected and subsequently approved the 2<sup>nd</sup> interested party. Contempt of court orders is ongoing. There is deliberate disobedience which should be punished.
47. Ms Victoria Tumaini filed an affidavit and attached a letter revoking the appointment of the petitioner. This letter was withheld until this petition was filed. This letter is backdated and illegal and there is no evidence that the petitioner was served with this notice revoking his appointment. This is a demonstration of how far the respondents are willing to go in violation of the law. Upon the letter of appointment, the petitioner had legitimate expectations that his appointment as County Attorney would be protected. The orders sought in the petition should be allowed with costs.
48. The 1<sup>st</sup> respondent and 3<sup>rd</sup> interested party submitted that under Section 5 of the Office of County Attorney Act upon nomination of a person by the 2<sup>nd</sup> respondent, the name(s) must be placed before the 1<sup>st</sup> respondent for vetting and approval. The petitioner did not transition to the position of County Attorney. If the appointment of the petitioner by the 2<sup>nd</sup> respondent was proper, under the Public Appointment of County Officer Act, the proper procedure was not followed. His name should have been placed before the 1<sup>st</sup> respondent for vetting and notice issued through the 3<sup>rd</sup> interested party which was not the case herein.



49. The 1<sup>st</sup> respondent and 3<sup>rd</sup> interested party submitted that on 6 November 2023, they were served with court orders that parties maintain the status quo but by dint of Section 9 of the Public Appointments Act, the nominees to be considered had to be vetted within 21 days. The respondent and interested party had no choice but to conclude the process. The 1<sup>st</sup> interested party was rejected by the County Assembly. There was no prejudice suffered. There was no intention to disobey the court.
50. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the petitioner is not a County Attorney as alleged. He did not transition to the position. For the 2<sup>nd</sup> respondent to appoint a County Attorney, the nominee must be presented for vetting by the 1<sup>st</sup> respondent which process the petitioner was not taken through. The 1<sup>st</sup> interested party was nominated based on Section 5 of the Office of the County Attorney Act and his name was submitted for vetting by the 1<sup>st</sup> respondent. There is the letter to the 3<sup>rd</sup> interested party copied to all officers unlike the letter of appointment issued to the petitioner dated 10 October 2022. The mere appointment does not meet the threshold of the law. Through a letter dated 1<sup>st</sup> November 2022, the 1<sup>st</sup> respondent revoked the appointment of the petitioner as the County Attorney and the claim that this revocation was an afterthought and forgery is without evidence.
51. The 1<sup>st</sup> interested party did not file any written submissions and supported submissions by the respondents.
- Determination
52. The issues that emerge for determination are whether the respondents and interested parties are in contempt of court;
53. Whether the petitioner was the County Attorney of the 1<sup>st</sup> respondent by dint of a letter dated 10 October 2022;
- Whether there were constitutional violations;
- Whether there is constructive dismissal;
- Whether the remedies sought should be issued.
54. On 23 October 2023, parties attended court, and hearing directions were issued. The court directed parties to maintain the status quo pending the hearing of objections filed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents dated 18 October 2023. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented in court by their advocate. The 1<sup>st</sup> and 3<sup>rd</sup> interested parties admit in reply to the petition that on 6 November 2023, the County Assembly of Tana River was served with the court orders issued on 23 October 2023. However, on 14 November 2023, the County Assembly Committee on Appointment tabled its report for adoption by the 1<sup>st</sup> respondent on the approval for the position of the County Attorney and rejected the nomination of the 1<sup>st</sup> interested party. The reasons given for proceeding despite being served with the Court Orders is that under Section 9(1) of the [Public Appointments \(County Assemblies Approval\) Act](#), they had only 21 days to make a determination.
55. Parties court to court to secure rights. To preserve the sanctity of the law. Upon the court's orders issued on 23 October 2023, the integrity of these orders can only become alive when parties obey and secure the rule of law by adhering to the same. Where the respondents found it impossible to comply with the orders issued on a good basis, recourse was the court. to proceed and fail to abide as directed whatever the justification was an affront to the very justice the respondents are seeking to secure in these proceedings.
56. During the highlighting of submissions in court, the respondents were casual about obedience to court orders. Ajila Advocate for the 1<sup>st</sup> respondent admitted service of court orders on 6 November 2023 but



made no apologies that on 14 November the County Assembly Committee on Appointments went ahead with the vetting process and filed its report rejecting the nominee.

57. Obedience of court orders is not for the benefit of the court. It is about preserving and safeguarding the rule of law. See *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* [2013] eKLR. The majority of the parties attending these proceedings are officers of the court who carry a heavier duty to secure the rule of law by abiding by court orders.
58. In *B v Attorney General* [2004] 1 KLR 431 the Court in addressing the sanctity of court orders held that;

The Court does not, and ought not to be seen to, make Orders in vain; otherwise, the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for the legality, and for the rights of all people.

59. On the admission of the 1<sup>st</sup> respondent and 3<sup>rd</sup> interested party, such disobedience being wilful and without any effort to apologize or purge, a sanction shall be issued. The attendant costs due to the petitioner will be met by the 1<sup>st</sup> respondent and 3<sup>rd</sup> interested party.
60. On whether the petitioner was the County Attorney of the 1<sup>st</sup> respondent, it is common cause that through a letter dated 20 November 2017 the petitioner was appointed by the respondents to the position of Legal Advisor. The letter of offer of employment was on the following terms;

Terms of service

Your terms of service will be a contract that expires when the term of service for the Governor comes to an end or when he/she ceases to hold that office; whichever comes earlier.

61. The tenure of the Legal Advisor lapsed with the tenure of the 2<sup>nd</sup> respondent in August 2022 given *The Governor, County of Vihiga v Evans Muswahili Ladtema & Others Civil Appeal No.53 of 2021 (Kisumu)*. Further, the petitioner's assertions that his contract ended on 9 August 2022 with the general elections but was renewed by implication and only terminated when the 2<sup>nd</sup> respondent appointed him through a letter dated 10 October 2022 as County Attorney is contrary to the provisions of Section 19(5) of the *Employment Act, 2007*. Where an employee is under a fixed term contract or the same is due to end through the end of a fact such as the end of the term for a governor, unless there is an unequivocal renewal of the contract, employment was not by implication in this case. Where particulars of employment change, the employee must be issued with written notice of the change. Employment particulars arising from a written contract are not changed through implication.
62. Through a letter dated 10 October 2022, the 2<sup>nd</sup> respondent appointed the petitioner to the Office of County Attorney with effect from 11 October 2022.
63. The basis of appointment was the provisions of Sections 31 and 5 of the Office of County Attorney Act.
64. Under Section 31 provisions, the county public service board has to ensure that the person to be appointed County Attorney meets the basic criteria to hold such a role. This then means a vetting of candidates presented to the county public service board.

Under Section 5 of the Act requires that;

- (1) The County Attorney shall be appointed by the Governor with the approval of the county assembly



65. Effectively, this meant that whenever a vacancy arose within the ranks particularly the position of County Attorney, an advertisement should be issued inviting candidates for the same. It further requires approval by the County Assembly for vetting. A public notice is mandatory. The 2<sup>nd</sup> respondent has no power to appoint but to nominate a County Attorney upon vetting it through the 1<sup>st</sup> respondent.
66. Through notice dated 9 August 2023, the 2<sup>nd</sup> respondent nominated for appointment of County Attorney the person of 1<sup>st</sup> interested party.
67. The petitioner acknowledges this process through his Supplementary Affidavit dated 17 January 2024 and his letter dated 6 November 2022 to the 2<sup>nd</sup> respondent. The petitioner notes that;

Nomination To The Office of The County Attorney – Refusa/reluctance To Submit My Name To The County Assembly For Vetting And The Continuous Stoppage of My Salary”

68. ... my salary stoppage and deliberate refusal by your office and that of the Governor to submit my name to the County Assembly of vetting. This is despite the fact that I was nominated for the position of County Attorney through a letter dated 10 October 2022.

As you may know by now, my salary was stopped at a time when my contract to serve as a legal advisor was still in force. It is instructive to note that my tenure of service was tied to the tenure of the Governor. The Governor’s tenure ends in 2027 courtesy of the successful re-election.

69. Why then did the 2<sup>nd</sup> respondent issue the petitioner letter of Appointment to the Office of County Assembly dated 10 October 2022 taking effect on 11 October 2022?
70. One explanation is given as being that he was hoodwinked by the petitioner to sign this letter. Another reason is stated to be that this was a transition period for the county and the petitioner took advantage to draft the letter in his favour. A further reason is that this letter was revoked through a letter dated 1<sup>st</sup> November 2022.
71. The 2<sup>nd</sup> respondent is the officer responsible for the County government of Tana River. He bears the greatest responsibility to the entirety of the population. Where the petitioner hoodwinked him into signing a letter dated 10 October 2022, he took a full month to issue a letter revoking such a letter. This is not diligent and no other action was taken against the hoodwinking. The petitioner has filed a litany of records where the 2<sup>nd</sup> respondent continued to engage him as an officer of the County. Various officers of the 1<sup>st</sup> respondent continued to engage the petitioner as an officer of the County. There is no contest that despite the lapse of the petitioner’s contract as legal advisor on 9 August 2022, the respondents continued to engage in his service. He was copied to emails dated 12 January 2023 from the County Secretary to the 2<sup>nd</sup> respondent. Attached were key records of the 1<sup>st</sup> respondent relating to budgets, county executive meetings, and minutes of a meeting held in Malindi. The notice was issued on 13 October 2022 by the 2<sup>nd</sup> respondent recognizing his chief officers with the petitioner being the County Attorney. The petitioner remained active during the Assumption of Office of the 2<sup>nd</sup> respondent.
72. The issue of the transition period for the 1<sup>st</sup> respondent is addressed casually. The 2<sup>nd</sup> respondent was also casual about it. Despite having various officers to facilitate the assumption of office, the position of legal advisor remained open and the County Attorney was not substantively filled despite the 1<sup>st</sup> respondent rejecting the nomination of the 1<sup>st</sup> interested party. Why then engage the petitioner after this fact?



73. The letter dated 1<sup>st</sup> November 2022 is introduced by Victoria Tumaini, County Secretary on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the Replying Affidavit dated 11 January 2024. Though the letter is dated, the forwarding address to the petitioner is a phone number and annexure “VT3”. The offer of appointment dated 20 November 2017 is annexure “VT4”. The forwarding address is noted as P.O. Box 29 Hola. This letter of revocation is not received by the petitioner. There is no evidence that it was sent to him. The requirements of Section 10(2) of the *Employment Act*, 2007 is for the employer to keep work details including contract addresses and postal address of the employee, and to communicate through such formal methods. Unless there is direct communication issued to the petitioner and he acknowledged receipt as he did to the email trails sent on 12 January 2023 by Mwanahiribae, the assertion that this letter of revocation was an afterthought and applied to negate his petition stands correct.
74. Up until this petition was filed on 19 October 2023, the records filed by the petitioner being engaged by the 2<sup>nd</sup> respondent are not contested.
75. Whereas the petitioner’s appointment by the 2<sup>nd</sup> respondent as County Attorney failed to meet the threshold of Section 5, and 31 of the Office of the County Attorney Act for want of notice to the County Assembly for vetting and approval, the 2<sup>nd</sup> respondent being a responsible officer for the 3<sup>rd</sup> respondent knowingly issued him with letter of appointment dated 10 October 2022. The letter revoking such appointment dated 1<sup>st</sup> November 2022 was not issued to the petitioner at any moment until he filed his petition and only arose on 11 January 2024 through the Replying Affidavit of Victoria Tumaini the County Secretary attending for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
76. The 2<sup>nd</sup> respondent as the officer responsible for securing the County of Tana River has since 9 August 2022 until the petitioner herein was filed enjoyed the services of the petitioner. Through the 2<sup>nd</sup> respondent’s letter appointing the petitioner as County Attorney with effect from 11 October 2022, he had a legitimate expectation that he was the candidate of choice. The duty to place the name of the petitioner before the County assembly for vetting is vested in the 2<sup>nd</sup> respondent. Instead, he issued a letter recommending the 1<sup>st</sup> interested party. The petitioner was left hanging on his letter.
77. Was this constructive dismissal of the petitioner? The scenario outlined above can only apply with regard to his claim that there was discrimination against him. Section 5(3) of the *Employment Act*, 2007 aptly describes the position the 2<sup>nd</sup> respondent placed the petitioner;
- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
    - (a) ...
    - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment.
78. The 2<sup>nd</sup> respondent, having initiated the process of the appointment of the petitioner as County Attorney failed to conclude this recruitment in accordance with the provisions of Sections 5 and 31 of the Office of the County Attorney Act. The direct issuance of the letter and then refusal to complete the process of recruitment placed the petitioner at a great disadvantage and eventually, other third parties became the preferred nominees. This is defined under the *Employment Act*, 2007 as being discriminatory against the potential or prospective employee such as the petitioner became as of 10 October 2022.



79. The court finds the discrimination against the petitioner was not justified. It placed him at a great disadvantage and eventually lost other opportunities for possible employment yet he held onto his letter of appointment by the 2<sup>nd</sup> respondent.
80. The petitioner is also not wholly without blame. He is an officer of the court with over 10 years of experience. He filed Malindi Petition No. E003 of 2022 after the respondents stopped payment of their salaries and allowances. How did he mitigate his situation? He withdrew this petition under a promise that his salary would be reinstated. Up until this petition, he claims that his salary from July 2022 to date has not been paid. A diligent and skilled employee has a duty to secure new opportunities particularly where he is seeking constructive dismissal.
81. In the case of Joseph Mwaniki Nganga v United Millers Limited [2022] eKLR the court held that;
- In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others.
- The Claimant in his testimony, told this court that he has since secured alternative employment and has been in employment with his current employer for about two years.
82. The court took a similar view in Ahamed Mwarumba Mwavita v Kocos Kenya Limited [2021] eKLR that the law obligates the employee to mitigate his losses upon loss of employment. The petition stood out as a highly skilled officer of the court sought after by the national Government and the Counties of Siaya and Homa Bay. After seeking the position of County Attorney from the respondents and filing Malindi Petition No. E003 of 2022, he ought to have moved to reduce the losses by putting his skills elsewhere.
83. The finding that there was discrimination against the petitioner instigated by the 2<sup>nd</sup> respondent, this court has the power to award damages in accordance with Section 12 of the Employment and [Labour Relations Act](#), 2011. The petitioner ceased being the legal advisor to the 2<sup>nd</sup> respondent neither was he the lawful County Attorney. Through a letter dated 10 October 2022, the 2<sup>nd</sup> respondent offered to pay him a consolidated salary of Kshs. 404,250 per month for 6 years.
84. The above analysis takes into account, the context of mitigation addressed. From 10 October 2022 to the point the petitioner filed this petition on 9 October 2023, this was a year under a promise. He is entitled to 50% of such a period. An award of six (6) months into his letter of appointment is found appropriate and justified at ksh. 404,250 6 all at ksh. 2,425,500.
85. With regard to payment of costs, as addressed above, these shall be met by the 1<sup>st</sup> respondent together with the 3<sup>rd</sup> interested party.
86. Accordingly, judgment is hereby entered for the petitioner in the following terms;
- a) The 2<sup>nd</sup> respondent discriminated against the petitioner in the recruitment for the position of County Attorney, County government of Tana River County;
  - b) The petitioner is hereby awarded damages at Kshs. 2,425,500 to be paid by the 2<sup>nd</sup> respondent;
  - c) The 1<sup>st</sup> respondent and 3<sup>rd</sup> interested party admitted contempt of court orders issued on 23 October 2023;



d) The 1<sup>st</sup> respondent and the 3<sup>rd</sup> interested party to jointly and severally meet costs due to the petitioner.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF MARCH 2024.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

**Court Assistant: Japhet**

..... **and** .....

