



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 21 OF 2020

HAMISI BWENI DZILA.....CLAIMANT

- VERSUS -

KWALE COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

COUNTY ASSEMBLY OF KWALE.....2ND RESPONDENT

SAMMY NYAMAWI RUWA.....3RD RESPONDENT

OMAR KITENGELE.....4TH RESPONDENT

ANTONY YAMA.....5TH RESPONDENT

MWAKARIBU HAMISI.....6TH RESPONDENT

CELINE LUSWETI.....7TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The claimant filed the statement of claim on 31.03.2020 through Aboubakar, Mwanakitina & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) A declaration that the 1st, 3rd, 4th, 5th, 6th, and 7th respondents' suspension of the claimant from his office as clerk of the Kwale County Assembly by the letter dated 02.03.2020 is a violation of the values and principles of public office as provided for in Article 232 and 236 of the Constitution of Kenya, 2010.
- 2) A declaration that the undated notice to show cause why removal proceedings should not be commenced against the claimant are also a violation of the values and principles of public office as provided for under Articles 232 and 236 of the Constitution of Kenya, 2020.
- 3) An injunction against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them from suspending the claimant from his office as clerk of the County Assembly of Kwale on the basis of the issues raised in these proceedings.
- 4) An injunction against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them from proceeding with the notice to show cause why removal proceedings should not be commenced against the claimant on the basis of the issues raised in these proceedings.
- 5) An injunction against the 2nd respondent restraining it from receiving, discussing, debating and or resolving any motion brought to it by the 1st, 3rd, 4th, 5th, 6th and 7th respondents seeking the removal of the claimant from his office as a clerk of the County Assembly of Kwale on the basis of the issues raised in these proceedings.
- 6) An order that the 1st or 2nd respondent do immediately pay the claimant his outstanding salary from December, 2019 to the date of filing this claim or the date of the judgment herein.

7) Costs of the claim.

The 1st to 7th respondents filed on 19.03.2021 a joint statement of response to the claim and through Muturi Gakuo & Kibara Advocates. The respondents prayed that the claimant's claim be dismissed with costs.

As per the pleadings on record, the parties are not in dispute about the following facts. The 1st respondent is a body corporate established under section 12(1) of the County Governments Act, 2012 and it performs human resource functions with respect to employees of the County Assembly. The 2nd respondent is an arm of the County Government of Kwale established per Article 176(1) of the Constitution of Kenya, 2010 undertaking legislative functions per Article 185 of the Constitution and the roles under section 8(1) of the County Governments Act, 2012. The 3rd respondent is the Chairperson of the 1st respondent per section 12(3) (a) of the County Governments Act, 2012 and is the Speaker of the 2nd respondent per Article 178(1) of the Constitution. The 4th and 5th respondents are elected members of the 2nd respondent. The 4th respondent is Vice-Chairperson and the 5th respondent a member of the 1st respondent per section 12(3) (b) and (c) of the County Governments Act, 2012 respectively. The 6th respondent is a member of the 1st respondent being a man under section 12(3) (d) of the County Governments Act, 2012 while the 7th respondent is a member being a woman under section 12 (3) (d) of the Act.

It is further not in dispute that the claimant filed suit on 17.12.2019, **Hamisi Bweni Dzila –Versus- County Assembly of Kwale and Kwale County Asembly Service Board, ELRC Cause 99 of 2019 at Mombasa.** The Court (Rika J.) delivered a ruling in that suit on 28.02.2020 and ordered:

- a) The claimant is reinstated with immediate effect to his position as the Clerk to the County Assembly of Kwale.
- b) He shall be paid his back salary from the date of termination, 11.12.2019, to-date.
- c) The respondents shall not interfere with the claimant's discharge of mandate as the Clerk, provided that any steps taken by the respondents to remove the claimant from office, in accordance with the law, shall not be deemed to amount to interference with discharge of mandate.
- d) No order on the costs.
- e) This ruling shall be adopted as the judgment of the Court within 30 days, and the file closed, unless the parties demonstrate to the Court there are triable issues pending.
- f) Mention on 31.03.2020.

Pursuant to that decision, the claimant reported to work on 02.03.2020 and he pleads that he was not allowed to enter the office as police had been deployed to prevent his entry. Prior to leaving the premises he was given a notice of administrative suspension pending investigation dated 02.03.2020. The Board (1st respondent) had sat on Sunday 01.03.2020 and decided that the notice be issued. The notice set out 8 allegations against the claimant as allegedly amounting to gross misconduct, thus:

- a) Failed to exhaust internal disciplinary mechanism in handling allegations against an officer of the service and opted to explore external disciplinary mechanism without involving the Board.
- b) Have refused or failed to implement several decisions or resolutions of the Board.
- c) Have on various occasions undertaken programs without seeking the Board's approval.
- d) Have written to sources external to the service seeking advice without the knowledge or approval of the Board.
- e) Have authorised or approved payments from the Assembly's account without the approval of the Board and contrary to financial procedures and guidelines.
- f) Have misrepresented information to the Board and presented minutes that do not capture the true deliberations and decisions of the Board.
- g) Have been insubordinate to the Board.
- h) Have refused or failed to subject himself to the attendance control systems set by the Assembly to check time-keeping and attendance.

The notice stated that pursuant to section 22 of the County Assembly Service Act, 2017 the claimant was suspended effective immediately for a period of 60 days. It further stated that the suspension was not disciplinary but intended to pave way for thorough investigations and to determine appropriate action and if investigations were not completed within the 60 days, the 1st respondent reserved the right to extend the suspension as necessary. Further, during investigations the claimant would be provided with the details of the allegations and given an opportunity to respond to them. If the claimant failed to avail himself, the notice stated that the 1st respondent would proceed with the disciplinary procedure in the claimant's absence and make a determination based on the information available to the Board. It further stated that the claimant had a right to personal or legal representation when appearing before the 1st respondent. If he was to leave town or not be

available to appear before the Board, he had to make a written request and obtain approval from the 1st respondent's Chairman. Further, upon receipt of the notice he had to hand over to the Chairman all 2nd respondent's property in his possession.

The claimant received undated notice to show cause signed by one Hon. Sammy N. Ruwa, Chairman of the 1st respondent. The notice conveyed that investigations had been completed and the details of the allegations were set out in that notice. The notice concluded thus, **“Consequently, we write to you and give you a Seven (7) days’ notice (the Notice Period) from the date of your receipt of this letter to submit to the undersigned a written response to the issues raised in this letter. Thereafter, the Board shall proceed in accordance with Section 22 and 23 of the County Assembly Services Act, 2017.”**

The claimant replied by his Advocates’ letter dated 23.03.2020 that the claimant was saddened and shocked by the content of the said notice to show cause. Further the allegations levelled against the claimant were motivated by malice, authoritarianism, abuse of office and disregard of the rule of law. The claimant replied to each of the allegations in detail.

The claimant is apprehensive that despite his response to the notice to show cause, the respondents have already made their decision to terminate his services as the Clerk of the 2nd respondent. The claimant's case is that the respondents are going through the process to appear to be complying with the legal procedure hence the claimant filed the claim herein.

The basis of the claimant's apprehension is pleaded as follows:

- a) The claimant was appointed Clerk of the 2nd respondent effective 01.08.2019 per section 12(4) of the County Government Act, 2012 and became Secretary for the 1st respondent but has never been allowed to take and sign minutes of the 1st respondent as per law required.
- b) After appointment the office was not handed to him and no hand over report was submitted.
- c) After appointment in August 2012 he started receiving cell phone calls that there was a dossier against him from his previous service and despite asking for the dossier it was not presented to him and he reported the matter to police per OB. No. 18/25/09/2019. The matter is pending investigation by the police.
- d) The claimant believes he is antagonised by the 3rd respondent together with the 4th to 7th respondents because he advised them that he could not authorize or approve payments to a contractor of a project which was under investigation by the Ethics and Anti-Corruption Commission (EACC) without the Commission's authority to pay and his advise was supported by the Assembly's Legal Department and the EACC. In the process, the claimant states that the County Procurement Officer became angry and uttered threats to the claimant's secretary whom the claimant advised to report to the police and after reporting, the 3rd to 7th respondents were not happy and the 3rd respondent moved to terminate the claimant's employment on 11.12.2019 which the claimant successfully challenged in the earlier suit. Thus the suspension letter of 02.03.2020 issued together with the undated notice to show cause herein.

The claimant's further case is that the alleged meeting of 01.03.2020 took place on a Sunday and the claimant says it was illegal as it breached clause 3 of the second schedule to the County Assembly Service Act, 2007 and which showed malice, lack of good faith, and abuse of office or power by the 3rd to 7th respondents as members of the 1st respondent.

The claimant was arrested in Mombasa on 11.03.2020 upon alleged giving of false information whereas his report to the police about work related complaints was still under investigation. He believes that his arrest was instigated by the 3rd to 7th respondents. Thus, it is his case that the 3rd to 7th respondents' actions herein are a violation of Article 236 of the Constitution of Kenya 2010 as they amount to victimization or discrimination against the claimant for having performed the functions of his office in accordance with the Constitution, the County Government Act, 2012, the County Assembly Service Act, 2017, and, the Public Finance Management Act, 2017.

In the response to the claim it is not disputed that the claimant filed suit on 17.12.2019, **Hamisi Bweni Dzila –Versus- County Assembly of Kwale and Kwale County Assembly Service Board, ELRC Cause 99 of 2019 at Mombasa**. The respondents opposed that suit in which the claimant prayed for reinstatement to the position of Clerk to the County Assembly of Kwale. Ruling was delivered by the Court on 28.02.2020. The 1st respondent convened on Sunday 01.03.2020 to deliberate the ruling and it was resolved that the suspension letter of 02.03.2020 be issued against the claimant.

The respondents pleaded that on 02.03.2020 the claimant did not report on duty as alleged but he reported on 03.03.2020 and it was not true, per claimant's averments, that he was prevented from accessing the office. After the adjournment of the County Assembly sitting on 03.03.2020, the Speaker summoned the claimant in presence of the Deputy Speaker and, the Speaker explained to the claimant the decision by the Board and handed to the claimant the suspension letter dated 02.03.2020.

The respondents' further case is that the claimant has declined to subject himself to the daily attendance biometric register put in place by the respondents for the period 01.07.2019 to 06.03.2020. The respondents' further case is that they did not instigate the arrest of the claimant as alleged by the claimant. It was the claimant who reported to the police that the 1st respondent's employee known as John Kalu had threatened the claimant's life but the police investigations failed to establish the alleged threats. Instead the police investigations discovered that there was a bad working relationship between the claimant and the staff of the County Assembly. The police recommended that the claimant and one Janet Mwanja be charged with the offence of giving false information to a person employed in public service contrary to section 129(a) of the Penal Code. The 1st respondent and the County Assembly were never involved in the arrest and subsequent charging of the claimant and the respondents became aware when the DCI wrote to the County Assembly the letter dated 17.03.2020 conveying that two of the Assembly's employees being the claimant and Janet Mulwa had been charged accordingly and the case had been fixed for mention on 02.04.2020 at Kwale law Courts for further directions and the Assembly was being notified to take appropriate administrative action.

It is pleaded that the 1st respondent completed its investigations and per sections 22 and 23 of the County Assembly Services Act, 2017 framed charges against the claimant who was given 7 days' notice to respond to the charges as per the notice to show cause delivered on 17.03.2020. The claimant responded by his Advocates' letter dated 23.03.2020. Further, under section 23(d) of the County Assembly Service Act 24 of 2017, after the written response, the claimant is to be invited to appear before the 1st respondent either personally or with Advocate to exculpate himself. However, due to Covid 19 situation restricting movement and gathering the 1st respondent had not convened awaiting lifting restrictions of inter-county movement. On 27.04.2020 the Court (Ndolo J.) suspended disciplinary process against the claimant. Thus the 1st respondent resolved that it would not initiate any disciplinary hearing against the claimant until the issues in dispute pending before Court are determined. The 1st respondent extended the administrative suspension of the claimant for 60 days (as per letter dated 30.04.2020) with full pay in line with section 22, section 27(1) of the CASA Act and as read with Article 236(b) of the Constitution of Kenya, 2010.

The respondents pleaded that the 1st respondent is impartial in carrying out its functions and maintains high standards of professionalism and per Article 232 and 236 of the Constitution of Kenya. Further, as Clerk to County Assembly and Secretary to 1st respondent and after appointment the claimant took 1st respondent's minutes which were signed by the 3rd respondent being the 1st respondent's Chairman. The claimant had reported to work on 01.08.2019 and took oath of office before the 1st respondent's members on 06.08.2019. On 19.08.2019 the 1st respondent withdrew the Deputy Clerk's duties of accounting officer and the claimant was designated as such per section 17(b) of the County Assembly Service Act, 2017. He was also facilitated to attend a two weeks' training or induction at the Centre for Parliamentary Studies and the Senate of Kenya to assist him settle smoothly in his new appointment. Nevertheless, the claimant continued to urge that there had been no proper handover whenever issues of the County Assembly Complex Project came up for his action. The 1st respondent intervened and the claimant was given all information and documents. Further, whenever the claimant was absent the Deputy Clerk performed the duty of recording the 1st respondent's minutes. Once appointed as Clerk, the claimant took over the duties as such. Whenever present, he attended Board meetings and took minutes and he enjoyed all his salary and benefits as Clerk. It is not true that he had been denied the chance to perform his work.

The respondents pleaded that it was true that the 1st respondent held a meeting on Sunday 01.03.2020 but the same was not illegal because clause 1 and 2 of the 2nd schedule of the County Assembly Services Act, 2017 provides that meetings of the Board can be held on such date and time as the Chairperson shall determine and the Board may meet as often as necessary. The meeting of 01.03.2020 was not a special meeting as contemplated in clause 3 of the schedule. Clause 3 applied where the meeting had not been initiated by the Chairman or Vice – Chairman in absence of the Chairman but initiated by a member to discuss an issue where the Chairman had been reluctant to call the meeting. That was not the case for the meeting of 01.03.2020. Further, at a Board meeting held on 28.02.2020, the Board resolved to meet on 01.03.2020 to receive the Advocates' report on the ruling which the Board members knew would be delivered by the Court on 28.02.2020. The Chairman had convened the meeting of 01.03.2020 per his notice dated 28.02.2020.

Further, the respondent's case was that the 1st respondent took no objection to the claimant's or other officers' communicating with the EACC. That the letter to show-cause did not allege that the claimant irregularly communicated with the EACC. The certificate No. 8 in issue as raised in the matter was handled with integrity and above board and subsequently paid. The allegations against the claimant are that while executing official duty he sought advice and direction from external sources relating to his duties as a Clerk without the knowledge and approval of the Board per section 4(3) of the County Assembly Act, 2017. Further, the claimant severally denied before the 1st respondent of ever communicating with EACC and which contradicted the claimant's own evidence to the 1st respondent. The EACC only cautioned the Board not to pay the certificate if all documents had not been provided. In any event, the respondents' case was that the disciplinary case cannot be considered on merits at this stage as it was still pending.

The respondents further case is that by replying to the notice to show-cause the claimant thereby submitted himself to the disciplinary process. If he did not wish to submit to the disciplinary process, he ought to have declined to reply the notice to show-cause. Article 236 of the Constitution requires that no officer is dismissed without regard to due process of the law. The respondents have followed the due procedure under the County Assembly Act 24 of 2017 and the claimant should subject himself to the disciplinary proceedings. Further, under section 42 of the County Assembly Service Act 24 of 2017, the members of the 1st respondent are not subject to any liability, action, claim, or demand if the same was done in good faith and their capacity as Board members so that, the 3rd to 7th respondents are improperly sued and the claim against them ought to be struck out with costs. It is contrary to section 7 of the Civil Procedure Act Cap.21 for the claimant to file the present suit about the same issues and against the same parties, the issues having been determined in the said previous ELRC Cause No.99 of 2019 determined by the ruling delivered on 28.02.2020.

In the Ruling delivered on 12.03.2021 the Court found that the claimant had made specific allegations, claims and prayers against all the respondents so that the 3rd to 7th respondents were proper parties to the suit. The Court further found that the present suit is not trapped by the doctrine of *res judicata* and the claimant was not re-litigating matters that were decided in the said ELRC Cause No.99 of 2019 determined by the ruling delivered on 28.02.2020. The Court will not therefore revisit those issues. In the same ruling the Court stated, "... **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 23 of the Act – 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.” After the full hearing of the suit and after taking into account all the material on record, the Court finds that there is nothing to defeat a finding that “suspend” in the section means “remove” and it can only be imposed after due process under section 23 of the County Assembly Service Act, 2017. 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.

At the hearing and in view of the Court’s opinion in the ruling, it was ordered, “**By consent issue on suspension duly decided upon in the ruling delivered on 12.03.2021.**” Further, at the hearing and upon an oral application for the claimant, it was ordered:

- 1) The claimant seeks prayers (2), (3) and (7).
- 2) Surrenders prayers (4) and (5),
- 3) Prayers (1) and (6) are already determined by reason of the ruling of 12.03.2021.

Accordingly, the Court will determine the residual suit in view of the orders made at the hearing of the suit. The claimant testified to support his case and the respondents’ witness (RW) was the 3rd Respondent. Final submissions were filed for the parties. The Court has considered the pleadings, evidence and the submissions. The Court makes the following pertinent findings.

To answer the 1st issue for determination, the Court returns that prayer 3 in the statement of claim will issue but with a proviso that, unless after the claimant being found culpable after compliance with section 23 of the County Assembly Service Act, 2017. The claimant is therefore entitled to an injunction against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them from suspending the claimant from his office as clerk of the County Assembly of Kwale on the basis of the issues raised in these proceedings unless as the claimant may be found culpable after compliance with section 23 of the County Assembly Service Act, 2017. The grant of that prayer is based upon the earlier Court’s finding that the Act’s design precludes the 1st respondent from imposing a suspension purportedly under section 22 of the Act as an interlocutory measure without compliance with section 23 of the Act – that “suspend” in section 22 of the Act is construed as “remove” and cannot be imposed without compliance with section 23 of the Act. The Court finds accordingly.

The 2nd issue for determination as framed separately by Counsel for the parties is whether the 1st respondent has a valid disciplinary mandate over the claimant. The claimant’s case is that the Board having made the decision on 11.12.2019 (one that was subject of the Court proceedings in **Hamisi Bweni Dzila –Versus- County Assembly of Kwale and Kwale County Assembly Service Board, ELRC Cause 99 of 2019 at Mombasa** and decided by Rika J), the same Board should not hear the disciplinary process afresh having already made a decision on the matter. The claimant’s case is that the Board Chairperson is also the Speaker, the 3rd respondent so that to that extent, both the Board as well as the County Assembly involved in decision making in the disciplinary case against him would be biased.

The claimant testified that the reason he filed the present case is because he felt that the 1st respondent was biased against him. He stated that his reasons for the alleged bias were as per paragraph 12 of his statement of claim and being essentially the orders made by Rika J in the earlier case between the parties and the termination subject of that earlier case had been predetermined. He lamented that after appointment as clerk he was not allowed to take minutes as the 1st respondent’s secretary; he was never given handover and he declined to sign the handover documents because they were falsified and doctored for court proceedings; he received threatening calls from anonymous persons prior to being handed over the clerk’s office; and he declined to sign payment for certificate No. 8 upon reasons. The claimant testified (and correctly so) that the earlier case before Rika J was that he had been erroneously appointed on probationary service and the Court had found that the purported termination of the probationary service by the 1st respondent was misconceived. He confirmed in his testimony (and correctly so) that in that earlier case he had not been taken through a disciplinary process.

RW testified that Board minutes were collectively owed by 1st respondent’s members and in event of errors or inaccuracy the members were at liberty to correct. Further, the minutes were authenticated by the Chairperson’s signature and actually recorded by an Administrative Officer but in presence of the Claimant as Board Secretary. After appointment as clerk he took over office and in the eyes of the 1st respondent, handing over took place because for instance he was appointed the accounting officer by the County Executive Council Member (CECM) for Finance. The appointment came after RW wrote to the CECM and no transaction could take place without the claimant signing. Further he attended 1st respondent’s meetings as Board Secretary. The handing over had taken place in a ceremony convened by the 1st respondent. RW confirmed that in the earlier case between the parties Rika J found that the probationary appointment was unlawful and the termination of the purported probationary service was set aside. In cross-examination RW stated that the 1st respondent minuted that the claimant ceded his role to his deputy with respect to the project involving certificate No.8 and the decision was taken by the claimant voluntarily. RW also confirmed that the claimant never signed acknowledging receipt of the handing over reports and there were no exhibited minutes of 1st respondent’s meeting at which the claimant received the handing over reports. Further the exhibit at page 421 of the respondent’s bundle showed that an insufficient handing over report had been provided and the claimant had rejected it as insufficient and, thereafter there was no exhibited evidence that a sufficient or complete handing over report had been provided or delivered to the claimant. RW testified that claimant received the show-cause letter on 17.03.2020 but the investigation report on the allegations in the letter were not attached on the letter and the investigation report had not been produced or filed in Court. On handing over RW stated that they did not deny or admit that they handed over to the claimant.

The Court has considered the parties’ respective evidence in relation to the claimant’s alleged bias against the respondents.

First, the law is that the respondents are vested with disciplinary powers over the claimant in terms of sections 22 and 23 of the County

Assembly Service Act, 2017. It is not urged for the claimant that the said sections are unconstitutional. The Court finds that accordingly, the respondents are properly vested with the statutory authority to exercise disciplinary control over the claimant. The Court finds that as was urged and submitted for the respondent, the Court cannot usurp the clear statutory mandate vested in the 1st and 2nd respondents and to be properly undertaken by the other respondents in that behalf.

Second, the evidence is that the earlier suit between the parties as decided by Rika J was about termination of probationary service and which the Court found unlawful and misconceived and set it aside. The claimant confirmed that he was not subjected to disciplinary proceedings in that regard. The Court therefore returns that as urged for the respondents, the respondents cannot be said to have decided the disciplinary case facing the claimant subject of the present suit by reason of the termination decision that was set aside in the ruling by Rika J. The Court further finds that as urged for the respondent the provisions of sections 22 and 23 of the County Assembly Service Act, 2017 provide for safeguards that would protect the claimant from real or perceived bias on the part of the respondents or any of them. For instance, the 1st respondent makes a recommendation and the 2nd respondent then considers the same towards making a resolution for removal. The Court considers that even if RW is Chairperson of the 1st respondent and Speaker of the 2nd respondent, there should be ample avenues for the claimant to ask for disqualification or declaration of interest as is for example provided for under the Public Officer Ethics Act, 2003 on standards and procedures of managing conflict of interest. In any event the Court finds that the claimant has raised issues which by themselves have not established bias on the part of the respondents. Thus, the Court holds that failure to receive a proper handover or discrepancies in minutes or other operational challenges in the manner the claimant may have worked with the respondents would not by itself disable the respondents from handling the disciplinary case against the claimant in exercise of statutory disciplinary powers as vested in sections 22 and 23 of the County Assembly Service Act, 2017. The Court considers that the statutory design is alert that the claimant serves under the respondents and it is the respondents who may have a complaint against the claimant resulting into a removal. Thus unless a clear disqualifying ground is established in a case to case basis and with respect to individual persons constituting the 1st or 2nd respondent, then generalised allegations to disable the 1st or 2nd respondents generally from discharging their statutory disciplinary mandate would not be valid or legitimate at all. The Court further considers that the claimant would of first instance have to raise the issue of bias before the 1st or 2nd respondent in a particular case as against a specific member and if disregarded, then it would constitute a ground to challenge the decision arrived at by the 1st or 2nd respondent or form a basis to stay the proceedings of the 1st or 2nd respondent – in appropriate legal proceedings in that behalf.

While making that finding the Court is guided by the decision of the Supreme Court in **Gladys Boss Shollei –Versus- Judicial Service Commission and 2 Others, Petition No. 34 of 2014 (Koome CJ & P, Mwilu DCJ & VP, Ibrahim, Njoki 7 Ouko, SCJJ)** thus, “(72) It is the appellant’s allegation that despite the presence of real, apparent and actual bias on the part of some of the Commissioners, the JSC proceeded with the hearing thereby infringing her right to an impartial hearing. So then, should the tribunal have been reconstituted on account of the alleged perceived bias by the named Commissioners and the Chairman? We don’t think so. Having perused the record at pages 1494 to 1506 where the allegations of bias were raised before JSC, we have taken note of the response by the Counsel for the appellant (at page 1504) admitting to JSC by stating that he could not authenticate the emails upon which the allegations of bias were made. In fact, Counsel stated that the same could be true or fake. For that reason alone, we are persuaded to agree with the appellate court’s finding that without authenticating the emails, it was impossible to conclude that there was actual or reasonable apprehension of bias. We ultimately find that the appellant’s right to a fair hearing regarding this aspect was not violated.”

In that case the Supreme Court upheld the Court of Appeal decision in **Judicial Service Commission –Versus- Gladys Boss Shollei and Another [2014]eKLR** cited for the respondent and where it was held that the courts should apply the objective test of “**reasonable apprehension of bias**” which requires the judge to determine two issues thus, the ascertainment of the circumstances upon which the allegation of bias is anchored; and to use the ascertained circumstances to determine objectively the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias. The Court has already found that the general challenges the claimant may have encountered in his service with the respondents as disclosed in the evidence on record by themselves would not constitute a finding of bias against the 1st and 2nd respondents as the institutions vested with disciplinary control over the claimant and further, the general lamentations have not established disablement of the 1st or 2nd respondents from exercising the statutory disciplinary control over the claimant.

In view of those findings, the Court returns that the claimant has failed to establish a justification for grant of prayer 3 being a declaration that the undated notice to show cause why removal proceedings should not be commenced against the claimant are also a violation of the values and principles of public office as provided for under Articles 232 and 236 of the Constitution of Kenya, 2020. The Court returns that the alleged violations have not been established.

On costs, the Court has considered the consent orders the parties entered at the interlocutory stages, considered the parties’ margins of success and further considered the continuing employer – employee relationship between the parties and returns that the 1st respondent will pay 50% of the claimant’s costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The injunction hereby issued against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them by themselves or by their agents or servants from, suspending the claimant from his office as clerk of the County Assembly of Kwale on the basis of the issues raised in these proceedings or other disciplinary proceedings commenced as the case may be, unless, as the claimant may be found culpable in accordance with section 23 of the County Assembly Service Act, 2017 and in accordance with other applicable law.
- 2) The declaration hereby issued that “**suspend**” in section 22 of the County Assembly Service Act means “**remove**” (and is not an interlocutory administrative measure that may be imposed pending investigations) and “**suspend**” under the section shall not be imposed by the County Assembly Service Board unless in accordance with and after conclusion of the due process prescribed under section 23 of the Act.

3) The 1st respondent to pay 50% of the claimant's costs of the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 25th February, 2022.

BYRAM ONGAYA

JUDGE