



Omao & another v Arati & 6 others; Nyandieka (Interested Party) (Petition E014 of 2023) [2023] KEELRC 2331 (KLR) (4 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E014 OF 2023**

S RADIDO, J

OCTOBER 4, 2023

IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2) (A), 258 AND 259(1) OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 25, 27, 28, 33, 35, 41 47, 48, AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF SECTION 13 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012 AND IN THE MATTER OF THE OFFICE OF THE COUNTY ATTORNEY ACT NO. 14 OF 2020 AND PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT NO. 5 OF 2017 AND IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE FAIR ADMINISTRATION ACT, 2015 AND IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007

BETWEEN

**VINCENT MARIITA OMAO 1ST PETITIONER
DAVID MANGONDI SENEMA 2ND PETITIONER**

AND

**HON PAUL SIMBA ARATI (GOVERNOR COUNTY GOVERNMENT OF KISII) 1ST RESPONDENT
COUNTY GOVERNMENT OF KISII 2ND RESPONDENT
COUNTY SECRETARY, KISII 3RD RESPONDENT
KISII COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT
CLERK, KISII COUNTY ASSEMBLY 5TH RESPONDENT
SPEAKER, KISII COUNTY ASSEMBLY 6TH RESPONDENT
KISII COUNTY ASSEMBLY 7TH RESPONDENT**



AND

ALFRED ONGIRI NYANDIEKA INTERESTED PARTY

RULING

1. Hon Paul Simba Arati (1st Respondent) gazetted the appointment of Alfred Ongiri Nyandieka (Interested Party) as the County Attorney, Kisii through Gazette Notice No 14717 on November 30, 2022. A letter of appointment was issued on December 1, 2022.
2. On May 18, 2023, the Petitioners filed a Petition alleging that the appointment of the Interested Party did not meet the threshold envisaged by Articles 10,159(2)(e), 232(1)(g) & (2)(a) of the Constitution, section 17(2)(i) of the Public Service (Values and Principles) Act, section 37 of the Public Service Commission Act, sections 4, 5 and 6(2),(3) and (4) of the Public Appointments (County Assemblies Approval) Act, the County Governments Act and the Office of the County Attorney Act.
3. The County Attorney filed a Memorandum of Appearance to come on record for the Respondents and Interested Party on May 23,2023. On the same day, the Respondents and Interested Party filed a Notice of Preliminary Objection questioning the locus standi of the Petitioners.
4. The next day, the firm of Ochoki & Co Advocates filed a Notice of Appointment to act for the County Public Service Board, Kisii (4th Respondent).
5. On June 7, 2023, Onserio Ondimu, Advocate with the County Assembly of Kisii filed a Notice of Appointment to act for the Clerk, Speaker, and the County Assembly of Kisii (5th to 7th Respondents).
6. The Petitioners took the view that the Interested Party was not qualified or entitled to represent the 1st to 4th Respondents and they took out a Motion on June 9, 2023 seeking orders:
 - (1) The Interested Party be disqualified and barred from acting in legal representation of the 1st, 2nd, 3rd, and 4th Respondents or any other person herein apart from himself.
 - (2) Any pleadings on record drawn by the Interested Party in the purported representation of any of the 1st, 2nd, 3rd, and 4th Respondents be struck off the record.
 - (3) Costs of this application be borne by the Interested Party.
7. The primary grounds advanced by the Petitioners in support of the application were that the Interested Party was the subject of the proceedings and was likely to be a witness and therefore ought not to appear as an advocate; the continued representation of the Respondents by the Interested Party was barred by Rule 8 of the Advocates (Practice) Rules, 1966 and that the Interested Party owed the Respondents a fiduciary duty as an advocate and there was a likelihood of a failure of justice.
8. The 4th Respondent through one of its Board members filed a replying affidavit on June 9, 2023, deponing that it had not issued any instructions to the Interested Party to represent it in the proceedings.
9. On June 12, 2023, the firm of Ochoki & Co Advocates filed a Notice of Change of Advocate to act for the 4th Respondent.



10. When the file was placed before the Court on the same day, the other Respondents questioned the competence of Ochoki & Co Advocates to act for the 4th Respondent, a public organ of the County Government.
11. The Court directed the advocates appearing for the 4th Respondent to resolve the dispute or file a formal application to enable the Court to adjudicate on the question of representation.
12. The advocates did not resolve the dispute and on June 21, 2023, the office of the County Attorney filed a Motion seeking orders:
 - (1) That this Honourable Court be pleased to strike out the Notice of Change of Advocates filed by the firm of Ochoki & Co Advocate date 12th June 2023 together with the relying affidavit of Judy Omare Nyakerario sworn on the same date on behalf of the 4th Respondent.
 - (2) That the cost of this application be provided for
13. On June 22, 2023, the firm of Odhiambo Oronga & Co Advocates filed a Notice of Change of Advocates to act for the 1st to 4th Respondents.
14. The 5th to 7th Respondents filed on July 26, 2023, a replying affidavit sworn by the acting Clerk in response to the Motion to strike out the Notice of Change of Advocate. The affidavit made assertions in support of the Motion. These Respondents filed their submissions on 20 September 2023.
15. The 1st to 4th Respondents filed their submissions on September 22, 2023.
16. The Court has considered the motion, affidavits, and submissions.
17. The advocate representing the 1st to 4th Respondents as signified by the Notice of Change of Advocates filed on June 22, 2023 is Odhiambo Oronga & Co Advocates. The notice supersedes any previous notices of appointment and therefore the Motion under consideration is not only superfluous but overtaken by events.
18. The aforesaid Notice of Change of Advocate also renders the Petitioners' amended Motion dated May 23, 2023 otiose.
19. Costs of the 2 Motions in the cause.
20. The Court will hereinafter give directions on the expeditious and proportionate disposal of the Petition.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 4TH DAY OF OCTOBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners Sam N. Mainga & Co. Advocates

For 1st to 4th Respondents Odhiambo Oronga & Co. Advocates

For 5th to 7th Respondents Onserio Ondimu, Advocate, County Assembly of Kisii

Interested Party Odhiambo Oronga & Co. Advocates

Court Assistant Chrispo Aura

