



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC PETITION NO. E056 OF 2021.

THOMAS TONGI MOGENDI.....1ST PETITIONER

ANDREW ONSERIO ONDIMU.....2ND PETITIONER

DANIEL OMWOYO MBAKA.....3RD PETITIONER

VERSUS

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

CLERK KISII COUNTY ASSEMBLY.....2ND RESPONDENT

COUNTY ASSEMBLY OF KISII.....3RD RESPONDENT

THE DIRECTOR, HUMAN RESOURCE

MANAGEMENT KISII COUNTY.....4TH RESPONDENT

THE PAYROLL MANAGER, KISII COUNTY.....5TH RESPONDENT

JUDGMENT

Introduction

1. Before court is the Petitioners petition dated 14th October, 2021. The petition was lodged together with a Notice of Motion application seeking conservatory orders of injunction staying the interdiction of the Petitioners, and consequential disciplinary proceedings emanating from the interdiction.
2. Parties by consent compromised the application and agreed to maintain the status quo in the interest of a faster conclusion of the main petition.
3. An application to join a total of ten (10) persons to the petition as interested parties was allowed the same being unopposed.
4. The Petition was opposed by all the Respondents through various Replying Affidavits, sworn by **Mr. James O. Nyaoga** for the 1st, 2nd & 3rd Respondents and a **Mr. Godfrey Mang'esa Nyayiem** for the Interested Parties. A joint reply was also received from members of the 1st Respondent.
5. The petition was prosecuted through written submissions.

The Petition

6. Through the Petition dated 14th October, 2021, the Petitioners seek the following declarations:

a) A declaration that the Petitioners are entitled to the full protection of the law and to be subjected to a disciplinary process and/or action strictly in accordance with the due process of the law.

- b) A declaration that the disciplinary actions initiated against the Petitioners herein by and at the instance of the 2nd Respondent and the subsequent interdiction letter dated 4/8/2021, which were issued before the approval, sanction and/or ratification of the 1st Respondent was unlawful, irregular and wrongful and thus *null and void ab initio*.
- c) A declaration that the actions/omissions/commissions of the 2nd, 4th and 5th Respondents jointly and severally to interdict the Petitioners under the purported authority/advisory of the disbanded Management Committee were unprocedural, irregular, without jurisdiction, null and void and of no legal consequences.
- d) A declaration that the failure and/or refusal by the 2nd, 4th and 5th Respondents to lift the interdiction of the Petitioners herein and expunge the decision of their interdiction thereof from the records of the County Assembly as instructed and/or directed by the 1st Respondent is illegal and unjustified.
- e) A declaration that the actions of the Respondents jointly and severally is arbitrary in continuing to effect the decision purporting to interdict the Petitioners from employment, continuing to withhold their half salaries, benefits and allowances, which act amounts to infringement of the Petitioners rights to fair labour practices and fair administrative action.
- f) A declaration that the actions of the Respondents and the manner in which they have treated the Petitioners is unfair and a violation of their basic and fundamental human rights as protected in the Constitution.
- g) An order of Mandamus against the 2nd, 4th and 5th Respondent jointly and severally, to implement the decision of the 1st Respondent rescinding the interdiction of the Petitioners.
- h) A conservatory Order of injunction preserving the employment status of the Petitioners together with their salaries and allowances as they were prior to their impugned interdiction.
- i) An award of general damages for infringement of the Petitioner's basic and fundamental human rights.
- j) The Respondent be condemned to pay damages and compensate the Petitioners for unlawful and/or wrongful interdiction.
- k) A permanent order of injunction prohibiting the Respondents from disciplining, suspending, preventing, barring, restricting and interfering with the Petitioners' performance and discharge of their duties in their various capacities whatsoever and howsoever, subject only to observance of the provisions of the Constitution, the Fair Administrative Actions Act, the County Government Act and other relevant statutes.
- l) A permanent order of injunction prohibiting and restraining the Respondents by themselves, servants and/or employees from appointing or directing appointment of any other person to act in the Petitioners' respective positions without regard to the due process of the law.

7. The Petition was premised on the following grounds:

- i. That vide a letter dated 4/8/2021 the 2nd Respondent in cohort with other employees of the 1st Respondent terming themselves as the Management Committee wrote an advisory to the 1st Respondent alleging the existence of a 'gang' led and coordinated by the Petitioners herein moving from office to office flashing out other employees from their offices, breaking meetings of various committees of the 1st Respondent, harassing staff, conducting demos, leaking official documents amongst other allegations.
- ii. That the management committee issued letters of interdiction against the Petitioners and 6 other officers of the Respondents on the 4/8/2021, notwithstanding the fact that the 1st Respondent is the only one mandated to sanction disciplinary action against its employees per Section 27 of the County Government Act, and had not yet deliberated on the advisory by the Management Committee.
- iii. That according to *Section 29 of the county Assembly Services Act*, the Staff Advisory Committee is the only entity mandated to advise the Board on staff issues including termination, appointment, interdiction, suspension, stopping, withholding or deferring normal salary increment.
- iv. That the purported advisory by the Management Committee touching on staff matters including recommendation for interdiction and withholding of salaries was a usurpation of the powers, functions and responsibility of the Staff advisory Committee.
- v. That the interdiction of the Petitioners was done unilaterally at the instance of the 2nd Respondent.
- vi. That the interdiction letters issued to the Petitioners were irregular, unprocedural, unlawful and illegal.
- vii. That the Petitioners were not given prior notice and/or reasons for their interdiction.
- viii. That the Petitioners were never heard nor given an opportunity to be heard and to make representation in that regard.

The Petitioners' Submissions

8. The Petitioners submitted that their interdiction is illegal, unlawful, null and void as it is an affront to the provisions of Articles 10, 47, and 236 of the Constitution.

9. It is the Petitioners submission that the impugned disciplinary process was initiated by an unauthorized person and entity; the 2nd Respondent and the Management Committee and not the 1st Respondent.

10. It is submitted for the Petitioners that their interdiction was informed by an advisory given by the Management Committee of the 1st Respondent and that they were not given an opportunity to be heard and make representation prior to the decision to interdict and suspend them from duty.

11. It is submitted that the decision to interdict the Petitioners was rescinded by the 1st Respondent in a meeting held on 13th August, 2021 and the decision to rescind communicated to the 2nd, 4th and 5th Respondents, who were expected to comply with the directive.

The Respondents' Submissions

12. **Mr. James O. Nyaoga** avers that Kisii County Assembly underwent turbulent times in the last one year which saw a section of employees engage in riots and various acts of lawlessness. He avers that it was incumbent upon the 1st Respondent to restore order in the interest of service delivery, and part of the effort to restore order was subjecting the officers culpable for the unrest to disciplinary action.

13. **Mr. James O. Nyaoga** avers that he commenced disciplinary action against the Petitioners and other officers of the 1st Respondent with the authority of the 1st Respondent. He further avers that initial investigations had been conducted by the Staff advisory Committee pursuant to Sections 28 and 29 of the County Government Act, which investigation culminated in a listing of staff who were identified as ring leaders of the riots.

14. It is further submitted for the 1st and 3rd Respondent, that Section 17(1)(e)(ii)(h) of the County Assembly Services Act, empowers the 2nd Respondent to interdict officers of the 1st Respondent vide his power as the accounting officer in a bid to ensure compliance with the principles and values of the public service.

15. The Respondents further submitted that the 1st Respondent through a board meeting held on 9th August, 2021, ratified the interdiction and deployment of its staff, including the Petitioners. The Respondent further avers that the board of the 1st Respondent allowed him and Management authority to commence disciplinary action.

16. **Mr. James O. Nyaoga** avers that on 15th August, 2021, a section of the 1st Respondent's board purported to reverse the decision of the full Board by directing him, and the Human Resources Director to revoke the interdictions and reverse deployments effected pursuant to the earlier directive of the full board. It is his position that the latter meeting was not properly constituted as he, as the Secretary to the board was not invited to the meeting, and that a member of the County Assembly Service Board (CASB) acted as the Secretary for purposes of that meeting contrary to Section 12(4) of the County Government.

17. The Respondents aver that the Petitioners herein, instead of responding to the show cause letter, they decided to file this matter in court. It is **Mr. James O. Nyaoga's** position that letters of interdiction are an interim measure taken by employers so as to enable conduct of investigation. He further states that the Petitioners herein, are subject of investigation following allegations of misconduct and abuse of office.

18. It is the Respondents' case that the interdiction of the Petitioners will not affect service delivery as government services are not dependent on any one individual. He further states that interdictions are only vacated at the end of a disciplinary process as provided under the 1st Respondent's Human Resources Manual and that the same can only be lifted by the authorized officer in accordance with disciplinary policy.

19. The Respondents submits that the Petitioners assertion that their salaries have been unjustifiably stopped is not true as an officer under interdiction is only entitled to half of his salary.

20. The Respondents submitted that the instant petition was brought prematurely for reason that disciplinary processes had just commenced against the Petitioners and which should have first been concluded before the Petitioners seek legal redress. The Respondent relied on the holding in the case of **Patrick Oyugi & 2 Others v County Assembly of Migori & 3 Others (2017) eKLR** where the court stated thus:

“interdiction is an interim measure taken by employers in order to carry out investigations on alleged misconduct by an employee where it is not desirable for the employee to stay in office while the investigations are ongoing...”

21. It is submitted for the Respondents that the Petitioners have not referred to any specific provisions of the Constitution that the Respondents have failed to comply with or contravened in respect of the interdiction. It is further submitted that the argument that the Petitioners have been condemned unheard is premature as no substantive disciplinary action has been taken against the Petitioners. It is submitted that the alleged failure to comply with Articles 41, 47 and 236, is not true.

22. It is submitted for the Respondents that the invalidity of the letters of interdiction has not been established and neither have the Petitioners shown that there was procedural impropriety in their interdiction.

23. It is submitted for the Respondents that the Staff advisory Committee is a creation of statute that cannot be disbanded. It is further submitted that the both the staff Advisory Committee and the Management Committee are creations of law, and their disbandment was unlawful, illegal null and void.

24. The Respondents submitted that the Petitioners are bound by the Respondent's Human Resource Manual contrary to their assertions that they are not. They submitted that much as the Act requires at Sections 45 that the Board makes regulations, does not in itself render the manual inapplicable to the Petitioners as they all had employment contracts that were in effect in the years 2015 and 2016. They sought to rely on the holding in *Aluha Chandai V Clerk County Assembly of Bungoma & 3 Others (2021) eKLR* to buttress this position.

25. It is further submitted that the petition herein offends the doctrine of exhaustion as the Petitioners did not exhaust the existing internal dispute resolution mechanisms before coming to court vide the instant petition. The Respondents sought to rely on the *Geoffrey Muthinja & Another v Samuel Henry & 7 Others (2015) eKLR* to support this position.

26. It is submitted for the Interested Parties that the petition herein is fatally defective, incompetent and an abuse of the court process, as the same is founded on the Petitioners' remuneration and terms and conditions of service, disciplinary control and national values and principles of public service. It is submitted that the Petitioners ought to have appealed to the Public Service Commission in the first instance before approaching the court, and thus this court lacks jurisdiction to entertain this petition. They cited *Samson Chembe Vuko v Nelson Kilumo & 2 Others (2016) eKLR*, where the Court of Appeal quoted with approval the decision in *Speaker of the National Assembly v Karume (2008) that;*

“... where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed...”

27. It is submitted for the Interested Parties that the Petitioners have not impugned the actions of the Respondents in regard to the interdictions as being either illegal or ultra vires. They submitted that the Petitioners have not complained that the Respondents lacked the authority, power or mandate to interdict them.

28. It is the submission of the Interested Parties that this petition is aimed at forestalling the 1st Respondent from carrying out investigations on the allegations and complaints against the Petitioners as its employees. They submitted that a court cannot be asked to declare as illegal, un-procedural and/or wrongful a legitimate process aimed at according the Petitioners a hearing. They cited *Republic V Chief Magistrate Milimani & Another ex parte Tusker Mattresses Ltd & 3 Others (2013) eKLR* to support this position.

29. The Interested Parties further submitted that according to Section 22 of the County Assembly Services Act, 2017 and Article 236 of the Constitution, the 1st Respondent has not breached any of the Petitioners' rights by initiating a process through aimed at according the Petitioners an opportunity to be heard.

Analysis and Determination

30. I have considered the Petition, the grounds in support the Orders sought together with the Respondents' and the Interested Parties' responses and the submissions filed by the parties. The issues for determination are:

- i. Whether the Disciplinary Action against the Petitioners was fair and lawful
- ii. Whether the Respondents are in breach of the Petitioners' Constitution Rights and Fundamental Freedoms in regard to the interdiction of the Petitioners
- iii. Whether this court is seized with the jurisdiction to entertain this petition.
- iv. Whether the Petitioners are entitled to the reliefs sought.

Whether the Disciplinary Action against the Petitioners was fair and lawful

31. The import of this petition are interdiction letters issued to the Petitioners on 4th August, 2021. The letters required the Petitioners to respond to the charges leveled against them within 21 days. The letters also advised the Petitioners not to report to work so as to allow the 1st Respondent time to investigate the allegations of misconduct against them, as well as the remuneration payable to them during the interdiction period.

The Petitioners case is that the letters of interdiction were issued by a person without authority. From the documents presented to this court in evidence, the interdiction letters were signed of by the 2nd Respondent herein, who is the Clerk of the 3rd Respondent and the Secretary to the 1st Respondent. Section 27 vests the power to exercise disciplinary control over officers of the 1st Respondent on the Board of the 1st Respondent.

32. Section 17 of the County Assembly Services Act, 2017, provides the following as the functions of the Clerk/Secretary/ who is the 2nd Respondent herein:

“17. (1) The Secretary shall be-

(a) the chief executive officer of the Board;

(b) the accounting officer of the Board;

(c) the administrative head of the Service;

(d) the custodian of the Board's records;

(e) responsible for –

(i) the execution of the decisions of the Board; and

(ii) assignment of duties and supervision of the staff of the Board;

(f) the preparation and submission of the programmes necessary for the achievement of the Board's mandate for approval by the Board;

(g) causing to be kept records of the proceedings and minutes of the meetings of the Board and such other records as the Board may direct; (h) ensuring staff compliance with public service values, principles and ethics....”

33. The Respondents contends that the 1st Respondent authorized the interdiction of the Petitioners herein, and which decision he gave effect pursuant to his mandate as the Secretary to the Board. The letters produced in evidence confirm that the Management and Advisory Committees were directed to take disciplinary action against Staff of the 1st Respondent who were taking part in an illegal strike. Minutes of the 1st Respondent's Board meeting held on 9th August, 2021, are indicative of a divided house. In the meeting, some members recommended the lifting of the interdictions while others supported the continued interdiction of the Petitioners. Those who supported the continued interdiction, advised that the interdicted employees be accorded a fair hearing. Further minutes of a Board meeting that took place on 13th August, 2021, recommended that the interdictions be rescinded.

34. The meeting that resulted in the resolution to rescind, was challenged by the Respondents on the ground that the meeting lacked quorum and was thus not properly constituted. Specifically, minutes of that meeting were said to have been taken by a member of the Board instead of the Secretary or in his, absence someone authorized so to do. Section 20(2) provides as follows”

“In carrying out the functions specified in subsection (1), the Clerk shall be assisted by such other officers of the Service as may be necessary.

35. The member of the Board who took minutes or was the Secretary at the contested meeting, is by law not an *officer of the service*. The assertions by the Respondents are therefore true, and the court will not give any weight or legal effect to the resolutions of the meeting as the same was not properly and/or legal constituted.

36. It therefore follows that for reason that the documents availed to this court indicates that the Secretary/2nd Respondent had authority from the Board of the 1st Respondent to take disciplinary action against the Petitioners and other employees of the 1st Respondent, debunks the Petitioners' assertion that the issuer of the interdictions did not have authority so to do, by virtue of Section 17(1)(e) which provides:

“17. (1) The Secretary shall be-

(e) responsible for –

(i) the execution of the decisions of the Board..”

37. Further, the Petitioners' letters of appointment and confirmation, were signed of by the 2nd Respondent or for him, which in itself, signifies the position of the 2nd Respondent as the person charged with implementing decisions of the 1st Respondent. The role of the Board was to pass the resolution and leave the rest to the Secretary.

38. The Letter of 24th August rescinding the interdiction letters, was signed of by the Speaker of the 3rd Respondent, who is also the Chairman of the 1st Respondent. The Speaker by law does not have executive and administrative power to give effect to the decisions of the Board. The decision ought to have been communicated by the 2nd Respondent as the holder of the mandate.

39. The Petitioners have questioned the legality of the advice emanating from the Management Committee and Staff Advisory Committee, which advice culminated in their interdiction. The function of the committees is to render advice to the Board on various issues including disciplinary control. For reason that the Board has been held to have authorized the interdiction of the Petitioners, the role played by the two committees in relation to the interdiction is not relevant to this case as their said advice was overtaken by the ratification given by the Board.

40. The letters of interdiction have been found to have been issued by the person with authority so to do as explained herein. The next issue is whether this makes the disciplinary process fair.

41. The Petitioners assertions is that they were not given an opportunity to be heard and to make representation prior to the issuance of interdiction letters. The Respondent contend that the interdiction letters were the beginning of the disciplinary process and that the Petitioners action by dint of this petition was premature.

42. Section 4(3) of the Fair Administrative Actions Act provides as follows in regard to fair process:

“4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable....”

43. The letters of interdictions issued to the Petitioners, spell out the charges leveled against each of them, and thereafter informs the Petitioners that they had 21 days to respond to the charges so as to exonerate themselves of the charges.

44. The disciplinary process subject of this petition had only begun at the time of institution of this petition. As submitted by the Respondents, the petition is premature as the Petitioners’ right to be heard had not been denied as yet. Moreover, an interdiction letter is the beginning of the hearing process where an employee is expected to show cause why disciplinary action should not be taken against them through answering to the allegations leveled against him, which then gives way to an oral hearing.

45. The petition and the orders sought thereunder, seeks to stay a disciplinary process put in motion by an employer for various acts of alleged misconduct. In the case of *Thomson Kerongo & 2 Others v James Omariba Nyaoga & 3 Others(2017)eKLR*, it was held that due process is an internal disciplinary process to be exercised by the employer and that the court is not expected to enter into the Boardrooms of the employers to micro-manage their affairs. In a further decision of the court in *George Wekesa v Multimedia University of Kenya (2016) eKLR*, the court stated thus:

“The prerogative of the employer in managing its business and administration of staff should not be unduly stifled by judicial interventions...”

46. At this point, it is apparent to this court that this petition relates to a Board at war. The Board should contain its battles within its board room and if they feel the 2nd Respondent herein is not acting in their best interest, they know or should know what do. This court declines the invitation to the apparent board room wrangles between the membership of the 1st Respondent and the 2nd Respondent.

47. Disciplinary action is an employer’s administrative process, and to bar an employer from exercising disciplinary action against her employees, amounts in my opinion to judicial overreach.

48. Considering the provisions of the law enumerated herein, and the evidence adduced, the court finds and hold that the petition herein is premature and the court declines the invitation to prefect the Respondents’ internal disciplinary mechanisms at this point.

Whether the Respondents are in breach of the Petitioners’ Constitution Rights and Fundamental Freedoms in regard to the interdiction of the Petitioners

49. The court has already found that the discipline process in relation to the Petitioners’ cases had just begun, triggering the institution of this suit. The petition has been held to be premature and so is the issue of violation of rights. Enough said.

Whether this court is seized with the jurisdiction to entertain this petition

50. The Interested Parties have questioned this court’s jurisdiction in view of the provisions of Section 77 of the County Government Act. Section 77 of the County Government Act provides as follows: -

(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

(a).....

(b)

(c) disciplinary control;

51. The provisions of Section 77 of the County Government act, are not couched in mandatory terms so as to oust this court's jurisdiction in respect of matters arising from the decisions of the county governments. However, Section 87(2) of the Public Service Commission Act, 2019, does. Section 87(2) of the Public Service Commission Act states:

“(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 under this Part has been exhausted.

52. Interdiction is a disciplinary issue, and disciplinary control is amongst the matters that fall under the purview of the Public Service Commission. From the foregoing provisions, there is no doubt that employment disputes emanating from the county government public service should, in the first instance, be referred to the Public Service Commission by way of appeal. In the case of **Republic v National Environment Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR**, the Court of Appeal held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act, and the Public Service Commission Act, save in exceptional circumstances.

53. I find and hold that as submitted by the Interested Parties herein, Section 77 of the County government and as read with Section 87(2) of the Public Service Commission Act, ousts this court's jurisdiction in respect of employment disputes arising from the county government public service. As was held in the famously cited case of **Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] eKLR**, I have no option but to down my tools.

54. The issue of whether or not the Petitioners deserve the orders sought, falls by the wayside.

55. The upshot is that this court lacks jurisdiction to entertain this petition and the same is truck out with no orders as to costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ochoki Present for the Petitioners

Ms. Nyamwaya & Ms. Muma present for 1st and 3rd Respondents

Ms. Ochwal present for the 2nd 4th and 5th Respondents

Mr. Onsongo present for the Interested Parties

Christine Omollo- C/A