



Mutui v Speaker, Laikipia County Assembly & another (Employment and Labour Relations Petition E012 of 2023) [2024] KEELRC 680 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 680 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS PETITION E012 OF 2023

ON MAKAU, J

MARCH 15, 2024

IN THE MATTER OF: ARTICLES 10, 20, 22, 23,27, 28, 29, 41, 47, 50 AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTIONS 5, 17, 35, 43 & 46 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: SECTIONS 12 AND 13 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: SECTIONS 5, 10, 17, 19, 22, 23, 27 AND 30 OF THE COUNTY ASSEMBLY SERVICES ACT, 2017

AND

IN THE MATTER OF: VIOLATION AND THREATENED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER (INTER ALIA) ARTICLES 10, 27, 28, 29, 41, 47 AND 236 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JASPER MWITI MUTUIRI PETITIONER

AND

THE SPEAKER, LAIKIPIA COUNTY ASSEMBLY 1ST RESPONDENT

THE LAIKIPIA COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT



Declaration of a vacancy and advertisement for recruitment of the Clerk of a County Assembly seconded to the County Executive violated the clerk's rights to fair labour practices and fair administrative action

Reported by Kakai Toili

Devolution – county assemblies – clerk of county assemblies - procedure for the removal of a clerk of a county assembly from office - whether the secondment of the clerk of a county assembly to the county executive rendered the position of clerk vacant – County Assembly Services Act (cap) 265D, sections 22 and 23; Employment Act (cap 226), section 45.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - rights to fair labour practices and fair administrative action - distinction between fair labour practices and fair administrative action - whether the declaration of vacancy and advertisement for recruitment of another person to replace the clerk of a county assembly who had been seconded to the county executive violated the rights to fair labour practices and fair administrative action - Constitution of Kenya, articles 10, 41, 47, 232 and 236(b); Employment Act (cap 226), section 45; Fair Administrative Action Act (cap 7L), section 2.

Constitutional Law – doctrine of separation of powers - doctrine of separation of powers in county governments – county assemblies vis a vis county executives - whether it was contrary to the doctrine of separation of powers to second officers from one arm of a county government to the other - whether a county chief officer could be seconded to act as a county assembly clerk where the substantive clerk had been seconded to the county executive – Constitution of Kenya, articles 176 and 185; County Assembly Services Act (cap) 265D, section 26.

Brief facts

The petitioner was the Clerk of the Laikipia County Assembly (the County Assembly) and the secretary to the Laikipia County Assembly Service Board (the 2nd respondent). He held the two offices on permanent and pensionable terms. The petitioner averred that he was seconded to the County Executive to serve as the Acting Municipal Manager Nanyuki and that the Governor of Laikipia County Government seconded a chief officer (the Chief Officer) to the County Assembly to serve as the Acting Clerk. The petitioner stated that the action by the respondents to second him to the County Executive was malicious, illegal and irregular. The petitioner believed that the respondents' motive for seconding him to the County Executive was to, among other things, instigate his termination and/or removal from office.

The petitioner claimed that on October 19, 2023, despite the express terms of the secondment, the respondents advertised vacancy in the office of the Clerk Laikipia County Assembly and invited applicants for recruitment. The petitioner thus stated that the action meant that there was an intention to replace him while he was in employment on permanent and pensionable terms and to thereby terminate his employment. The petitioner thus sought for among other orders; a declaration that the purported declaration of vacancy and the advertisement for the recruitment to fill the position of Clerk, Laikipia County Assembly by the respondents when the position was not vacant was a violation of his constitutional rights.

Issues

- i. What was the procedure for the removal of a clerk of a county assembly from office?
- ii. Whether the secondment of the clerk of a county assembly to the county executive rendered the position of the clerk vacant.
- iii. Whether the declaration of vacancy and advertisement for recruitment of another person to replace the clerk of a county assembly who had been seconded to the county executive violated the rights to fair labour practices and fair administrative action.
- iv. What was the distinction between fair labour practices and fair administrative action.
- v. Whether a county chief officer could be seconded to act as a county assembly clerk where the substantive clerk had been seconded to the county executive.



- vi. Whether it was contrary to the doctrine of separation of powers to second officers from one arm of a county government to the other.

Relevant provisions of the Law

Constitution of Kenya

Article 236 - Protection of public officers

A public officer shall not be—

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

Held

1. The petition disclosed a reasonable cause of action founded on violation of the Constitution. The petition was clear on the provisions of the Constitution which were alleged to be violated, and the manner in which the violation had been done. Consequently, the petition met the competence threshold for a constitutional petition.
2. Section 23 of the County Assembly Services Act stipulated the procedure to be followed before the removal of the clerk was done. The procedure included;
 - a. framing the charges and serving the clerk;
 - b. inviting the clerk to respond to charges in writing;
 - c. inviting the clerk to appear before the board either in person or with an advocate, to exculpate himself/herself;
 - d. submission of a motion to the assembly for revocation of appointment of the clerk;
 - e. reference to a select committee for investigation; appearance of the clerk before the select committee;
 - f. the assembly was to consider the report of the select committee and approved the motion for removal.
3. The respondents had not disputed that the petitioner was the substantive Clerk of the Laikipia County Assembly on a permanent and pensionable basis. They had also not rebutted the petitioner's evidence that he had not resigned, retired or been removed from office under section 22 and 23 of the County Assembly Services Act. The petitioner was just seconded to the County Executive for three years to assist in establishing Nanyuki Municipality with the option of returning to his substantive position of Clerk of the County Assembly.
4. The office of the Clerk Laikipia County Assembly was not rendered vacant by the secondment of the petitioner to the County Executive in May 2023. The declaration of vacancy and advertisement for recruitment of another person to replace the petitioner as the Clerk of the County Assembly violated section 45 of the Employment Act by purporting to terminate the employment of the petitioner without any valid reason and without following a fair procedure. The declaration of the vacancy was therefore uncalled for, illegal, irrational, null and void because it was an attempt to remove him from office contrary to article 236(b) of the Constitution.
5. The actions by the respondents were contrary to law and without jurisdiction. They actually violated the petitioner's rights to fair labour practices and fair administrative action as guaranteed under article 41 and 47 of the Constitution. Fair labour practices in common parlance referred to practices that affected *inter alia*, hiring, promotions, transfers, suspension, disciplinary actions, terminations and reassignments. On the other hand, fair administrative action referred to the obligation on the part of a decision maker to act fairly. Section 2 of the Fair Administrative Action Act defined administrative action.
6. Section 26 of the County Assembly Services Act was clear that in case of the absence of the clerk, the deputy clerk shall act as the clerk and in the event of the absence of the deputy clerk, any other officer of the county assembly service could be appointed by the Board to act as the clerk. In the instant case,



- when the petitioner was seconded to the county executive, the right person to act as clerk of the County Assembly and the secretary of the 2nd respondent ought to have been the Deputy County Assembly Clerk. It had not been shown that there was no deputy clerk in Laikipia County Assembly and that he/she was absent or unable to perform the duties of the clerk.
7. The secondment of a chief officer from the county executive to act as the clerk of the county assembly was not only *ultra vires* but also uncalled for, illegal, irrational and outrightly unconstitutional. The decision and the action of seconding the Chief Officer to the County Assembly to act as the clerk was therefore intended to remove the petitioner from the office of the clerk and create a mongrel of County Government contrary to the established doctrine of separation of powers.
 8. The county assembly and the county executive were separate and distinct arms of the County Government established under article 176 of the Constitution. The former enjoyed the legislative authority in the county by dint of article 185 of the Constitution and its functions included overseeing the county executive. The county executive on the other hand enjoyed the executive powers in the county including administration and coordination of government functions.
 9. It was untidy and contrary to the constitutional principle of separation of powers to purport to second officers from one arm of county government to the other. It was even worse where such secondments contravened an express provision of the law like section 26 of the County Assembly Services Act. Violation of such clear provision of the statute amounted to a violation of the national values and principles of good governance, and the values and principles of public service. The purported consent by the petitioner to the terms of secondment was immaterial because a contract could not amend express provision of the law.
 10. Public officers, public organs and institutions of Government were bound to observe the national values and principles of good governance while exercising their mandate. They were also bound to observe the values and principles of public service when dealing with issues of employment in the public service. If they failed to do so, the court would readily invoke its jurisdiction to declare the supremacy of the Constitution over the inconsistent decisions and actions by public officers and public organs.
 11. The declaration of vacancy in the petitioners' substantive position while serving a temporary secondment in the County Executive, was irregular, illegal, irrational and contrary to section 45 of the Employment Act, section 22 and 23 of the County Assembly Services Act, and section 4 of the Fair Administrative Action Act. Consequently, the same was unconstitutional for being inconsistent with article 41, 47 and 236(b) of the Constitution. It was also a violation of the values and principles enshrined under article 10 and 232 of the Constitution.

Petition partly allowed.

Orders

- i. *In view of the petitioner having not resigned, retired or been removed from his office as the Clerk of the Laikipia County Assembly, the court made a declaration that the petitioner was and had been the duly appointed Clerk of the Laikipia County Assembly Service Board/ Laikipia County Assembly and could only be removed from Office in accordance with the provisions of sections 22 and 23 of the County Assemblies Act.*
- ii. *The purported declaration of vacancy and the advertisement for the recruitment to fill the position of Clerk, Laikipia County Assembly by the respondents as advertised in the newspapers (both print and electronic) on October 19, 2023, when the position was not vacant was a violation of the petitioner's constitutional rights protected under articles 41(1), 47 and 236 of the Constitution and statutory rights protected under the provisions of sections 23, 27(2) and (3) and 30 of the County Assemblies Act; section 5 of Fair Administration Actions Act and section 45 of the Employment Act.*



- iii. *The court issued an order of certiorari quashing the purported declaration of vacancy and the advertisement for the recruitment to fill the position of Clerk, Laikipia County Assembly by the respondents as advertised in the newspapers (both print and electronic) on October 19, 2023.*
- iv. *The court issued a permanent injunction restraining the respondents, whether acting directly or through third parties, agents and/or proxies, from illegally or irregularly advertising, interviewing, recruiting, employing, confirming and/or otherwise filling up the position of the Clerk of the Laikipia County Assembly when the petitioner's contract of employment was still subsisting.*
- v. *The court made a declaration that the purported decision by the 2nd respondent made on May 17, 2023 vide Minute No. 91/3/2023 to second the petitioner to the County Executive arm of the Laikipia County Government as the acting Municipal Manager - Nanyuki Municipality, and as communicated to the petitioner by the 1st respondent in letter Ref. No. CGL/CA/PF/001/13/31 and dated May 17, 2023, was unlawful, illegal, capricious, arbitrary, malicious, contrived and thereby constituted a violation of the petitioner's fundamental rights under articles 41, 47 and 236 of the Constitution and his employment and other statutory rights.*
- vi. *The court issued an order of certiorari quashing the decision of the 2nd respondent made on May 17, 2023 vide Minute No. 91/3/2023 purporting to second the petitioner to the Executive arm of Laikipia County Government as the acting Municipal Manager of the Nanyuki Municipality and as communicated to the petitioner by the 1st respondent in letter Ref. No. CGL/CA/PF/001/13/31 and dated May 17, 2023.*
- vii. *The court issued a permanent injunction restraining the respondents, whether acting directly or through third parties, agents and/or proxies, from seconding and/or transferring the petitioner from the Laikipia County Assembly Service Board/ Laikipia County Assembly to the Laikipia County Executive/ Laikipia County Public Service Board, and/or otherwise from interfering with the petitioner's contract of employment as the Clerk of the Laikipia County Assembly.*
- viii. *Based on the doctrine of separation of powers, the court made a declaration that the purported decision of the 2nd respondent approving the appointment of the County Chief Officer for County Co-ordination, Administration, ICT and Public Service to be seconded to the 2nd respondent as the acting Clerk of the Assembly and as communicated by the 1st respondent in letter Ref. No. CGL/CA/CON/02 and dated June 6, 2023 was unlawful, illegal, irregular, arbitrary, contrived and thereby constituted a violation provisions of sections 13 and 45 of the County Governments Act, sections 26 of the County Assembly Services and sections 4, 5, 6, 7, 8, 9 and 11 of the Public Appointments (County Assemblies Approval) Act. The latter provisions barred appointments without approval by county assembly where the approval was required; and they set out the procedure to be followed during the approval process.*
- ix. *The court made a declaration that the decision by the 2nd respondent approving secondment of the County Chief Officer from the County Executive to the County assembly to act as the clerk of the assembly was illegal, irrational, unconstitutional. The right person to act was the Deputy Clerk or any other officer of the County Assembly Service appointed by the 2nd respondent. Therefore, the court issued an order of certiorari quashing that decision.*
- x. *The court granted the petitioner's prayer for a finding and holding that the 1st and 2nd respondents had engaged in a malicious scheme of orchestrating the unlawful and unfair termination and/or removal of the petitioner from the Office of the Clerk Laikipia County Assembly.*
- xi. *Judgment entered for the petitioner with costs to be agreed between the parties or taxed.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1979] KLR 154 - (Applied)



2. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Applied)

Uganda

Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300 - (Explained)

United Kingdom

Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9; [1984] 3 All ER 935 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 2, 10, 22, 23, 27, 41, 47, 176, 185, 234, 236; Chapter 6 - (Interpreted)
2. County Assembly Services Act (cap 265D) sections 5, 10, 11, 12, 13, 17, 18, 19, 22, 23, 25, 26, 27, 30- (Interpreted)
3. County Governments Act (cap 265) sections 12, 13, 45, 73- (Interpreted)
4. Employment Act (cap 226) sections 5(3); 17; 35; 43; 45; 46- (Interpreted)
5. Fair Administrative Action Act (cap 7L) sections 2, 4, 5- (Interpreted)
6. Public Appointments (County Assemblies Approval) Act (cap 265B) sections 4, 5, 6, 7, 8, 9, 11 - (Interpreted)

Advocates

Mr Ngwele for the petitioner

Mr Kibicho for the respondent

JUDGMENT

1. The petitioner is the Clerk of the Laikipia County Assembly (hereinafter, “the Assembly”), and the Secretary to the 2nd respondent. He has held the two offices since September 18, 2013.
2. The 1st respondent is the Speaker of the Assembly and Chairperson of the 2nd respondent. He has held the two offices since September 2022.
3. The 2nd respondent is a statutory body established under section 12 of the [County Governments Act, 2012](#) and section 12 of the [County Assembly Services Act, 2017](#). The main function of the 2nd respondent is to establish an independent and politically neutral county public service that adheres with the values and principles set out in articles 10 and 232 of the [Constitution of Kenya, 2010](#). The 2nd respondent is composed of the Speaker of the county Assembly as Chairperson plus four other members while the Clerk to the Assembly sits as the Secretary.
4. By the Petition herein dated October 26, 2023 and supported by his own affidavit, the petitioner alleges that the respondents hatched a plan to remove him from the said offices unlawfully and seeks the following reliefs against the respondents:
 - a. A declaration that the petitioner is and has been the duly appointed Clerk of the Laikipia County Assembly Service Board/ Laikipia County Assembly and can only be removed from Office in accordance with the provisions of sections 22 and 23 of the County Assemblies Act;
 - b. a declaration that the purported declaration of vacancy and the advertisement for the recruitment to fill the position of Clerk, Laikipia County Assembly by the 1st and 2nd respondents as advertised in the newspapers (both print and electronic) on October 19, 2023 when the position is not vacant is a violation of the petitioner’s Constitutional rights protected



under articles 41(1), 47 and 236 of the Constitution and statutory rights protected under the provisions of sections 23, 27(2)& (3) and 30 the County Assemblies Act; section 5 of Fair administration Actions Act and sections 5(3),35,43 and 45 Employment Act;

- c. an order of *certiorari* quashing the purported declaration of vacancy and the advertisement for the recruitment for to fill the position of Clerk, Laikipia County Assembly by the 1st and 2nd respondents as advertised in the newspapers (both print and electronic) on October 19, 2023;
- d. permanent injunction restraining the 1st respondent and the 2nd respondent, whether acting directly or through third parties, agents and/or proxies, from illegally or irregularly advertising, interviewing, recruiting, employing, confirming and/or otherwise filing up the position of the Clerk of the Laikipia County Assembly when the petitioner's contract of employment is still subsisting;
- e. a declaration that the purported decision by the 2nd respondent made on May 17, 2023 vide Minute No 91/3/2023 to second the petitioner to the County Executive arm of the Laikipia County Government as the Municipal Manager - Nanyuki Municipality, and as communicated to the petitioner by the 1st respondent in letter Ref No CGL/CA/PF/001/13/31 and dated May 17, 2023, is unlawful, illegal, capricious, arbitrary, malicious, contrived and thereby constitutes a violation of the petitioners Constitutional Rights under article 236, his fundamental rights and freedom under Article 41 and 47 of the Constitution and his employment and other statutory rights;
- f. an order of *certiorari* quashing the decision of the 2nd respondent made on May 17, 2023 vide Minute No 91/3/2023 purporting to seconded the petitioner to the Executive arm of Laikipia County Government as the Municipal Manager of the Nanyuki Municipality and as communicated to the Petitioner by the 1st respondent in letter Ref No CGL/CA/PF/001/13/31 and dated May 17, 2023;
- g. Permanent injunction restraining the respondents, whether acting directly or through third parties, agents and/or proxies, from seconding and/or transferring the petitioner from the Laikipia County Assembly Service Board/ Laikipia County Assembly to the Laikipia County Executive/ Laikipia County Public Service Board, and/or otherwise from interfering with the petitioner's Contract of Employment as the Clerk of the Laikipia County Assembly;
- h. A declaration that the purported decision of the 2nd respondent approving the appointment of Mr. Peter Ndirangu Hinga, the County Chief Officer for County Co-ordination, Administration, ICT & Public Service, be seconded to the 2nd respondent as the acting Clerk of the Assembly and as communicated by the 1st respondent in letter Ref No CGL/CA/CON/02 and dated June 6, 2023 is unlawful, illegal, irregular, arbitrary, contrived and thereby constitutes a violation provisions of sections 13 and 45 of the County Governments Act, sections 26 of the County Assembly Services and sections 4, 5, 6,7,8,9 and 11 of the Public Appointments (County Assemblies Approval) Act ;
- i. an order of *certiorari* quashing the decision of the 2nd respondent approving the appointment of Mr Peter Ndirangu Hinga, the County Chief Officer for County Co-ordination, Administration, ICT & Public Service, be seconded to the 2nd respondent as the acting Clerk of the Assembly and as communicated by the 1st respondent in letter Ref No CGL/CA/CON/02 and dated June 6, 2023.



- j. a finding and holding that the 1st and 2nd respondents have engaged in a malicious scheme of orchestrating the unlawful and unfair termination and/or removal of the petitioner from the Office of the Clerk Laikipia County Assembly;
- k. costs of and incidental to this Petition;
- l. interest on (k) at court rates from the date of filing this Petition to the date of full and final settlement.

Factual background

5. The petitioner holds the two offices of Clerk of the Laikipia County Assembly and Secretary of the 2nd respondent on permanent and pensionable terms pursuant to sections 13 of *County Governments Act* and sections 18 of the *County Assembly Services Act* since September 18, 2013.
6. Prior to his appointment as the Clerk of the Laikipia County Assembly, the petitioner had served from September 18, 1995 in the defunct local authorities in various capacities. On August 14, 2012 he appointed the Town Clerk of the Municipal Council of Nyahururu, and diligently served until February 25, 2013 when he was appointed by the defunct Transition Authority as the Interim Clerk of the newly established Laikipia County Assembly.
7. It is the petitioner's case that, following the swearing-in of the current County Government in 2022, a section of the county leadership hatched a malicious scheme against employees that they termed as outsiders for reason of not being born in Laikipia County and more so to instigate the petitioner's termination and/or removal from the office of the Clerk of the Assembly.
8. The said scheme, allegedly, begun as an undertone evinced by rumors, innuendos and other assertion done behind the petitioner's back, but its full colours were uncovered and brought to fore from May 2023 through a well-choreographed malicious scheme to get the Petitioner out of the County Assembly.
9. It is further alleged that on or around May 15, 2023, HE the Governor of the Laikipia County Government, through a letter to the 1st respondent Ref No CGL/GVN/E(i)23/7 and dated May 15, 2023, requested the Laikipia County Assembly Service Board to second the petitioner to the Executive arm of the County Government to serve as the acting Municipal manager of the newly established Nanyuki Municipality.
10. On or around May 16, 2023, the 1st respondent through a letter addressed to me, Ref No CGL/CA/PF/001/13/29 and dated May 16, 2023, notified the petitioner of the contents of the letter Ref No CGL/GVN/E(i)23/7 and dated May 15, 2023 from HE the Governor, which had requested for his "secondment" to the Executive arm of the County Government as the Municipal Manager- Nanyuki Municipality and requested him to submit his position on the matter to his office the soonest.
11. The petitioner alleges further that, prior to the exchange of the said correspondences, the 1st and 2nd respondents and other senior officers of the County Executive had held informal meetings in a bid to plan his illegal and irregular secondment to the County Executive, citing his immense experience as a Town Clerk of several Municipalities.
12. The petitioner further avers that, on or around August 28, 2018 after due consideration, consultation and agonizing over the matter, and being privy to the undertones, innuendoes and behind the scene machinations and schemes to kick him out of office, he gave a conditional acceptance being fully aware of the consequences of refusing to take the "soft landing" offered. The conditional acceptance was through his letter dated May 16, 2023 to the 1st respondent as the Chairperson of the 2nd respondent which set out the terms for the "secondment".



13. The petitioner further averred that on or around May 17, 2023, the 2nd respondent at its meeting, under Minute No 91/3/2023 considered the request by HE the Governor communicated to approve the petitioner's secondment to the Executive arm as the acting Municipal Manager - Nanyuki Municipality. The 2nd respondent through a resolution, approved the request for the petitioner to be seconded for at least three years and that all terms as per the secondment policy shall apply.
14. The petitioner further averred that the 2nd respondent accepted the terms of secondment as contained in his letter Ref No CGL/CA/PF/001/13/30 and dated May 16, 2023 that "the secondment arrangements" did not affect his substantive position as the Clerk of the Assembly and that inter alia: -
 - a. the "secondment" will be for a period of three years;
 - b. the 2nd respondent will ensure a seamless and timely transition for the Petitioner to return to his substantive position of the Clerk of the County Assembly as and when the need arise; and
 - c. "both parties acknowledge that either party had the right to terminate the secondment agreement by providing written notice of thirty days in advance. We understand that termination may occur due to unforeseen circumstances, operational requirements, or any other justifiable reason. In such cases, the County Assembly Service Board and Nanyuki Municipality will collaborate to ensure a smooth transition and the completion of any pending tasks and responsibilities"
15. The petitioner averred that on or around May 17, 2023, the 1st respondent through letter Ref No CGL/CA/PF/001/13/31 and dated May 17, 2023 conveyed to him the resolution and the decision of the 2nd respondent that he be "seconded" to the Executive arm as the Municipal Manager - Nanyuki Municipality, for a period of at least three years subject to the terms contained therein which he had outlined in his letter Ref No CGL/CA/PF/001/13/30 and dated May 16, 2023.
16. On or around May 19, 2023, the 1st respondent through letter Ref No CGL/CA/PF/001/13/32 and dated May 19, 2023 conveyed to the HE the Governor, the resolution and the decision of the 2nd respondent that the petitioner be "seconded" to the Executive arm as the Municipal Manager of Nanyuki Municipality for a period of at least three years subject to the terms outlined in his letter Ref No CGL/CA/PF/001/13/30 and dated May 16, 2023 and additional terms contained therein.
17. On or around May 31, 2023, the County Secretary, Laikipia County Government, through a letter Ref No CGL/HRM/19950003504 (3)TY and dated May 31, 2023, conveyed to the petitioner the approval of the Laikipia County Public Service Board that he be "seconded" to the Executive arm as the Municipal Manager of Nanyuki Municipality for a period of three years with effect from June 12, 2023 subject to the conditions that the petitioner will retain his current job grade, salary, remuneration, allowances and pension status and that in addition he will enjoy the benefits applicable to the public officer in the Laikipia County Public Service.
18. The petitioner earnestly believe that, the choreographed actions by the 1st and 2nd respondents to "second him to the County Executive as Acting Municipal Manager, Nanyuki Municipality, was not only malicious and contrived but also illegal and irregular for the following reasons: -
 - a. He holds the Office of the Clerk of the Laikipia County Assembly which is a Statutory Office by dint of section 13 of the [County Governments Act](#) and sections 17 & 18 of the [County Assembly Services Act](#) on permanent and pensionable term and there exists no provision in law for the said office or Office holder to be seconded to the County Executive;



- b. The purported secondment to the county Executive is a violation to the constitutional principles of separation of powers given that both the County Assembly and the County Executive, are distinct and independent arms of the County Government, and the office of the Clerk is an office of the County Assembly only, accordingly, the holder of such an office, being an “Officer of the House” cannot be seconded to the other Arm of the County Assembly;
 - c. The purported “Secondment” is nothing but an attempt by the 1st and 2nd respondents to indirectly terminate the petitioner’s contract of employment given that there is no equivalent position, job or job group at the County Executive which he can take up;
 - d. The petitioner’s contract of employment as a Clerk of the County Assembly, which is permanent and pensionable can only be terminated in accordance with the provisions of sections 22 and 23 of the [County Assembly Services Act, 2017](#);
 - e. The petitioner was coerced and subjected to extreme undue influence into agreeing into the said illegal and irregular “secondment” and owing to the subsequent events, it is now evidently clear that, the same was an attempt to hoodwink and push the petitioner out of the way and alter the terms and conditions of his employment to his disadvantage without giving him a fair hearing and giving him any reason at all thereby contravening the petitioner’s constitutional rights of fair hearing as enshrined under article 47 of the [Constitution](#) and the [Fair Administrative of Action Act](#);
 - f. The purported secondment to the County Executive is erroneous and has been arrived at arbitrary, irrationally, unreasonably and is tantamount to constructive dismissal of the petitioner from his employment as the Clerk of the County Assembly;
 - g. there was a deliberate scheme by the two bodies of the County Government to hide from the petitioner their plans to “second” him to the County Executive and he only got wind of the scheme when he received from the 1st respondent the letter addressed to the petitioner Ref No CGL/CA/PF/001/13/29 and dated May 16, 2023;
19. The petitioner further earnestly believe, in view of the matters set out in paragraph 3 to 15 of this affidavit, that the 1st and 2nd respondents’ motive for illegally and irregularly seconding him to the County Executive as an Acting Municipal Manager, Nanyuki Municipality was to:
- a. of facilitate the implementation of their long-run malicious scheme of instigating his termination and/or removal from office;
 - b. on punish the petitioner on account of his ethnicity more so, by the fact that he held a senior public position in a County which is not his “own”;
 - c. replace the petitioner as the Clerk of County Assembly with their proxies and cronies; and
 - d. harass, intimidate, vex, vilify and scandalize the petitioner.
20. Despite the illegalities and the irregularities leading to the secondment of the petitioner pointed out in paragraph 15 above, out of fear of losing his job and knowing that he stood to lose if he objected to taking up the position more so due to the hostile environment which then prevailed, he proceeded on the secondment where he has exemplary discharged his duties with distinction albeit extreme challenges since no functions and duties have been transferred to the municipality and that, it has only been allocated a paltry budget of Kshs 2,000,000 for both development and Recurrent.



21. On October 19, 2023, despite the express terms of the said secondment and while the petitioner was still on secondment, the 1st and 2nd respondents advertised vacancy in the office of the Clerk Laikipia County Assembly in the Standard Newspapers and invited applicants for recruitment. The said action meant that there was intention to replace the petitioner while still in employment on permanent and pensionable terms and thereby terminate his employment as a means for implementing the malicious scheme alluded to above.
22. The petitioner avers that the Clerk of a County Assembly is appointed in accordance with the provisions of section 13 of the [County Governments Act](#) and can only be removed in accordance with section 22 and 23 of the [County Assembly Services Act](#) but as it stands now, the Office of the Clerk of the Laikipia County Assembly is not vacant.
23. The petitioner further avers that, the decision by the respondents purporting to declare vacancy and advertise for recruitment to the position of the Office of the Clerk Laikipia County Assembly, when the same is not vacant, as advertised in the Standard Newspaper of October 19, 2023 is illegal, irregular, malicious, irrational and unlawful because (inter alia):
 - a. The petitioner holds the Office of the Clerk of the Laikipia County Assembly which is a Statutory Office by dint of section 13 of the [County Governments Act](#) and sections 17 & 18 of the [County Assembly Services Act](#) on permanent and pensionable terms and he has never resigned, retired or otherwise removed from office under any procedure provided by law and as such, the said position is not vacant;
 - b. The purported declaration of vacancy and advertisement of recruitment to the position of the Office of the Clerk Laikipia County Assembly is nothing but an attempt by the 1st and 2nd respondents to terminate his contract of employment and render him jobless having hoodwinked and coerced him into agreeing to the said illegal and irregular secondment and consigned him into a junior position of the Acting Municipal Manager; and
 - c. The petitioner's contract of employment as a Clerk of the County Assembly, which is permanent and pensionable can only be terminated in accordance with the provisions of sections 22 and 23 of the [County Assembly Services Act, 2017](#).
24. The petitioner avers that the purported declaration of vacancy and advertisement of his position when the position is not vacant, is an affront, and violation of his constitutional rights protected under articles 41(1), 47 and 236 of the [Constitution](#); sections 23, 27(2) & (3) and 30 of the [County Assembly Services Act](#), section 5 of the FAA Act and sections 5(3),35,43 and 45 of the [Employment Act](#).
25. Accordingly, he contended that the purported declaration of Vacancy and recruitment has been arrived at arbitrarily, illegally, irrationally, unreasonably and without according the petitioner an opportunity of being heard.
26. On May 29, 2023, the 1st respondent wrote to H.E the Governor through letter Ref No CGL/CA/SP/CPNF/001 and dated May 29, 2023 requesting for the County Executive to “second” an officer of the County Executive to the County Assembly to be appointed as the “acting Clerk”.
27. On May 30, 2023, HE the Governor through letter to the 1st respondent Ref No CGL/CA/SP/CPNF/00GVN/E(i)23/8 and dated May 30, 2023, conveyed his decision that he had “identified” the Chief Officer for County Co-ordination, Administration, ICT & Public Service, Mr Peter Ndirangu Hinga as a suitable officer to be seconded to the Assembly to act as Clerk.



28. On June 6, 2023, the 1st respondent through a letter to H.E the Governor Ref No CGL/CA/CON/02 and dated June 6, 2023, conveyed the approval by the 2nd respondent that the said Mr Peter Ndirangu Hinga, then serving as the Chief Officer for County Co-ordination, Administration, ICT & Public Service, be seconded as the Assembly acting Clerk.
29. The Petitioner earnestly believes that, the choreographed actions by the 1st and 2nd respondents and the County Executive to second Mr Peter Ndirangu Hinga, then serving as the Chief Officer for County Co-ordination, Administration, ICT & Public Service, as the Assembly acting Clerk was not only contrived but also illegal and irregular for the following reasons: -
- a. the appointment is contrary to the provisions of section 13 of the [County Governments Act](#), sections 18 and 19 of the [County Assembly Services Act](#) No. 24 of 2017 and sections 4, 5, 6,7,8,9 and 11 of the [Public Appointments \(County Assemblies Approval\) Act](#) No 5 of 2017 which decrees for the Clerk to be appointed in a competitive process that is open, transparent and with the approval of the County Assembly.
 - b. it is an affront and violation to the constitutional principles of separation of powers given both the County Assembly and the County Executive are distinct and independent of the County Government, and the office of the Clerk is an office of the County Assembly in the county Assembly service only, accordingly the holder of such an office being an “Officer of the House” cannot at the same time be a County Chief Officer seconded from the Executive arm of the County government;
 - c. section 26 of the [County Assembly Services Act](#) is explicitly clear that “If the office of the Clerk is vacant, or if for any reason the Clerk is unable to exercise the functions of his or her office, the Deputy Clerk or, in the absence of the Deputy Clerk, any other officer in the Service appointed by the Board may exercise all the functions, duties and powers of the Clerk”;
 - d. the office of the Deputy Clerk is not vacant, accordingly, the right person who should have taken up the role of the acting Clerk during the petitioner’s absence was the Deputy Clerk or any other member of staff of Laikipia County Assembly Service and not Mr Peter Ndirangu Hinga, who is the Chief Officer for County Co-ordination, Administration, ICT & Public Service in the County Executive;
 - e. a County Chief Officer is an Officer in the County Executive public Service appointed pursuant to section 45 of the [County Governments Act](#) and such a person cannot be seconded to any other entity, institution or Service, outside that specific County Executive;
 - f. by dint of section 45(3) of the [County Governments Act](#) “a county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46.” Accordingly, such a person cannot be supervised or be responsible to a County Assembly, the Speaker of County Assembly or the County Assembly Service Board; and
 - g. by dint of section 45(4) of the [County Governments Act](#) “the governor may re-assign a county chief officer”. Accordingly, the Governor’s Statutory powers with respect to a County Chief Officer is to reassign him to another department within the County Executive and not to second him to any other entity, institution or Service, outside that specific County Executive;
30. The petitioner further averred that the 1st and 2nd respondents long-running malicious scheme of instigating the termination and/or his removal from office violates the petitioner’s fundamental rights and freedoms under:



- a. Article 27 of the *Constitution of Kenya* which protect the Petitioner from discrimination or harassment on grounds of (inter alia) ethnicity and political affiliation;
 - b. Article 28 and 29 of the *Constitution* which guarantee the Petitioner security of the person, protection of the law and freedom from cruel, inhuman and degrading treatment;
 - c. Article 41 of the *Constitution* which guarantees the Petitioner the right to fair labour practices;
 - d. Article 47 of the *Constitution* which guarantees the Petitioner the right to fair administrative action; and
 - e. Article 236 of the *Constitution* which protects the Petitioner from:
 - i. victimization or discrimination for having performed the functions of his office in accordance with the *Constitution* or any other law; and
 - ii. dismissal, removal from office, demotion in rank or subjection to disciplinary action without the due process of the law.
31. The petitioner contended that the 1st and 2nd respondents' conduct also violates his rights under the statutory provisions, which amplify the above constitutional provisions:
- a. section 5 of the *Employment Act* which protects the Petitioner against discrimination and harassment;
 - b. section 45 and 46 of the *Employment Act* which protects the Petitioner against unfair termination or removal from office without due process of the law;
 - c. section 5 of the *County Assembly Services Act* which provides for political neutrality and the values of the Assembly's service for the Petitioner;
 - d. section 11 of the *County Assembly Services Act* which provides for the statutory functions of the 2nd respondent;
 - e. section 17 and 19 of the *County Assembly Services Act* which provide for the functions of the Clerk of the Assembly;
 - f. section 22 and 23 of the *County Assembly Services Act* which provide for the security of office, suspension and Clerk of the Assembly; and
 - g. section 30 of the *County Assembly Services Act* which provide for the retirement and resignation of the employees of the County Assembly Service.
32. As a result of the foregoing matters, the petitioner contended that the 1st and 2nd respondents actions have caused him grave, irreparable, immeasurable and inestimable loss, harm and damage including:
- a. job insecurity, due to imminent threats to the Petitioner's termination, redundancy and/or removal from office;
 - b. mental and psychological trauma, due to persistent harassment, intimidation and the looming threat to lose the employment;
 - c. exposure to public ridicule, hatred, moral censure, social stigma, opprobrium and scandal; and
 - d. malicious removal from the Office of Clerk office and loss of benefits that go with the office.



33. on the other hand, the Speaker of the County assembly of Laikipia honorable Lantano Nabaala swore a Replying Affidavit to oppose the petition. He confirmed that he is the Chairman of the County Assembly Service Board, and hence competent to swear the Replying Affidavit on behalf of the 2nd respondent.
34. He further confirmed that, section 13 of the [County Governments Act](#) establishes the office of the Clerk of the County Assembly who shall be appointed by the County Assembly Service Board with the approval of the County Assembly. Further, the functions of the Clerk to the County Assembly are provided in section 19 of the [County Assembly Services Act](#) No 24 of 2017. The said functions are to essentially act as the Secretary to the County Assembly Service Board and further to act as the Chief Administrative Officer of the County Assembly and to oversee the day-to-day management and functioning of the County Assembly.
35. He confirmed that the Petitioner has been the Clerk to the County Assembly of Laikipia since his appointment in the year 2013 and that he had diligently served in this position till his secondment to the Executive arm of the government. He also confirmed that prior to his appointment as the Clerk to the County Assembly of Laikipia, the Petitioner had previously worked as an administrative officer and Clerk in various municipalities since 1995 including Meru, Narok, Mombasa and Nyahururu Municipalities, and had been transferred in that capacity to municipalities. Consequently, the respondent contended that the petitioner's secondment and transfer from the County assembly to the County Executive to serve as the Municipal Manager, Nanyuki Municipality is no exception.
36. He contended that upon establishment of the Nanyuki Municipality in March 2023, there was need for appointment of members to the municipal board as per the provisions of section 14 of [Urban Areas and Cities Act](#). The section provides that the Municipal board shall comprise of 9 members who shall include;
- a. The county executive member for the time being responsible for cities and urban areas or his representative.
 - b. Three members who shall be appointed by the county governor, with the approval of the county assembly.
 - c. Four members shall be nominated by an association and appointed by the county governor, with the approval of the county assembly.
 - d. The chief officer responsible for urban development; and
 - e. The municipal manager who shall be the secretary of the board and ex officio member of the board.
37. He contended that since this was the first time a Nanyuki municipal board was established, it was prudent that an internal recruitment be done so as to commence operations since a competitive recruitment process would take time.
38. He admitted that due to the petitioner's track record, the Governor of the County Government of Laikipia proposed that the petitioner be seconded for the position of acting municipal manager. The secondment was communicated to the County Assembly of Laikipia through his office vide a letter dated May 16, 2023.
39. He contended that after receiving the letter dated May 16, 2023 he held an informal meeting with the Petitioner and explained that due to his extensive experience, the Governor had proposed his



- secondment to the executive to hold the position of Municipal manager. After the discussions, the Petitioner informally agreed to the secondment.
40. Subsequently, he formally notified the petitioner of the Governor's proposal, vide a letter dated May 16, 2023 and requested him to give his opinion and decision on the secondment. The petitioner responded by a letter dated May 16, 2023 communicating his acceptance to the secondment and putting forth terms for consideration including inter alia that either party would be at liberty to terminate the secondment agreement through a written notice of thirty (30) days.
41. On May 17, 2023, he tabled the petitioner's letter before the County Assembly service Board (hereinafter "the Board") for consideration of the petitioner's proposed terms of secondment and the petitioner also attended the meeting held as the secretary to the board. The Board discussed at length the proposed terms of secondment and the same were approved without any variation including the following:
- a. The petitioner's salary and benefits during the secondment period would remain at his current level in addition to the Municipality covering any additional costs associated with the secondment.
 - b. The Board would ensure a seamless and timely transition for the petitioner's return to his substantive position as and when need arises.
 - c. The secondment period would be for at least three years as requested by the Petitioner in his letter of acceptance.
 - d. Either party was at liberty to terminate the secondment agreement by giving a 30-day written notice.
 - e. The petitioner would be released on June 12, 2023 to commence his duties as the Municipal Manager, Nanyuki Municipality.
42. Through a letter dated May 17, 2023, he informed the petitioner that the Board had approved his secondment with no variations to his proposed terms of secondment. Subsequently, the County Secretary through a letter dated May 31, 2023, wrote to the petitioner informing him of his secondment to the executive as the Municipal Manager, Nanyuki Municipality, for a renewable term of 3 years. The letter further confirmed that the petitioner would retain his current job grade, salary, remuneration allowances and pension status.
43. In view of the foregoing matters, it is the respondents' case that the petitioner retained his terms and conditions of service and that he was assured of career progression with the County Government of Laikipia. It is further respondents' case that the secondment of the petitioner was in terms of section 25 of the County Assembly Services Act No 24 of 2017. It also complied with the provisions of section 73 of the County Governments Act which empower the 2nd respondent to inter alia hire, transfer, redeploy and second an employee. It also complied with the Public Service Commission guidelines on secondment.
44. The respondents maintained that the petitioner accepted the secondment voluntarily, and as such his current complaint is an afterthought. They denied the alleged long running malicious scheme to terminate his contract of employment and averred that the allegations are invalid since the Petitioner was involved in the process of his secondment from inception. That the petitioner was called upon to give his views on the proposed secondment and he also sat in the meetings that passed the resolution on his appointment.



45. It is further defence case that during the meeting held on May 17, 2023 the petitioner tabled a letter inviting him to attend an international conference on post Pandemic Strategic Public Administration and Management in Australia. Travel was approved as a sign of appreciation of his work to the County Assembly and as a Secretary to the board. Accordingly, the respondents averred that there was no malice in the petitioner's secondment, and that the same was done in good faith.
46. They contended that, under the terms of Secondment, the petitioner has the option of terminating the secondment agreement by issuing a 30-day written notice. They further contended that the petitioner has deliberately refused to exercise this option and instead moved the Court to be declared the Clerk of the County Assembly in addition to holding the office of the Municipal Manager in blatant abuse of court process.
47. They further averred that, the allegations by the petitioner that the declaration of vacancy and advertisement for recruitment to the position of officer of the Clerk of Laikipia County Assembly is an attempt to indirectly terminate the petitioner's employment is farfetched. They contended that the petitioner is the current substantive Municipal Manager, Nanyuki Municipality, on a renewable three-year contract.
48. They maintained that the petitioner is already in office carrying out his official duties pursuant to the secondment after he handed over the position of the Clerk of the County Assembly to the current acting Clerk on June 12, 2023 and as such he cannot purport that he still holds the office of the clerk of the County Assembly.
49. The respondents contended that the petitioner's remuneration and all other benefits were moved to the County Public Service Board and the petitioner continues to receive his monthly salary and benefits as per his original contract of employment. They maintained that the petitioner's intention is to mislead this court into believing that the respondents completely violated the *County Assembly Services Act*.
50. The respondents contended that secondment is not a new creature as various Acts provide for it as a viable tool of management of critical skills that need to be shared within the public service. They argued that the law does not provide for any limitations and/or exceptions on secondment.
51. They reiterated that the petitioner's assertions that the respondents began behind-the-scenes machinations and schemes to kick him out of office are baseless since Nanyuki Municipality was created in March 2023. They maintained that the petition is full of speculations and innuendos that do not have any bearing in law. They argued that this court cannot grant orders on fears or speculations.
52. They contended that the petitioner has not presented before this honorable court an iota of evidence to at least substantiate his allegations that his secondment was a well-crafted scheme to ensure that he loses his position as the Clerk of the County assembly of Laikipia, and that the petitioner was coerced into agreeing to the secondment.
53. They further contended that, the petitioner has also not adduced any evidence to prove the alleged infringement of any right set out in the bill of rights and therefore the petitioner is not entitled to any orders sought by the petition. Therefore, they urged the court to dismiss the petition.

Submissions

54. Mr Ngwele, learned counsel argued the petition on behalf of the petitioner by largely repeating the averments in the petition. In brief he submitted that the petitioner was still in office as the substantive Clerk of the Laikipia County Assembly on permanent and pensionable terms and therefore the purported advertisement of vacancy in the office of the Clerk for recruitment of another person to



- replace him while serving on secondment as acting Municipal Manager Nanyuki for three (3) years, is illegal, irrational and it amounts to removal from office outside the established legal framework.
55. He clarified that the only way a Clerk can exit his office apart from natural way, is through resignation or removal under section 22 and 23 of the [County Assembly Services Act](#). In this case, the counsel submitted that the petitioner has neither resigned nor been removed from his office under the said provision and therefore there is no vacancy in the office of the Clerk Laikipia County Assembly.
 56. He further submitted that article 41(1), 47 and 236 of the [Constitution](#) gives the petitioner protection from removal or dismissal from office without due process. He contended that the decision by the respondents to second the petitioner to the County Executive for the three years and then declare vacancy in his substantive position, are arbitrary and unlawful. According to the counsel, the said decision is contrary to section 23,27, and 30 of the [County Assembly Services Act](#) (CAS Act), section 5 of the FAA Act and section 5, 35, 43 and 45 of the [Employment Act](#).
 57. He further submitted that, the Clerk of the County Assembly cannot be seconded to the County Executive because the position is statutory and for the County Assembly only. He submitted that Clerk is an officer of the House and its legislative function set out in section 17,18 and 20 of the CAS Act cannot be exercised elsewhere. He clarified that section 13(5) of the [County Assembly Services Act](#) distinguishes the clerk from the other staff of the County Assembly Service.
 58. He faulted the secondment of Mr Peter Hinga Chief Officer by the Governor from the County Executive to act as the Clerk of the Laikipia County Assembly contending that the said decision violated section 13 and 18 of the CAS Act. The counsel submitted that under the said provisions, provides for competitive recruitment and approval by the County Assembly.
 59. The counsel submitted that the secondment of the petitioner to the County executive and the secondment of CO Peter Hinga to the County Assembly violated the doctrine of separation of powers by usurping the power to appoint the Clerk of the County Assembly. Further, section 45 of the [County Governments Act](#) was violated because the governor only has the power to re-assign a Chief Officer to departments within the County Executive and not second them to the County Assembly.
 60. The counsel submitted that, section 26 of the CAS Act is clear that during the absence of the Clerk, the Deputy Clerk is the right person to act and in the absence of the deputy Clerk, any other officer of the County Assembly Service. Therefore, he faulted the secondment of Peter Hinga from the County Executive to act as the Clerk of the County Assembly contending that it violated the doctrine of separation of powers in Government.
 61. On the other hand, Mr Kibicho learned counsel for the respondent opposed the petition and urged the court to dismiss it with costs. He placed reliance on the Replying Affidavit and the list of authorities filed on November 9, 2023. He submitted section 73 of the [County Governments Act](#) allows secondment and contended that there is no law that bars secondment of the clerk of a County assembly to the county executive.
 62. He adopted the definition of secondment in the public Service Regulations and cited regulation 37 of the said Regulations which provides for the terms of secondment and the officers who can be seconded in the public service. He submitted that prayer (e) and (f) in the petition seeks to declare regulation 37 unconstitutional yet he has not pleaded the same.
 63. As regards the petitioner's submissions that section 45 of the [County Governments Act](#) was violated, Mr Kibicho contended that such submission cannot be relied upon and no orders can issue in that respect since Mr Peter Hinga is not a party to the suit. He emphasized that parties are bound by their pleadings and therefore he objected to the petition being expanded the issues of the Chief Officer.



64. He further submitted that the petition herein does not meet the threshold of pleadings enunciated in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & another* [2013] eKLR. He contended that the petitioner has basically cited the provisions of the *Constitution* that have been violated by the secondment but he has not shown how the violation was done.
65. On the merits of the petition, Mr Kibicho submitted that the petitioner consented to the secondment and largely dictated the terms of his secondment vide his letter dated May 16, 2023 including return to his position upon termination of the secondment. He further submitted that the terms dictated by the petitioner were approved by the County Assembly Service Board subject to a variation that, upon termination of the secondment, the Board would facilitate his return to his previous position or any other position. The counsel contended that the petitioner consented to the said variation and therefore he cannot turn around and dispute the same.
66. He further submitted that the petitioner never objected to another person taking over his office in an acting capacity, and he, in fact, handed over the office peacefully. Therefore, he reiterated that the petition should be dismissed with costs.
67. In his rejoinder, Mr Ngwele submitted that the issue whether a County Assembly Clerk can be secondment to the County Assembly is well covered by the petitioner's pleadings and in particular prayer (e). He contended that the petitioner was coerced to take the secondment by the Governor and the Speaker, who are the two most powerful persons in the County Government. He further submitted that the petitioner has pleaded the circumstances under which the secondment was done including external factors which left him with no option but to accept.
68. He submitted that section 73 of the *County Governments Act* provides for secondment of an officer and where he shall go after the secondment. He contended that secondment is temporary under the Act and an officer reverts back to his substantive position. He further contended that a contract cannot amend an express provision of a statute.
69. He also submitted that the PSC regulations cited by the respondent's counsel do not apply to the County Assembly Service employees. For emphasis he cited article 234 of the *Constitution* which states that powers and functions of the PSC do not apply to County Government. He contended that article 235 of the *Constitution* empowers the parliament to enact Laws for governing County Government.
70. As regards failure to plead precisely, the counsel submitted that paragraph 20,24,25 and 35 of the Petition contains precise pleading. He submitted that he was not worried about the non-joinder of Peter Hinga because prayer (h) in the petition seeks declaration of nullity of the decision of a public body. Finally, he submitted that the respondent did not address the court on section 76 of the *County Governments Act* and reiterated that only the Deputy clerk or another officer in the County Assembly service staff could be appointed as the acting Clerk.

Issues for Determination and Analysis

71. Having considered the petition, affidavits and the submissions presented by each side, it is fact that the petitioner is the substantive Clerk of Laikipia County Assembly; that he has not resigned, retired or been removed from office as provided by the County Assembly Service (CAS) Act; that he was seconded to the County Executive to serve as the acting Municipal Manager Nanyuki; that the Governor seconded a Chief Officer one Peter Ndirangu Hinga to the County Assembly to serve as the acting Clerk; that soon thereafter the respondents advertised vacancy in the office of the Clerk for recruitment; that the petitioner has since resigned from the secondment in the county executive to



return to his substantive position of Clerk of the county assembly; and that the respondents are not agreeable to his return to substantive position and instead want him to take another junior position.

72. The issues falling for determination are:
- a. Whether the petition meets the competence threshold of precise pleading required of a constitutional petition.
 - b. Whether the declaration of vacancy for recruitment of a new Clerk after secondment of the petitioner violated his constitutional rights.
 - c. Whether the secondment of the petitioner to the County Executive and the secondment of one Peter Hinga from the County Executive to the County Assembly as the acting Clerk violated the Constitution.
 - d. Whether the petitioner is entitled to the reliefs sought in the petition.

Competence Threshold

73. The respondent submitted that the petition herein falls short of the threshold of a constitutional pleading as established in the celebrated case of Anarita Karimi Njeru v Republic, *supra*, since he has not showed how the cited provisions of the Constitution were violated. In the said case the court stated that: -

“We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the Constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

74. The petitioner, has however submitted that paragraph 20,24,25 and 35 of the Petition contains precise pleading of how the cited provisions of the Constitution have been violated. I have carefully considered all the paragraphs of the petition. Paragraph 35 and 36 sets out the provisions of the Constitution and the statutes which have been violated. Paragraph 20, 24, 25, 26, 27,32, 33 and 34 of the petition, pleads with a reasonable degree of clarity how the said constitutional provisions are alleged to have been violated.
75. Having so said, I am satisfied that the petition discloses a reasonable cause of action founded on violation of the Constitution. I am clear on the provisions of the Constitution which are alleged to be violated, and the manner in which the violation has been done. Consequently, I find and hold that the petition meets the competence threshold for a constitution petition.

Violation of the Petitioner’s Constitutional Rights.

76. The petitioner was aggrieved by the respondents’ decision to declare vacancy for recruitment of a County Clerk soon after his secondment to the County Executive as acting Municipal Manager Nanyuki Municipality. He contended that he was still the substantive Clerk of the Laikipia County Assembly on permanent and pensionable terms. He contended that other than the natural way, the only way his contract of employment can be terminated is through resignation, retirement or removal from office under section 22 and 23 of the CAS Act.
77. Section 22 provides that the county Assembly Service Board may remove a clerk from office for;



- a. “Inability to perform the functions of the office, whether arising from Infirmity of body or mind;
 - b. Gross misconduct or misbehavior;
 - c. Incompetence;
 - d. Bankruptcy;
 - e. Violation of provisions of the Constitution, including Chapter six of the Constitution; or
 - f. Violation of the provisions of this Act.”
78. Section 23 of the Act basically stipulates the procedure to be followed before the removal of the clerk is done. The procedure includes framing the charges and serving the clerk; inviting the clerk to respond to charges in writing; inviting the clerk to appear before the board either in person or with an advocate, to exculpate himself/herself; submission of a motion to the Assembly for revocation of appointment of the clerk; reference to a select committee for investigation; appearance of the clerk before the select committee; the Assembly considers the report of the select committee and approves the motion for removal.
79. The respondents have not disputed that the petitioner is the substantive Clerk of the Laikipia County Assembly on a permanent and pensionable basis. They have also not rebutted the petitioner’s evidence that he has not resigned, retired or been removed from office under section 22 and 23 of the CAS Act. It is also a fact that the petitioner was just seconded to the County Executive for three years to assist in establishing Nanyuki Municipality with the option of returning to his substantive position of clerk of the County Assembly.
80. In view of the foregoing, it is obvious that the office of the Clerk Laikipia County Assembly was not rendered vacant by the secondment of the petitioner to the County Executive in May 2023. It follows that the declaration of vacancy and advertisement for recruitment of another person to replace the petitioner as the clerk of the county assembly violated section 45 of the Employment Act by purporting to terminate the employment of the petitioner without any valid reason and without following a fair procedure. The said section provides that:
- “(1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”



81. The said declaration of vacancy in the office of the clerk and advertisement for recruitment was therefore uncalled for, illegal, irrational, null and void because it was an attempt to remove him from office contrary to article 236(b) of the Constitution. The said article provides that:

“ A public officer shall not be-

- a.
- b. Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.”

82. In the Ugandan case of *Pastoli v Kabale District Local Government Council & others* (2008) 2 EA 300, illegality was defined as:-

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

83. The court also defined irrationality in the above case as follows:-

“Irrationality is when there is such gross unreasonableness in the decision-making process in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision.”

84. Several decades before the above case, an English Court in case of *Council of Civil Service Union v Minister for the Civil Service* [1984] 3 All ER 935 expressed itself as follows: -

“By irrationality I mean what can now be succinctly referred to as Wednesbury unreasonableness ... it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

85. Having considered the facts of the instant, I find that the decision and the actions by the respondents were contrary to law and without jurisdiction they actually violated the petitioner’s rights to fair labour practices and fair administrative action as guaranteed under article 41 and 47 of the Constitution. Article 41 provides that:

“Every person has the right to fair labour practices.”

86. Fair labour practices in common parlance refers to practices that affect inter alia, hiring, promotions, transfers, suspension, disciplinary actions, terminations and reassignments. On the other hand, fair administrative action refers to the obligation on the part of a decision maker to act fairly. Section 2 of the Fair Administrative Action (FAA) Act defines administrative action as:-

- “(i) The powers, functions and duties exercised by authorities or quasi tribunal; or
- ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

87. Further section 4 of Fair Administrative Action Act provides that;



1. “Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for administrative action that is taken against him.
 3. Where administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. Prior and adequate notice of the nature and the reasons for the proposed administrative action;
 - b. An opportunity to be heard and to make representations in that regard;
 - c. ...”
88. The petitioner was not exposed to the above benefits and rights to fair administrative action. Guided by the foregoing provisions, I am satisfied that the declaration of vacancy in the office of the Clerk for recruitment of another person to replace the petitioner while he was on secondment to the County Executive violated his rights under the Constitution and the statutes cited above.

Secondments violated the Constitution

89. The petitioner contended that his secondment to the County Executive as acting Municipal Manager and the secondment of Mr Peter Hinga, a Chief officer in the County executive to the County Assembly as the acting Clerk violated the legal principle of separation of powers and therefore it was unconstitutional. He argued that his appointment has a statutory underpinning and is meant specifically to serve the County Assembly only. He emphasized his case by citing section 13 of the County Governments Act.
90. As regards Peter Hinga, he contended that the Governor acted *ultra vires* by seconding the chief officer to the County Assembly. He contended that under section 45 of the County Governments Act, a Governor’s power is only limited to re-assignment of a Chief Officer to different departments within the County Executive.
91. He further observed that the secondment of a Chief officer to act as the clerk of the County Assembly violated section 26 of the CAS Act which provides that:
- “if the office of the Clerk is vacant, or if for any reason the Clerk is unable to exercise the functions of his or her office, the Deputy Clerk or in the absence of the Deputy Clerk, any other officer in the Service appointed by the Board may exercise all the functions, duties and powers of the Clerk”
92. The above provision is clear that in case of the absence of the Clerk, the Deputy Clerk shall act as the Clerk and in the event of the absence of the Deputy Clerk, any other officer of the County Assembly Service may be appointed by the board to act as the clerk. In this case, when the petitioner was seconded to the County executive, the right person to act as clerk of the Assembly and the secretary of the board ought to have been the Deputy County Assembly clerk. It has not been shown that there is no Deputy Clerk in Laikipia County Assembly and that he/she is absent or unable to perform the duties of the Clerk.
93. It follows that the secondment of a chief officer from the County executive to act as the Clerk of the County Assembly was not only *ultra vires* but also uncalled for, illegal, irrational and outrightly



unconstitutional. The decision and the action of seconding the Chief Officer to the County Assembly to act as the Clerk was therefore intended to remove the petitioner from the office of the Clerk and create a mongrel of County Government contrary to the established doctrine of separation of powers.

94. The county assembly and the county executive are separate and distinct arms of the County Government established under article 176 of the Constitution. The former enjoys the legislative authority in the County by dint of Article 185 and its functions includes overseeing the County executive. The county executive on the other hand enjoys the executive powers in the County including administration and coordination of government functions. Consequently, it is untidy and contrary to the constitutional principle of separation of powers to purport to second officers from one arm of county government to the other. It is even worse where such secondments contravene an express provision of the law like section 26 of the CAS Act above. Violation of such clear provision of the statute amounts to a violation of the National values and principles of good governance, and the values and principles of public service aforesaid. It must be clear that the purported consent by the petitioner to the terms of secondment is immaterial because a contract cannot amend express provision of the law.
95. Article 10 of the Constitution obliges every public officer and public organs to observe the national values and principles of good governance whenever performing their duties or implementing decisions. The said article provides as follows:

“ 10.

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include—
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development”

96. Article 232 of the Constitution which spells out the values and principles of public service. They are as follows:

- “ 1. The values and principles of public service include—
- a. high standards of professional ethics;
 - b. efficient, effective and economic use of resources;



- c. responsive, prompt, effective, impartial and equitable provision of services;
 - d. involvement of the people in the process of policy making;
 - e. accountability for administrative acts;
 - f. transparency and provision to the public of timely, accurate information;
 - g. subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - h. representation of Kenya's diverse communities; and
 - i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - i. men and women;
 - ii. the members of all ethnic groups; and
 - iii. persons with disabilities.
2. The values and principles of public service apply to public service in—
 - a. all State organs in both levels of government; and
 - b. all State corporations.
 3. Parliament shall enact legislation to give full effect to this article.”

97. The above articles reflects the new national Culture in this country whereby public officers, public organs and institutions of government are bound to observe the national values and principle of good governance while exercising their mandate. They are also bound to observe the values and principles of public service when dealing with issues of employment in the public service. If they fail to do so, this court will readily invoke its jurisdiction to declare the supremacy of the *Constitution* over the inconsistent decisions and actions by public officers and public organs.

98. Article 2 the *Constitution* provides for the supremacy of the *Constitution* as follows:

“2

1. This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
2. No person may claim or exercise State authority except as authorized under this Constitution.
3. The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.
4. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”
[emphasis added]



99. In this case, I have observed that the declaration of vacancy in the petitioners' substantive position while serving a temporary secondment in the County Executive, was irregular, illegal, irrational and contrary to section 45 of the Employment Act, section 22 and 23 of the CAS Act, and section 4 of the FAA Act. Consequently, I find and hold that the same was unconstitutional for being inconsistent with article 41, 47 and 236(b) of the Constitution. It was also a violation of the values and principles enshrined under article 10 and 232 of the Constitution.

Reliefs

100. The petitioner has made numerous prayers which I have considered. In view of the finding above that the petitioner has not resigned, retired or been removed from his office as the Clerk of the Laikipia County Assembly, I must make a declaration that the Petitioner is and has been the duly appointed Clerk of the Laikipia County Assembly Service Board/ Laikipia County Assembly and can only be removed from Office in accordance with the provisions of sections 22 and 23 of the County Assemblies Act.
101. For the same reasons above, I make further declaration that, the purported declaration of vacancy and the advertisement for the recruitment to fill the position of Clerk, Laikipia County Assembly by the 1st and 2nd respondents as advertised in the newspapers (both print and electronic) on October 19, 2023, when the position is not vacant is a violation of the petitioner's Constitutional rights protected under articles 41(1), 47 and 236 of the Constitution and statutory rights protected under the provisions of sections 23, 27(2)& (3) and 30 of the County Assemblies Act; section 5 of Fair Administration Actions Act and section 45 Employment Act.
102. In addition, I issue an order of *certiorari* quashing the purported declaration of vacancy and the advertisement for the recruitment for to fill the position of Clerk, Laikipia County Assembly by the 1st and 2nd respondents as advertised in the newspapers (both print and electronic) on October 19, 2023. The basis for granting this order is my finding herein above that the decision and actions by the respondents and the Governor of Laikipia acted contrary to express provisions of section 26 of the CAS Act, section 45 of the Employment Act, section 45 of the County Governments Act and article 236(b) of the Constitution.
103. Such offending decisions and actions by the respondents and the Governor were *ultra vires*, illegal, irrational, unconstitutional, null and void. I must reiterate that, by dint of article 2(4) of the Constitution, any decision or action by the government or government organs or their officers, that are inconsistent with the Constitution are invalid to the extent of the inconsistency and this court has the mandate to declare them as such, if they relate to employment and labour relations. The said mandate is drawn from article 23 and 165(5) of the Constitution.
104. Further I hereby issue permanent injunction restraining the 1st respondent and the 2nd respondent, whether acting directly or through third parties, agents and/or proxies, from illegally or irregularly advertising, interviewing, recruiting, employing, confirming and/or otherwise filling up the position of the Clerk of the Laikipia County Assembly when the petitioner's contract of employment is still subsisting;
105. Further to the declaration in (b) above, I make a declaration that the purported decision by the 2nd respondent made on May 17, 2023 vide Minute No 91/3/2023 to second the Petitioner to the County Executive arm of the Laikipia County Government as the acting Municipal Manager - Nanyuki Municipality, and as communicated to the Petitioner by the 1st respondent in letter Ref No CGL/CA/PF/001/13/31 and dated May 17, 2023, is unlawful, illegal, capricious, arbitrary, malicious, contrived and thereby constitutes a violation of the petitioner's fundamental rights under article 41, 47 and 236



- of the Constitution and his employment and other statutory rights. The said secondment was done with haste and in a manner that corroborates the petitioner's contention that he did not accede to it voluntarily. The correspondences between the 1st respondent and the Governor, which was initiated by the latter smacks of unholy collusion between the heads of the county assembly and the county executive arms of the County carefully choreographed to remove the petitioner from his office as the Clerk of the County assembly for no just cause and without following the due process of the law.
106. For the foregoing reason and on the basis of the doctrine of separation of powers, I issue an order of *certiorari* quashing the decision of the 2nd respondent made on May 17, 2023 vide Minute No 91/3/2023 purporting to second the Petitioner to the Executive arm of Laikipia County Government as the acting Municipal Manager of the Nanyuki Municipality and as communicated to the petitioner by the 1st respondent in letter Ref No CGL/CA/PF/001/13/31 and dated May 17, 2023.
107. I also issue Permanent injunction restraining the respondents, whether acting directly or through third parties, agents and/or proxies, from seconding and/or transferring the petitioner from the Laikipia County Assembly Service Board/ Laikipia County Assembly to the Laikipia County Executive/ Laikipia County Public Service Board, and/or otherwise from interfering with the petitioner's Contract of Employment as the Clerk of the Laikipia County Assembly.
108. Based on the doctrine of separation of powers, I again make a declaration that the purported decision of the 2nd respondent approving the appointment of Mr. Peter Ndirangu Hinga, the County Chief Officer for County Co-ordination, Administration, ICT & Public Service, be seconded to the 2nd respondent as the acting Clerk of the Assembly and as communicated by the 1st respondent in letter Ref No CGL/CA/CON/02 and dated June 6, 2023 is unlawful, illegal, irregular, arbitrary, contrived and thereby constitutes a violation provisions of sections 13 and 45 of the County Governments Act, sections 26 of the County Assembly Services and sections 4, 5, 6,7,8,9 and 11 of the Public Appointments (County Assemblies Approval) Act. The latter provisions bars appointments without approval by county assembly where the approval is required; and they set out the procedure to be followed during the approval process.
109. The petitioner further prayed for an Order of *certiorari* to quash the decision of the 2nd respondent approving the appointment of Mr Peter Ndirangu Hinga, the County Chief Officer for County Co-ordination, Administration, ICT & Public Service, be seconded to the 2nd respondent as the acting Clerk of the Assembly and as communicated by the 1st respondent in letter Ref No CGL/CA/CON/02 and dated June 6, 2023. The respondents contended that this order cannot issue due to non-joinder of Mr Peter Hinga as that would amount to condemning him unheard.
110. However, what is being challenged is legality or validity of the decision and action of approving the secondment of a chief officer from the county executive to the county assembly to act as the clerk of the assembly. I have already held that secondment officers, especially accounting officers, from the county assembly to the county executive and the vice versa violates the doctrine of separation of powers and is an affront to the said Constitutional doctrine. I have also held that any decision or actions by government or government officers or organs of government which are inconsistent with the Constitution are invalid to the extent of the inconsistency. In this case, I make declaration that, in deed, the decision by the 2nd respondent approving secondment of Peter Hinga from the County Executive to the County assembly to act as the clerk of the assembly was illegal, irrational, unconstitutional. The right person to act was the Deputy Clerk or any other officer of the County Assembly Service appointed by the 2nd respondent. Therefore, I issue an order of *certiorari* quashing the said decision.
111. The petitioner also prayed for a finding and holding that the 1st and 2nd respondents have engaged in a malicious scheme of orchestrating the unlawful and unfair termination and/or removal of the



Petitioner from the Office of the Clerk Laikipia County Assembly. I grant the said order based on the provisions of the law cited above.

112. In the end, I enter judgment for the petitioner to the extent highlighted above with costs to be agreed between the parties or taxed.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF MARCH, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

