



REPUBLIC OF KENYA



**KENYA LAW**  
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**Opiyo, Chairperson & 5 others v Ayacko Governor, County of Migori & 2 others  
(Petition E002 of 2023) [2023] KEELRC 1300 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1300 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**PETITION E002 OF 2023**  
**S RADIDO, J**  
**MAY 24, 2023**  
**IN THE MATTER OF ARTICLES 3, 10, 19, 20, 21, 22,**  
**23, 159, 162(2)(A), 165 AND**  
**251 OF THE CONSTITUTION OF**  
**KENYA, 2010**  
**AND**  
**IN THE MATTER OF CONTRAVENTION OF**  
**FUNDAMENTAL RIGHTS AND**  
**FREEDOMS UNDER ARTICLES**  
**27(1) & (2), 28, 29(D), 41 AND**  
**47 OF THE CONSTITUTION OF**  
**KENYA**  
**AND**  
**IN THE MATTER OF SECTIONS 58(4)(A) & (5)(A),**  
**59A, 59(1)(B), 63(1) AND 64**  
**OF THE COUNTY**  
**GOVERNMENTS ACT**  
**AND**  
**IN THE MATTER OF IRREGULAR AND UNLAWFUL**  
**REMOVAL FROM OFFICE OF**  
**THE CHAIRPERSON AND**  
**MEMBERS OF THE MIGORI**  
**COUNTY PUBLIC SERVICE**



**BOARD  
BETWEEN**

**BETWEEN**

**JARED ODHIAMBO OPIYO, CHAIRPERSON ..... 1<sup>ST</sup> PETITIONER**  
**JEMIMAH ADHIAMBO WERE VICE-CHAIRPERSON ..... 2<sup>ND</sup> PETITIONER**  
**HESBON OTIENO OMWA, MEMBER ..... 3<sup>RD</sup> PETITIONER**  
**ENOCK ODHIAMBO ACHIENG, MEMBER ..... 4<sup>TH</sup> PETITIONER**  
**PHOEBE ADHIAMBO ALOO, MEMBER ..... 5<sup>TH</sup> PETITIONER**  
**RANGE MWITA MAROA, MEMBER ..... 6<sup>TH</sup> PETITIONER**

**AND**

**OCHILO GEORGE MBOGO AYACKO GOVERNOR, COUNTY OF  
MIGORI ..... 1<sup>ST</sup> RESPONDENT**  
**CHARLES OYUGI OWINO SPEAKER, COUNTY ASSEMBLY  
MIGORI ..... 2<sup>ND</sup> RESPONDENT**  
**VINCENCIA OWINO KIONGE, CLERK, COUNTY ASSEMBLY  
MIGORI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners sued the Respondents on 25 January 2023, alleging that the Respondents had commenced and or facilitated an unconstitutional and unlawful process to remove them from their offices as members of the County Public Service Board, Migori (the Board).
2. The Petitioners further alleged that the Respondents had interfered with their independence by unlawfully appointing one Judith Okinda on or around 11 October 2022, to act as the Secretary/ Chief Executive Officer of the Board and also attempting to direct them in the performance of their functions.
3. The Petition was accompanied with a Motion under a certificate of urgency. The Motion sought various interlocutory orders.
4. The Respondents filed Grounds of Opposition to the Motion on 26 January 2023 and on the same day, the Court took brief oral submissions on whether to grant any intervening orders ex-parte and reserved Ruling to 31 January 2023.
5. The Respondents filed replying affidavits sworn by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents and Judith Okinda on 30 January 2023.
6. The 3<sup>rd</sup> Respondent filed a further affidavit on 31 January 2023.
7. In the Ruling delivered on 31 January 2023, the Court declined to issue the orders and further directed that the Motion and Petition be taken together.



8. The Court further directed the parties to file and exchange responses, affidavits, and submissions with judgment reserved.
9. The Petitioners did not comply with the directions while the Respondents filed their submissions on 15 March 2023.
10. On 16 March 2023, the Petitioners sought and the Court granted leave to file and serve an Amended Petition on or before 23 March 2023.
11. The Petitioners did not comply with the timelines and they only filed the Amended Petition on 28 March 2023.
12. In the Amended Petition, the Petitioners sought the following remedies:
  - i. A declaration be and is hereby issued to declare that the purported appointment of Judith Okinda as the ag Secretary/CEO, Migori County Public Service Board vide letter dated 11<sup>th</sup> October 2022 and referenced CGM/GVN/MCPSB.22/Vol. 1.002 and variously extended is unconstitutional for violating sections 58(1)(c), 59(1)(b), 63(1), 64(1), 65(1)(b) and 75 County Governments Act as read with Article 10 and 232, Constitution.
  - ii. A declaration be and is hereby issued that the impugned actions of the Respondents, itemised inter alia at paragraphs 18 to 29 21 to 39 hereof are an unlawful abridgment on the independence of the Migori County Public Service Board, and its members' labour rights.
  - iii. A declaration be and is hereby issued that the invocation of the authority and/or discretion of the Respondents to facilitate removal process of members of the Migori County Public Service Board is amenable and/or subject to oversight and supervision by this Hon Court where it is alleged that the same is not ripe or crystallised?
  - iv. A declaration be and is hereby issued that commenced (sic) process of removal of the Petitioners as chairperson, vice-chairperson and members of Migori county public service board violates the Petitioners' rights to fair labour practices, due process, equal protection of the law and non-discrimination, right to human dignity, freedom and security of the person, right to property, right to fair administrative action and right to fair hearing enshrined in Articles 27, 28, 29, 40, 41 and 47 of the Constitution as particularised in this Petition and further violates the values of public service and national values under Articles 232 and 10 of the Constitution respectively, having been nefariously precipitated.
  - v. A judicial review order of certiorari be and is hereby issued calling up and quashing the impugned decision of the 1<sup>st</sup> Respondent reposed in the letter dated 11<sup>th</sup> October 2022 ref CGM/GVN/MCPSB.22/Vol. 1.002 and all subsequent extensions, purportedly appointing Judith Okinda, as the ag Secretary/CEO, Migori County Public Service Board, and all consequential actions undertaken and decisions thereon.
  - vi. A judicial review order of prohibition be and is hereby issued barring the Respondents from in any way howsoever, commencing and proceeding with the process of removal of the Petitioners as chairperson, vice-chairperson, and members of the Migori County Public Service Board as commenced via the Gazette Notice published on 11<sup>th</sup> January 2023.
  - vii. A judicial review order of prohibition be and is hereby issued barring the Respondents, jointly or severally, directly or indirectly from in any way howsoever interfering with the independence of the County Public Service Board and the Petitioners' lawful execution of their mandate.



- viii. A judicial review order of mandamus be and is hereby issued directing the Respondents, and their agents to restore the Petitioners' access to the Board's offices including returning all necessary equipment, documents, and tools necessary for the effective execution of their mandate, immediately nonetheless within three (3) days of the order of the Hon Court.
  - ix. The Hon Court be pleased to award a reasonable amount in general damages for the violations of the Petitioners' fundamental rights and freedoms, as evinced herein.
  - x. Costs of the Petition be awarded for each of the Petitioners on a full indemnity basis.
13. On 11 April 2023, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents and Judith Okinda filed supplementary affidavits in response to the Amended Petition.
  14. Pursuant to further directions on 17 April 2023, the Court directed the Petitioners to file and serve a further affidavit and submissions before 5 May 2023, and the Respondents to file and serve their submissions on or before 19 May 2023.
  15. The Petitioners filed the supplementary affidavit without submissions on 23 May 2023 (way outside the agreed timeline of 5 May 2023). At the same time the Petitioners wrote to the Court requesting that the supplementary affidavit (and submissions, which were not on record) be accepted and considered).
  16. The Respondents filed their submissions on 17 May 2023.
  17. The Court has given due consideration to the Motion, Amended Petition, Grounds of Opposition, affidavits, and submissions.

#### **Admission of the supplementary affidavit**

18. In a letter dated 22 May 2023, the Petitioners urged the Court to excuse the late filing of the further affidavit and consider it. Explanations for the late filing were offered in the letter.
19. The Court has given due consideration to the explanations and keenly perused the supplementary affidavit.
20. The Petitioners sought to introduce through the supplementary affidavit copies of the 3 Petitions lodged with the County Assembly seeking their removal from office; the report of the Ad Hoc Committee which inquired into the removal Petitions; the Petitioners written responses to the County Assembly on the removal Petitions and an extract copy of the Standing Orders of the County Assembly of Migori.
21. The copies of the 3 Petitions, the Petitioners' responses, and the Standing Orders were documents/ records which were available or were in the possession of the Petitioners by the time they moved the Court or so soon thereafter and should have been filed early enough.
22. The Court also recalls questioning the Petitioners why they had not filed copies of the Petitions during the early stages of these proceedings.
23. The Court, will in the circumstances decline to allow the introduction of these documents/records at the tail end of the proceedings as the Respondents stand to be prejudiced.
24. With respect to the report of the Ad Hoc Committee, the Petitioners did not disclose when they received it.
25. There are indications in the supplementary affidavit that orders had been secured in a different case, Kisumu Judicial Review No. E001 of 2023, Speaker, County Assembly of Migori v Mokoro Jared



John & Ar, compelling the Respondents to supply copies of Hansard of proceedings for 31 January 2023 and 6 February 2023.

26. Without an indication when the Petitioners received or obtained a copy of the Report, again, the Court declines to allow its introduction as the Petitioners did not demonstrate it was not available to them at the early stages of the proceedings.
27. The Court, in effect, declines to admit the supplementary affidavit.

### **Action and orders against Judith Okinda**

28. The position Judith Okinda was appointed to is an office within the county public service. By dint of section 77(2) of the [County Governments Act](#), the Public Service Commission has been bestowed with appellate power over disputes relating to such appointments.
29. In order to exercise its appellate mandate over such disputes, section 87(2) of the [Public Service Commission Act](#) has denied the Courts' first instance jurisdiction over such disputes until the exhaustion of the Commission's appellate function.
30. The Court of Appeal had occasion to address its mind to the jurisdiction of the Court before the exhaustion of the alternative dispute resolution avenue in Secretary, County Public Service Board & Ar v Hulbhan Gedi Abdille (2017) eKLR where it held:

There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.

31. The Court, therefore, finds that its jurisdiction was invoked prematurely in connection to the appointment of Judith Okinda as an acting Secretary/Chief Executive Officer of the Board.
32. It is also noted that although adverse orders were sought against Judith Okinda, she was not made a party to the proceedings.

### **Interference with the independence of the Board**

33. One of the assertions by the Petitioners was that the Respondents had purported to interfere, direct and or control them in the performance of their functions.
34. To support the allegations, the Petitioners placed before the Court a letter dated 6 October 2022 from the County Secretary relaying the decision by the County Executive that the Board stops the exercise of engaging casuals or fixed-term contract employees.
35. The Petitioners also alleged that the Governor infringed on their independence by appointing an acting Secretary/Chief Executive Officer of the Board for a period of 6 months through a letter dated 11 October 2022.
36. To further illustrate interference with their independence, the Petitioners drew the Court's attention to a letter dated 15 November 2022 requesting for the creation of certain offices in the Governor's office and another dated 14 December 2022 on the appointment of some named 9 persons to as the Governor's personal staff.



37. According to the Petitioners, the conduct of the Respondents as gleaned from the letters were in violation of the prescriptions of sections 59(1) and 59A of the [County Governments Act](#) which clothed it with the functions of establishing and appointing persons to hold and or act in offices within the county public service.
38. Section 60(3) of the [County Governments Act](#) envisages Heads of Department requesting the Board to establish an office within the county public service.
39. The letters dated 6 October 2022, 15 November 2022, and 14 December 2022 were not directing the Board to take any unlawful action. The letters might have been bold in the language used, but they were requesting the Board to exercise its powers and functions.
40. It was open to the Board to use the legal parameters allowed it under the obtaining legal and human resource framework either to accede to the requests or not.
41. In this respect, it is the Court's view that the relationship between the levels or different offices at the county government are not and cannot be linear. It should be based on mutual dependence and engagement. The Board as an organ would not know the human capital needs of the executive without requests and consultations.
42. The fact that a Governor or County Executive writes to a county public service board by itself cannot amount to interference with the independence of the Board. Neither can it be harassment or intimidation by itself.
43. With regard to the appointment of an acting Secretary/Chief Executive Officer of the Board, section 58 of the [County Governments Act](#) gives the Governor the power to nominate and appoint with the approval of the County Assembly, a person to serve as the Secretary of the Board.
44. Since the appointment power lies with the Governor, it is this Court's view that by dint of sections 42, 43, 44, 45, and 50 of the [Interpretation and General Provisions Act](#), the Governor may appoint a person to act temporarily as Secretary/Chief Executive Officer of the Board.
45. The Court is of that view because, in the absence of a substantive Secretary/Chief Executive Officer of the Board and a person to act in the office, the likelihood that the activities of the Board itself may be paralysed to the prejudice of the running of the county public service may be adversely affected.
46. The Court, therefore, concludes that the Respondents did not interfere with the independence of the Board as alleged.

### **The lawfulness of the removal process**

47. The removal process of a member of a county public service board is underpinned by both [the Constitution](#) and various statutes including the [County Governments Act](#), the Petitions to the County Assemblies (Procedure) Act, 2020 and the relevant Standing Orders.
48. The function of inquiring into and determining whether a member of the county public service board should be removed from office is reposed at the first instance upon the County Assembly by section 58(5) of the [County Governments Act](#).
49. When performing the function, the County Assembly exercises quasi-judicial power.
50. Needless to say, in the exercise of such functions, Courts should only interfere with functions of the legislative arm before the function is completed where exceptional circumstances are demonstrated to



show manifest unlawfulness. Such a principle is not only legally sound because of separation of powers concerns but also because of the need to allow exhaustion of other ordained dispute resolution avenues.

51. Addressing the need for restraint, the Court of Appeal in *Pevans East Africa Limited & AR v. Chairman, Betting Control and Licensing Board and 7 Ors* (2013) eKLR held that:

Where *the Constitution* has reposed specific functions in an institution or organs of state, the court must give those organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the Constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of other of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have.

52. The call for restraint was also addressed by the Supreme Court in *Justus Kariuki Mate & Ar v. Martin Nyaga Wambora & Ar* (2017) eKLR where the Court held:

it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of *the Constitution* allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate allocation under *the Constitution*, is essential, as a scheme for circumventing conflict and crisis, in the discharge of government responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practise from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.

53. Earlier the Supreme Court had held in the case of *Speaker of Senate & Ar vs. Attorney General & Ors* (2013) eKLR that:

this Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

54. The Court has set out its role in these types of cases and it would now be germane to look at the facts advanced by the parties.

55. On or around 9 January 2023, the County Assembly received 3 Petitions seeking the removal of the Petitioners from their offices as members of the Board.

56. Under section 4 of the *Petition to County Assemblies (Procedure) Act*, it is the statutory duty of the Clerk to receive Petitions from members of the public.

57. Upon satisfying himself or herself that the Petition passes legal muster, section 5 of the Act demands that the Clerk forwards the Petition to the Speaker of the County Assembly for reporting to the Assembly.

58. In the case under consideration, the Speaker of the County Assembly and the Clerk are the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

59. The Petitioners have not shown in what way or how these 2 Respondents acted outside the statutory framework guiding the receipt and processing of the removal Petitions. Neither have the Petitioners



- demonstrated how the commissions and or omissions of the 2 Respondents if any violated their rights and fundamental freedoms.
60. The Petitioners also joined the Governor as the 1<sup>st</sup> Respondent. No evidence was placed before the Court to interdict the conduct of the Governor in the removal process.
  61. The Court will now discuss the process and proceedings before the County Assembly, noting at this stage that the County Assembly as the organ with the mandate to inquire into the removal process was not a party to these proceedings.
  62. The Petitioners alleged that their removal process was engineered by the Respondents for nefarious purposes and that the notice given to them was short, there was no quorum when the Ad Hoc Committee was constituted, the police had been used to intimidate them, and that the staff of the Board had been frustrated.
  63. The Petitioners also alleged the removal process was a violation or threatened violation of their rights and fundamental freedoms by asserting that the Ad Hoc Committee had no jurisdiction to consider the removal Petitions as the mandate should have been carried out by the sectoral Committees in place.
  64. After the Clerk and the Speaker had played their respective statutory and procedural roles, the Petitions were placed before the County Assembly. It appointed an Ad Hoc Committee to inquire or investigate.
  65. The Petitioners were notified of the Petitions and were invited to make oral representations on 26 January 2023 (they made written representations).
  66. The Petitioners did not appear for the hearings but instead moved the Court to interdict the process (the Court declined to interdict the process).
  67. The Ad Hoc Committee proceeded with its work and presented a report to the County Assembly which the Assembly debated on 6 February 2023. The County Assembly passed a resolution to remove the Petitioners from office.
  68. The Court has already stated that when justified through demonstration of the existence of exceptional circumstances, it would be obliged to intervene in a process before the legislative arm.
  69. The Petitioners have not demonstrated through evidence that the 3 Petitions or the removal process were initiated at the behest of any of the Respondents or that the Petitions in themselves violated their rights or fundamental freedoms.
  70. The Petitioners were called upon to make representations and were afforded an opportunity to appear before the County Assembly, but they snubbed the chance. Most of the allegations and assertions placed before the Court were within the competence of the Ad Hoc Committee and the County Assembly to deliberate on and make appropriate findings on.
  71. Whether the allegations raised to get the Petitioners from office had merit or were nefarious should have been placed at the doorstep of the Ad Hoc Committee or the County Assembly as an inquirer of facts, Assembly at the first instance.
  72. The Petitioners did not discharge the burden expected of them of showing exceptional circumstances existed which warranted the Court interfering with the proceedings before the County Assembly.
  73. Further, there was no evidence placed before the Court that the County Assembly did not comply with the timelines for processing Petitions covered by the Petitions to County Assemblies (Procedure) Act or the Standing Orders to give credence to the allegations that the time to respond was not adequate.



74. On the complaint that the Petitions were not processed through the sectoral Committees in place, the Court cannot question the wisdom of the County Assembly in passing a resolution to establish an Ad Hoc Committee since the Petitioners did not pinpoint any particular Standing Order which precluded the formation of such a Committee.
75. It is also noteworthy that the Petitioners also approached the High Court after approaching this Court in Nairobi Judicial Review Case No. E017 of 2023, to challenge the removal (the proceedings were transferred to the High Court sitting in Migori. The Petitioners also amended the Petition herein to reflect the new circumstances) without disclosing that fact to this Court (this Court is not aware whether a material disclosure of pending proceedings was made to the High Court).
76. The course taken by and or on behalf of the Petitioners has the potential to seriously erode public confidence in the administration of justice since the Petitioners have approached separate Courts with distinct jurisdictions.
77. It would not be out of the ordinary to suppose that different conclusions may be reached by the different Courts causing untoward embarrassment to the judiciary.
78. In the course of the proceedings, it also emerged that a Magistrates Court had been approached to stop the process before the County Assembly, and it did issue injunctive orders.
79. Before concluding, the Court must note that the Petitioners did not comply with the directions of this Court more than once.
80. The conduct of the Petitioners of not complying with directions in order to achieve an expeditious and proportionate determination of the Petition before this Court was most wanting, considering the pivotal role played by a county public service board within the county government public service.
81. Disputes involving a county public service board ought to be determined with expedition in order not to adversely affect the human capital function within a county.

### **Conclusion and Orders**

82. In light of the above, the Court finds and declares:
  - i. The action in respect to the appointment of Judith Okinda as acting Secretary/Chief Executive of the County Public Service Board was premature hence the Court lacks first-instance jurisdiction.
  - ii. The Petitioners did not prove that the Respondents interfered with their independence.
  - iii. The Petitioners did not prove that the Respondents violated their rights and fundamental freedoms in respect to the removal process as members of the County Public Service Board.
83. The Petition is dismissed with costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 24<sup>TH</sup> DAY OF MAY 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

**For Petitioners Mr Lusi instructed by C.M. Advocates LLP**



**For Respondents Mr Okong'o instructed by Okong'o Wandago & Co. Advocates  
Court Assistant Chrispo Aura**

