



**Atemba v Kakamega County Assembly Service Board & another (Cause E007 of 2022) [2023] KEELRC 763 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 763 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E007 OF 2022  
JW KELI, J  
MARCH 23, 2023**

**BETWEEN**

**LABAN MALOBA ATEMBA ..... CLAIMANT**

**AND**

**KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**SPEAKER OF KAKAMEGA COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant following suspension from employment as Clerk of the Kakamega County Assembly filed in court memorandum of claim dated 22<sup>nd</sup> march 2022 and received in court on the 24<sup>th</sup> March 2022 seeking the following reliefs:-
  - a. A declaration that the suspension of the claimant from his employment was unfair and unlawful
  - b. A declaration that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, to suspend the claimant from employment be set aside forthwith.
  - c. The claimant be reinstated to his full-time employment with 1<sup>st</sup> Respondent forthwith and without loss of benefits
  - d. The claimant to be paid his full salary an allowances during the period of the purported suspension.
  - e. The respondents be ordered to compensate the claimant for unlawful suspension at the equivalent of twelve (12) months' salary
  - f. This honourable court do issue such other orders as it may deem fit and just to grant
  - g. The respondents do pay costs of these proceedings



- h. Interest on the above at court rates.
2. The Claimant in addition filed verifying affidavit to the claim dated 22<sup>nd</sup> March 2022 , list of witnesses and the claimant's witness statement and list of documents all of even date together with the bundle of documents. The claimant filed a replying affidavit dated 4<sup>th</sup> May 2022 to the notice of motion application by the respondents.
  3. The Respondents entered appearance through the law firm of M/S Fwaya Masakhwe Were Advocates and filed an application to set aside the interim orders and replying witness statement of John Simwa dated 12<sup>th</sup> April 2022 , list of documents of even date and the bundle of documents. The Respondent further filed a replying affidavit by John Molenje Simwa which was to the notice of motion by the claimant. In addition was a replying affidavit by Morris Buluma, the 2<sup>nd</sup> respondent , sworn on the 12<sup>th</sup> April 2022.
  4. The Respondents in addition filed memorandum of defence dated 12<sup>th</sup> April 2022 and the respondents' witness statement of Morris Indakwa Buluma all of even date and received in court on the 20<sup>th</sup> April 2022. The respondents filed further affidavit on 20<sup>th</sup> September 2022 of John Molenje Simwa sworn on the 17<sup>th</sup> September 2022 and annexed proceedings of the 1<sup>st</sup> respondent of 6<sup>th</sup> December 2021 and of 9<sup>th</sup> February 2022.

### **Preliminary**

5. The court on the 24<sup>th</sup> May 2022 upon hearing the parties made an order that the Notice of motion dated 17<sup>th</sup> May 2022 by the applicant be allowed and granted leave to amend the claim and other prayers marked as withdrawn. Secondly an order that Notice of Motion dated 22<sup>nd</sup> March 2022 be determined together with the claim. Thirdly the interim order to abide until determination of the claim.
6. On the 5<sup>th</sup> July 2022 the claimant informed the court that he had withdrawn his application dated 17<sup>th</sup> May 2022 and all documents and the application be marked as withdrawn and it was so marked thus vacating order of leave of 24<sup>th</sup> May 2022 to amend automatically.
7. All further affidavits were admitted by consent of parties. There was a lot of back and forth on the proceedings until 26<sup>th</sup> October 2022 when parties agreed to have their experts produce their forensic reports on the resignation letter and case to proceed on the said reports and documents filed as well as written submissions.

### **Production of forensic expert reports on the 30<sup>th</sup> January 2023**

#### **The claimant's evidence**

8. The Claimant called as his expert witness one Emmanuel Kenga who told the court he was a forensic document examiner of 30 years trained as a document examiner and retired Commissioner of Police in charge of document examination. He told the court he was now a private document examiner. He produced his report dated 13<sup>th</sup> April 2022 and filed in court on the 3<sup>rd</sup> October 2022 (C-exhibit1). The witness also produced documents of his qualifications under his further affidavit dated 7<sup>th</sup> October 2022 received in court on the 30<sup>th</sup> January 2023 and was cross-examined by counsel for the respondents Ms. Masakhwe.



### **The Respondents' evidence**

9. The Respondents called their expert witness one Corporal No. 91798 Samson Omalla who told the court he was a qualified forensic document examiner currently working at directorate of criminal investigation at the National Forensic laboratories. The witness adopted his witness statement dated 7<sup>th</sup> October 2022 as his evidence in chief. The witness produced his report and accompanying documents as his evidence as D- EXHIBIT 1. The witness was cross-examined by the counsel for the claimant Mr. Ekesa Advocate holding brief for Mr. Sore Advocate.

### **Written Submissions**

10. The parties filed written submissions after the hearing of the expert witnesses for the court to make its decision on the claim based on the witness reports and the affidavits filed therein and documents.

### **The claimant's written submissions.**

11. The claimant's written submissions on main claim drawn and filed by GSLAW LPP and dated 7<sup>th</sup> October 2022. Further claimant's submissions on the expert report were drawn and filed by Wamalwa & Echesa Company Advocates and dated 13<sup>th</sup> February 2023.

### **Respondents' submissions**

12. The respondents' written submissions drawn by Fwaya Masakhwe Were & Company Advocates were dated 15<sup>th</sup> October 2022 and filed in court on the 18<sup>th</sup> October 2022. The respondents filed further submissions on the expert witness reports dated 7<sup>th</sup> February 2023 and filed in court on the 14<sup>th</sup> February 2023.

### **Determination**

#### **Issues for determination**

13. The claimant in his submissions on main claim dated 7<sup>th</sup> October 2022 addressed the validity of the suspension , the purported resignation and whether the reliefs sought were merited. In further submissions the claimant addressed a preliminary objection allegedly raised by the respondents. The court finds that there was no preliminary objection raised and issue of resignation was raised in response to the claim. The parties agreed the claim be disposed by way of filed documents and affidavits and the expert witness reports. The claimant had different advocates in the proceedings and this could have contributed to the mistaken position in the submissions. The respondents' counsel submissions took the foregoing position of the court consistent with the proceedings.

#### **The claimant's issues for determination under further submissions**

14. The Claimant in his further submissions addressed the following issues:-Who lodged a complaint about the forgery and under what circumstance?Whose expert report should the court taken into account?
15. The respondents in their submissions filed on 18<sup>th</sup> October 2022 addressed the following issues:-
  - a. Whether the claimant was procedurally suspended?
  - b. Whether the claimant resigned?
  - c. Whether the claimant is entitled to reliefs sought?



16. The Respondents in their further submissions filed in court on the 14th February 2023 addressed procedure for appeals against decision by County Government public Service hence challenge to the jurisdiction of the court in the claim.
17. The court having read the pleadings, having heard the expert witnesses on their reports and taking into account the documents and pleadings filed by the parties was of the considered opinion that the issues placed before the court for determination were as follows:-
  - a. Whether the court had jurisdiction to determine the claim.
  - b. Whether the claimant was procedurally and fairly suspended?
  - c. Whether the claimant resigned?
  - d. Whether the claimant is entitled to reliefs sought?

**Whether the court had jurisdiction to determine the claim?**

18. The court finds that the issue of jurisdiction was not raised in the memorandum of defence dated 12<sup>th</sup> April 2022 or at any point. The issue only popped up in the further submissions. It is trite law submissions are not pleadings and in the instant case the issue of jurisdiction being raised at further submissions was tantamount to unfair hearing as the Claimant had no opportunity to respond to the issue.
19. The court considers that jurisdiction is everything and without it its decisions amount to nothing as decided in Motor Vessel ‘Lilian S’ v Caltex Oil(Kenya) Ltd (1989)e KLR. In the instant case the respondents submit that the court lacks jurisdiction to entertain the claim as the internal dispute resolutions mechanisms had not been exhausted and relies on section 8 of the Public Service Act (No. 12 of 2017 ( the Public Service Commission )(County Appeals Procedures) regulations 2022 to wit:-

‘ Part IiAppeals

— 8

- (1) A person who is dissatisfied with a decision of a county government public service may appeal to the Commission against that decision.
  - (2) A public officer who wishes to file an appeal with the Commission shall do so after all internal processes of the county government public service have been exhausted.
9. The Commission may hear and determine an appeal against any decision regarding the engagement of any person in a county government, including— Commission may hear and determine appeals. (a) the recruitment, selection, appointment, promotion, redesignation, deployment and qualifications attached to any office;
- (b) training and development;
  - (c) the remuneration, benefits, and terms and conditions of service;
  - (d) disciplinary control including dismissal and imposition of any other administrative punishment;
  - (e) the national values and principles of governance set out in Article 10 of *the Constitution*



- (f) the values and principles of public service as set out in Article 232 of *the Constitution*;
- (g) retirement or other forms of removal from service; and
- (h) any other decision of a county public service that falls within the Commission's jurisdiction. 10. (1) A person shall file an appeal against a decision of a county public service with the Commission within ninety days after the making of the decision by the county public service.'

20. On this issue the claimant had no opportunity to respond. The court considered the issue to be a pure point of law which the court must consider to satisfy itself that it had jurisdiction. The regulations by Public Service Commissions on county government appeals emanate from the Principle Act being the *Public Service Commission Act* Section 87 which provides:-

'Section 87(2)

"A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from County Government Public Service unless the procedure provided for under this Part has been exhausted."

21. The court finds that the Public Service Commission is limited to executive county government employees and that for the said Commission to deal with employees of the County Assembly Service Boards would be undermining the doctrine of separation of powers. There is need to draw parallel with the national government(executive) and the National Assembly. The Public Service Commission only deals with employees of the national government (the executive) respecting the doctrine of separation of powers. Under Article 6 Kenya has two level government, the national and county. The doctrine of separation of powers applies with equal measure to both levels of government.

22. The court perused the County Government Act and found that unlike the County Public Service Boards, there is no clear redress mechanism provided for appeals from decisions of the County Assembly Service Boards on employees claims as envisaged under the decision of the Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992] Eklr where the court held:

'In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.'

Further applying the Speaker of National Assembly decision the court finds and determines that any regulations by PSC purporting to give it jurisdiction over the County Assembly Service Boards decisions would be illegal as regulations cannot oust clear constitutional and legislative provisions.

23. In this case the court upholds with approval to apply in the case the decision of Justice Rika in *John Mwivithi Mutie v Speaker Kiambu County Assembly & 2 others; County Secretary Kiambu County Government & another (Interested Parties)* [2022] eKLR where he held,

'The position taken by the Preliminary Objector, requiring the Court to decline jurisdiction, and direct the Petitioner to submit to the Public Service Commission, is in gross misapprehension of the concept of separation of powers, and distorts the objects and



principles of devolution, under Articles 174 and 175 of the Constitution.” In *James Omariba Nyaoga v Chairman, County Assembly Service Board & another; County Assembly Service Board (Interested Party)* [2021] eKLR where the court issued a declaration to wit “A declaration is hereby issued that section 76(6) of the County Governments Act, 2012 does not apply to the Petitioner and/or employees of the County Assembly Services Board.”. The court has in the recent past made a similar finding and holding in *Bungoma Elrc Cause No. E003 Of 2021 Martin Adams Wamukota Situma versus The Bungoma County Assembly Of Service Board (CASB) and others (UR)*

24. The court is satisfied that the claimant being an employee of the county assembly service board, the Public Service Commission has no jurisdiction over his employment and that the court is properly seized of the claim. The court has jurisdiction to determine the claim.

#### **Whether the claimant was procedurally and fairly suspended?**

25. The Claimant in his claim stated that the suspension from employment of 6<sup>th</sup> December 2021 was wrongful, unfair and devoid of due process on the following reasons:-
- a. The Respondents wholly contravened provisions of section 23 of the County Assembly Services Act by failing to follow the procedure for removal of clerk
  - b. There was no notification by the respondents to the claimant of the employer’s intention and reason for considering suspension of the claimant from employment
  - c. The suspension was in breach of section 41 the Employment Act.
26. The Claimant submits that he was not found culpable of anything that had been investigated and that no report was presented on findings of the suspension. The suspension having expired the claimant was set to resume duty only to be issued with another suspension. The suspension was set to expire on 6<sup>th</sup> February 2022 and it was the subject of the claim filed. The claim was served on the respondents, upon service the respondents advertised for filling of the claimant’s position. The court stayed the advertisement. That the response to the claim was ‘we agree but you resigned.’ That at that point the case took another turn.
27. The claimant submits that the cause of his suspension was vendetta as pleaded under his supporting affidavit of 22<sup>nd</sup> march 2022 paragraph 5 which vendetta he attributed to performance of his duty. That he received a motion of impeachment of the 2<sup>nd</sup> respondent as the speaker of the County Assembly of Kakamega and having sought legal advice introduced the motion to the assembly. That the 2<sup>nd</sup> respondent then took this action as war against the claimant. That the claimant was performing his administrative role to introduce the motion which could only have been passed or rejected by the county assembly.
28. The Claimant in his submissions invited the court to make the following findings:-
- a. The Respondents herein have no power to investigate the claimant as that is the preserve of the select committee of the county assembly
  - b. There was no select committee formed and no evidence of the same was tabled in court and so the respondents purported to exercise power they do not have.
  - c. Even without the power, the respondents investigations (which were illegal for want of legal authority ) found no wrong with the claimant.
  - d. For the total 120 days the claimant was suspended , no wrong doing was found on him.



- e. The procedure for the removal of the clerk from office under section 23 of the County Assemblies Services Act was not followed.

29. Section 23 of the County Assemblies Services Act provides:-

“23. Procedure for removal of the Clerk

- (1) Where the Board considers it necessary to remove the Clerk under section 20, the Board shall—
  - (a) frame a charge or charges against the Clerk;
  - (b) forward the statement of the said charge or charges to the Clerk together with a brief statement of the allegations in support of the charges;
  - (c) invite the Clerk to respond to the allegations in writing setting out the grounds on which the Clerk relies to exculpate himself or herself; and
  - (d) invite the Clerk to appear before the Board, either personally or with an advocate as he or she may opt, on a day to be specified, to exculpate himself or herself.
- (2) If the Clerk does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Board the Clerk fails to exculpate himself or herself, the Board shall submit a notice of a motion to the Speaker seeking that the county assembly revokes the appointment of the Clerk.
- (3) A motion under subsection (1) shall specify—
  - (a) the grounds set out in section 21 in which the Clerk is in breach; and
  - (b) the facts constituting that ground.
- (4) Upon notice of the motion under subsection (2), the Speaker shall refer the matter to a select committee of the assembly consisting of eleven members and established in accordance with the Standing Orders of the assembly to investigate the matter within ten days of receipt of the motion.
- (5) The select committee shall, within ten days, report to the assembly whether it finds the allegations against the Clerk to be substantiated.
- (6) The Clerk shall have the right to appear and be represented before the select committee during its investigations.
- (7) The assembly shall consider the report of the select committee and resolve whether to approve the motion.



(8) If the assembly approves a motion filed under this section, the Clerk against whom the motion was filed shall be deemed to have been removed from office from the date the motion was approved.”

30. The Claimant submits that there was no evidence of select committee, no minutes of resolutions of the County assembly service board to suspend the claimant and hence this claim on the suspension succeeds without scintilla of doubt. That in the letter of extension of suspension dated 8<sup>th</sup> February 2022 (annexture JMS1 under replying affidavit of John Molenje Simwa sown on the 12<sup>th</sup> April 2022 ) it was indicated that the suspension was to pave way for further investigations yet it was undisputed the select committee had never been established and only the chair or member of the selected committee could tender such evidence in court. The claimant to buttress his submissions on the claim of illegality of the suspension relied on the decision in Isaac Felix Olwero V Siaya County Assembly Service Board & 2 others (2021)e KLR where the County Assembly Service Board invited the claimant, a select committee was formed , charges were served and a report was prepared. A motion of approval was tabled and passed. However there was no prove the Board had forwarded to the claimant in that case the framed charges. That misstep alone led to quashing of the decision to remove the clerk from office. The claimant submits that in the instant case the respondent can only say the claimant was suspended and it will be travesty of justice if the process in this case is upheld when a near perfect process in the Siaya County case was impugned.
31. The Claimant further relied on the decision of Justice Byram Ongaya in Hamisi Bweni Dzila v Kwale County Assembly Service Board & 6 others [2022] eKLR who addressed issue of suspension of the clerk of county assembly by adopting his holding of 12<sup>th</sup> march 2021 between same parties in Mombasa ELRC Cause No.99 of 2019 in to wit:-

“Thus, the exercise of the power to suspend in section 22 (in absence of any other statutory provisions and safeguards) in the opinion of the Court, amounts to potentially a power for summary removal of a Clerk from office whereby nothing therefore prevents suspension under the section from being indefinite or eternal or final and thereby rendering the removal procedure (in section 23 of the Act and involving the County Assembly) as mute. The Court observes that section 22 of the Act prescribes definitive grounds for suspension or removal and the Court is burdened to resolve how, without due process or natural justice prior to suspension, like in the instant case, any of the grounds in section 22 of the Act had been established prior to imposing the suspension against the claimant. It appears to the Court that the respondents’ case is that the suspension was based upon allegations and which obviously would fall short of the definitive grounds for suspension or removal in section 22 of the Act. In that sense, it appears to the Court that suspension in section 22 of the Act is not preliminary but means removal and cannot be imposed except as a removal in accordance with section meaning that the 1st respondent has no power to impose “a preliminary suspension” pending the procedure in section 23 of the Act. Such is a state of things and considerations that encourage the Court to find that the scope and manner of the 1st respondent’s exercise of the statutory power to suspend the Clerk, the claimant herein, is such a serious matter to be investigated at the full hearing of the suit. Further section 22 of the Act refers to “suspend or remove” upon the stated grounds and is open to interrogate whether “suspend” in the section essentially means “remove” so that the suspension thereunder is then potentially, in the statutory design, amenable to section 23 of the Act providing for procedure for removal of a Clerk –so that as urged for the claimant



the suspension can only be imposed per procedure in section 23 –after due process or observance of the rules of natural justice.”

32. The Claimant further relies on the holding of the court in the said decision of Hamisi Bweni Dzila v Kwale County Assembly Service Board & 6 others [2022] eKLR that:-

‘The Court therefore holds that the statutory design is that the Board cannot impose a suspension as a preliminary measure pending the due process in section 23 of the Act and under section 22 of the Act suspension as an administrative interlocutory measure pending a removal (as a final decision after due process) is not available at all. Accordingly, the suspension as was imposed by the respondent was in clear violation of Article 236 of *the Constitution* prescribing due process prior to imposition of a punishment against a public officer. In absence of any further material and otherwise persuasive submission on record, the Court upholds its opinion in the ruling accordingly.’

33. The Claimant to buttress his case that the suspension was illegal further relied on the decision in James Omariba Nyaoga v Chairman, County Assembly Service Board & another; County Assembly Service Board (Interested Party) [2021] eKLR, .The court found the decision was on compulsory leave not suspension.

#### **Respondent’s case/submissions.**

34. The Respondent vide further affidavit of John Simwa dated 17<sup>th</sup> September 2022 stated that the claimant was under suspension before his resignation and that the suspension was in accordance with section 22 the County Assembly Service Act which provides for grounds of suspension to wit:-

- ‘22. Suspension or removal of the Clerk The Board may suspend or remove from office, the Clerk for—
- (a) inability to perform the functions of the office, whether arising from infirmity of body or mind
  - (b) gross misconduct or misbehaviour;
  - (c) incompetence;
  - (d) bankruptcy;
  - (e) violation of the provisions of *the Constitution*, including Chapter Six of *the Constitution*; or
  - (f) violation of the provisions of this Act.’

35. The deponent averred that letter of suspension was specific on why the claimant was suspended and also under what provision and that the process of removal had not started. That had the claimant not resigned and the finding of the investigations recommended a removal the procedures would have been followed. That in response to contents of paragraph 8 of the further affidavit of the claimant on the suspension being founded on vendetta, the deponent denied vendetta was cause of the suspension but rather the decision to suspend the claimant was arrived at by the 1<sup>st</sup> respondent where members voted for him to be suspended for a period of 60 days to pave for investigations to be conducted(KMS-1 was a copy of the minutes vide affidavit of John Simwa of 17<sup>th</sup> September 2022). The deponent averred that the respondents were aware of the claimant’s accident and extended the suspension to allow him to



recuperate as the injuries per affidavit sworn on the 24<sup>th</sup> July 2022 by his brother were grievous. That the investigations were suspended once the claimant took the matter to court.

36. The Respondents submit that the claimant was suspended on 6<sup>th</sup> December 2021 on reasons stated in the letter which included failure to remit deducted payroll by products including members of the assembly and staff contributions to LAPFUND, LAPTRUST and other financial institutions, as the accounting and responsible officer failing and or refusing to account for monies received on behalf of the County Assembly resting with the exchequer release for the monies of August and September 2021, promoting staff and awarding benefits without authorisation of the County Public Service Board, wrong information to the Board on status of remittance of payroll and non-payroll products and procuring goods and services at exaggerated prices thus failing to achieve value for money.
37. The Respondents submit that the suspension was approved by members of the 1<sup>st</sup> respondent for 60 days to pave way for investigation. That during the period the claimant was on half pay and was to report to the Speaker as required. That the claimant was involved in accident hence the suspension extended on humanitarian grounds and he also had active court case (JMS-2 is the letter of extension under affidavit of John Simwa dated 12<sup>th</sup> April 2022).
38. The Respondents relied on decision of Rika J in Mombasa ELRC No. 465 of 2018 in Denis Musyoka Mutui v Kwale County Assembly Service Board Kwale County Assembly where the Judge held that suspension of an employee is lawful as authorised under section 22 of the County Assembly Service Act. That there was no requirement that the clerk be given hearing before the suspension. That suspension under section 22 is an administrative measure and not form of penalty but act of stepping aside to enable investigations. Section 4(1) of the Fair Administrative Actions Act 2015 provides every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
39. The Respondents submit that they concluded the investigations after the 60 days and before they could follow the due process under section 23 of the County Assemblies Services Act the claimant resigned.

#### **Decision.**

40. The Claimant in their claim stated that the suspension from employment on 6<sup>th</sup> December 2021 was wrongful, unfair and devoid of due process on the following reasons:-
  - a. The respondents wholly contravened provisions of section 23 of the [\*County Assembly Services Act\*](#) by failing to follow the procedure for removal of clerk.
  - b. There was no notification by the respondents to the claimant of the employer's intention and reason for considering suspension of the claimant from employment.
  - c. The suspension was in breach of section 41 the [\*Employment Act\*](#).
41. The Claimant is the Clerk of the Kakamega County Assembly. The suspension of clerk to the county assembly is provided for under section 22 of the County Assembly Service Act to wit:-
  - ‘22. Suspension or removal of the Clerk. The Board may suspend or remove from office, the Clerk for—
    - (a) inability to perform the functions of the office, whether arising from infirmity of body or mind
    - (b) gross misconduct or misbehaviour;



- (c) incompetence;
- (d) bankruptcy;
- (e) violation of the provisions of the Constitution, including Chapter Six of the Constitution; or
- (f) violation of the provisions of this Act.”

42. The letter of suspension of the claimant dated 6<sup>th</sup> December 2021 gave reasons for the suspension which included failure to remit deducted payroll by products including members of the assembly and staff contributions to LAPFUND, LAPTRUST and other financial institutions, as the accounting and responsible officer failing and or refusing to account for monies received on behalf of the county assembly resting with the exchequer release for the monies of August and September 2021, promoting staff and awarding benefits without authorisation of the County Public Service Board, giving wrong information to the Board on status of remittance of payroll and non-payroll products and procuring goods and services at exaggerated prices thus failing to achieve value for money. On face value the reasons would fit under section 22 of the County Assembly Services Act. The respondents vide affidavit of John Simwa dated 17<sup>th</sup> September 2022 produced as JMS -1 Minutes of 6<sup>th</sup> December 2021 of the County Assembly Service Board where in minute CASB 4/12/21 it was resolved for the Clerk and secretary to the Board to step aside from office for a period of 60 (sixty) working days to facilitate investigations.
43. The letter of 6<sup>th</sup> December 2021 stated the suspension was for 60 days to facilitate the investigations. Section 22 of the County Assembly Services Act does not provide for the hearing before suspension. The court agrees with Justice Rika in Mombasa ELRC No. 465 of 2018 in Denis Musyoka Mutui v Kwale County Assembly Service Board Kwale County Assembly (supra) that section 23 is not about suspension but about the process of removal.
44. After lapse of the 60 days the 2<sup>nd</sup> respondent extended the suspension allegedly to facilitate further investigations. On the 24<sup>th</sup> March 2022 the claimant lodged application and the claim on the suspension. The affidavits of Hon Buluma and Hon Simwa for the respondents stated the reason for extension on basis the claimant was unwell and further there was active court case.
45. The court made the following findings on the issue:- There was no prior investigations prior to the suspension and the issue was introduced promptly by the 2<sup>nd</sup> respondent in the meeting held on 6<sup>th</sup> December 2021. That the claimant was never asked to show cause. The suspension was approved for 60 days by the 2<sup>nd</sup> respondent. There was no extension of the suspension by the Board. The court further found that the claimant did not ask for extension of the suspension due to his being unwell and sickness of an employee is not a basis to extend suspension as it amounts to punishing the employee for being unwell considering the suspension in this case was punitive as the claimant was on half salary.
46. The court determines that the suspension of the claimant by the Board under section 22 of the County Assembly Services Act was lawful. The court finds and holds the extension of the suspension was unlawful as it was not authorised by the 2<sup>nd</sup> respondent who authorised suspension of 60 days.
47. The court finds and holds that the extension of the suspension on 8<sup>th</sup> February 2022 was unlawful and further contravened the provisions of Section 4(1) of the Fair Administrative Actions Act 2015 which provides every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. The Respondents did not produce the investigations report in court despite filing several further and further affidavits leading the court conclusion that the suspension itself was not based on valid reasons.



## Whether the Claimant resigned

### The respondents' case on the resignation

48. The Respondents alleged that the claimant resigned before they could start the due process under section 23 of the *County Assembly Services Act*. The respondents vide affidavit of John Simwa dated 12<sup>th</sup> April 2022 stated that the claimant voluntarily resigned before the disciplinary hearing commenced and he was no longer employee of the 1<sup>st</sup> respondent and produced the said resignation letter dated 31<sup>st</sup> January 2022 as JMS-3. The same position was taken by Morris Buluma in affidavit of 12th April 2022. The respondent called their expert witness Samson Omalla No. 91798 an expert forensic document examiner working at DCI headquarters who presented his report and was cross examined by counsel for the claimant. He adopted his witness statement dated 7<sup>th</sup> October 2022 and filed in court on the 18<sup>th</sup> October 2022 as his evidence in chief where he analysed his report and that of Mr. Kenga the expert called by the claimant. In his opinion the resignation letter was signed by the claimant after expert analysis of the said letter in comparison with other signatures provided to him as specimen of claimant's signature.
49. The Respondents submit that the claimant was not under duress when signing and that the report by their expert Omalla was prepared in the laboratory with top notch equipment as such as video spectrum comparator 600 high spectrum which magnifies the visibility of minute characteristics thus reducing margin of error compared to the magnifying less/microscope used by Mr. Kenga. Relying on the expert report the respondents submit that the claim was no longer tenable as the claimant was no longer their employee.

### The claimant's case on resignation issue

50. The claimant submit that the on getting wind of the alleged resignation letter of 31<sup>st</sup> January 2022 from one Joel Ongero, he took measures and wrote to the respondents same day distancing himself for the said resignation. The claimant then lodged a complaint of forgery with the Regional Crime Investigations Officer (RCIO) which promoted the investigations. That to this end the RCIO contracted Mr. Emmanuel Kenga, an independent handwriting expert who carried out forensic examination of the signature and ascertained that it did not belong to the claimant.
51. That after receipt of the report of Kenga with 30 years experience, the RCIO went further and contracted expert Samson Omalla with lesser experience of not more than 4 years who linked the claimant to the said resignation letter. That the RCIO did not carry out further investigations after the contradictory reports. The claimant in submissions questioned who made the 2<sup>nd</sup> complaint for the RCIO to instruct for the 2<sup>nd</sup> report which favoured the respondents.
52. The Claimant submits that the court in considering the expert evidence the court ought to focus on the quality of expert's reasoning, examine the expert's testimony in terms of rationality and internal consistency in relation to all evidence presented. The claimant relied on decision in *Routestone Ltd v Minorities Finance Limited* and another where it was stated that what matters were the reasons given for the expert's opinion and in *Christopher Ndaru Kagina v Esther Mbandi Kagina and another (2016)e KLR* where it was stated that:-

‘The duty of an expert witness is to provide independent assistance to the court by way for objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.’



53. The Claimant further relied on the decision of Justice Ombija in *Shah and Another -vs- Shar and Others* (2003) 1 EA 290 wherein Ombija. J. expressed himself on this issue, inter alia as follows:-

“ One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art, including all subjects on which a cause of study or experience is necessary to the formation of an opinion and handwriting is one such field. The Opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so... if there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court... properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion”.

### **Decision**

54. It was not in dispute that the experts Omalla and Kenga were all qualified as forensic document examiners. The experts gave conflicting reports hence the need of the court to consider other relevant evidence on the issue as stated in the *Shah* case(supra). The court did not place much weight on the use of magnifying glass only by Mr. Kenga an examiner of 30 years experience affected his conclusion that there was natural variation between the resignation letter signature and other specimen signatures by the claimant. Evidence before court was that Omalla and Kenga used the same specimen of signatures to arrive at their conclusions with Omalla stating Kenga used a copy of the specimen meaning it was manipulated that could have affected the characteristics. The court found that the finding by Kenga was specific on the natural variation between the signature of claimant and that in the letter of resignation.
55. The Respondents filed affidavit of Sergeant Laban Chiluyi who stated that a report was made by Joel Ongoro Otwoma on the resignation letter. That he visited the hospital and met the claimant who gave a self recorded and thumb printed statement as he alleged he was unable to write at that time. That the county assembly availed to him the original resignation letter. The expert witness Omalla produced the specimen being the resignation letter dated 31<sup>st</sup> January 2022 which had original receipt stamp dated 9<sup>th</sup> February 2022(SO1b).
56. The Claimant on the resignation letter filed affidavit of Joel Otwoma Ongoro who was a member of the Kakamega County Assembly who stated that he received a call from Hon. Boniface Sakwa Akosi and chief whip majority party that a resignation letter had been received from the claimant dated 9<sup>th</sup> December 2022. That he asked the claimant who informed him he had not written the letter or instructed anyone to deliver the same (affidavit dated 24<sup>th</sup> July 2022). The affidavit of Boniface Akosi on the foregoing was dated 24<sup>th</sup> July 2022. The claimant's brother Khalayi filed affidavit dated 24<sup>th</sup> July 2022 stating on instructions of the claimant he typed the denouncement of the resignation on behalf of the brother who was bedridden and the Claimant thumb printed it and had it emailed to all the members of the County Assembly using email of the claimant. That email was also sent to the 2<sup>nd</sup> respondent.
57. The court found that it had no valid basis to question the opinions of the two experts as their qualifications were not in dispute. The respondents' witness stated that the claimant's witness Kenga relied on a copy of their specimen reducing the accuracy of the minute characteristics to be observed.



- The report of the claimant's witness was to effect that the resignation signature had natural variation. The court did not find much weight in use of magnifying glass instead of spectrum video the alleged sophisticated gadget as the flow of the signature which was basis of the finding of Mr. Kenga was clearly visible and the court found his over thirty years of experience relevant. The court then finds there was basis of finding by the claimant's witness who was an expert of more than 30 years. The court did not have basis to doubt the report of the respondents' expert witness report who was still in service as document examiner. Both experts were instructed by the RCIO according to their affidavits.
58. The court then applying authority of Shah case(supra)considered the totally of evidence before the court. The claimant was the complainant on the resignation letter. On getting information of the said letter on same date he denounced the resignation in writing which communication was admitted by the Respondents. It was the testimony of the 2<sup>nd</sup> respondent that the Board accepted the said resignation letter same date it was received. Hon Ongoro and Hon Akosi both members of the assembly in their affidavits of even date of 24<sup>th</sup> July 2022 stated it was not possible for the letter to be received and accepted by the Board same date.
59. The Respondents attached minutes of the board which refer to proceedings of 9<sup>th</sup> March 2022 vide affidavit of John Simwa of 17<sup>th</sup> September 2022 . The court examined the said minutes. In minute CASB 3/02/22 was the resignation of Mr. Laban Atemba. It was recorded:- 'The Ag Secretary brought to the attention of the members of a letter from the suspended clerk dated 31<sup>st</sup> January 2022 and received on 9<sup>th</sup> February 2022 at 8.30a.m.'" The meeting is indicated to have been held at 11.30 am. The court found that the reporting of 9<sup>th</sup> February 8.30AM instead of today 8.30 am was in the past tense and the court concluded that the meeting was not held on 9<sup>th</sup> February 2022. (JMS-2 17<sup>th</sup> September 2022 affidavit )At the last page of the minutes it is indicated as follows:- 'there being no other business , meeting was adjourned at 12.08 pm to 10<sup>th</sup> February 2022 made this 10<sup>th</sup> February 2022 and signed by the secretary. The court compared the said minutes with minutes of 6<sup>th</sup> December 2021 (JMS-1, same affidavit), in the said minutes the proceedings were indicated to have been held on 6<sup>th</sup> December 2021. At the last page it was indicated made this 6<sup>th</sup> December 2021 and signed by the secretary. Applying the same criteria where proceedings indicated of 9<sup>th</sup> December 2021 , the court finds that if the Board had met to accept the resignation, it met on 10<sup>th</sup> February 2022 as per the clause on closure stated made this 10<sup>th</sup> February 2022.
60. The court further finds that as at 10<sup>th</sup> February 2022 it was not in dispute that claimant had emailed the respondents on night of 9<sup>th</sup> February 2022 denouncing the resignation which issue was not placed before the board sitting on the 10<sup>th</sup> December 2022 as found by the court. The court found that despite the claimant questioning the identity of person who delivered the said resignation letter accepted by the respondents on the 9<sup>th</sup> February 2022 the respondents never disclosed the information despite filing several affidavits on the issue. This created doubts to the court on the authenticity of the said resignation letter. In totally of facts before the court, the court finds on balance of probabilities that the claimant did not write the alleged resignation letter of 9<sup>th</sup> February 2022, that the Board did not authorise acceptance of the resignation letter on the 9<sup>th</sup> February 2022 and thus the said acceptance of resignation was unlawful. The court finds it to be unprocedural for the Board to have relied on the disputed resignation letter to consider the services of the claimant to be terminated without affording him a hearing when he had denounced the resignation in writing(letter by the 1<sup>st</sup> respondent of 24<sup>th</sup> March 2022).
65. The court finds and determines that the claimant never resigned from his employment.



### **Whether the claimant is entitled to reliefs sought?**

61. The court having found the extension of the suspension on the 8<sup>th</sup> February 2022 was unlawful and that the claimant never resigned then finds merit in the claim. The court also found no investigation report was produced by the respondents on the allegations in the suspension letter despite sumitting the investigation report was ready on the alleged grounds of suspension. The court finds on balance of probabilities there were no valid reasons existing for the suspension. The court finds that the claimant was unlawfully on suspension from 8<sup>th</sup> February 2021 and orders the lifting of the suspension and resumption of work with the 2<sup>nd</sup> respondent with immediate effect without loss of benefits. The claimant to be paid his full salary and benefits from 8<sup>th</sup> February 2021 when the lawful suspension of 60 days expired to date of judgment. The respondents to pay costs of the suit to the claimant.

### **Conclusion and Disposition**

62. The court enters judgment for the claimant against the respondents in the following terms:-
- i. A declaration is hereby issued that section 77 of the *County Governments Act, 2012* does not apply to the Petitioner and/or employees of the County Assembly Services Board. The court had jurisdiction to determine the dispute.
  - ii. A declaration that the extension of suspension of the claimant on 8<sup>th</sup> February 2022 was unlawful and unfair.
  - iii. A declaration that the claimant did not resign from his employment with the 1<sup>st</sup> Respondent.
  - iv. An order lifting the suspension of the claimant and order of resumption of work with the 1<sup>st</sup> respondent as per his letter of employment with immediate effect without loss of benefits.
  - v. An order that the claimant be paid his full salary and benefits from 8<sup>th</sup> February 2022 when the lawful suspension of 60 days expired to date of judgment.
  - vi. Award of costs of the claim to the claimant against the respondents
  - vii. Interest at court rates from date of judgment until payment in full.
  - viii. Stay granted of 14 days.
63. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 23<sup>rd</sup> MARCH 2023.**

**JEMIMAH KELL,**

**JUDGE.**

In The Presence Of:-

Court Assistant : Lucy

For claimant : In person

For Respondents : Masakhwe

