



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 16 OF 2019

IN THE MATTER OF THE DECISION BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD ON 28/2/2019 TO SUSPEND THE PETITIONER FOR THREE (3) MONTHS WITH EFFECT FROM 1/3/2019 AS THE CLERK OF THE COUNTY ASSEMBLY NOF SIAYA

AND

IN THE MATTER OF THE SIAYA COUNTY ASSEMBLY SERVICE BOARD DISCIPLINARY COMMITTEE SITTING ON 20/5/2019

AND

IN THE MATTER OF THE DECISION BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD ON 25/5/2019 TO EXTEND THE SUSPENSION OF THE PETITIONER FOR A FURTHER THREE (3) MONTHS WITH EFFECT FROM 1/6/2019

AND

IN THE MATTER OF THE DECISION BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD ON 3/6/2019 TO RECOMMEND TO THE COUNTY ASSEMBLY OF SIAYA TO REVOKE THE APPOINTMENT OF THE PETITIONER AS THE CLERK OF THE COUNTY ASSEMBLY OF SIAYA

AND

IN THE MATTER OF THE NOTICE OF MOTION PRESENTED TO THE COUNTY ASSEMBLY OF SIAYA ON 4/6/2019 BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD RECOMMENDING THE REVOCATION OF THE APPOINTMENT OF THE PETITIONER AS THE CLERK OF THE COUNTY ASSEMBLY OF SIAYA

BETWEEN

ISAAC FELIX OLWERO.....PETITIONER

VERSUS

SIAYA COUNTY ASSEMBLY SERVICE BOARD.....1st RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF SIAYA..... 2nd RESPONDENT

COUNTY ASSEMBLY OF SIAYA3rd RESPONDENT

RULING

1. In a judgment delivered on 14 April 2021, the Court issued the following orders:

(i) A declaration be and is hereby issued that the proceedings before the County Assembly Service Board with a view to revoking the appointment of the Petitioner as the Clerk of the County Assembly of Siaya did not comply with the requirements of section 23(1)(a), (b) and (c) of the County Assembly Services Act.

(ii) An order of certiorari be and is hereby issued to bring into this Court to quash the recommendations of the County Assembly Service Board of Siaya to revoke the appointment of the Petitioner as Clerk of the County Assembly of Siaya.

2. On the same day, the Chairman of the County Assembly Service Board (the Board) wrote to the Petitioner to inform him that the Board had met and resolved to interdict him for 3-months pending fresh disciplinary process.
3. The letter of interdiction requested the Petitioner to make a written response within 21 days pending an appearance before the Disciplinary Committee on a date to be fixed.
4. The Petitioner caused his advocates to reply to the interdiction letter on 21 April 2021.
5. On 26 April 2021, the Board met and resolved to continue with the disciplinary process on 11 May 2021.
6. By a notice dated 27 April 2021, the Board recalled the interdiction of the Petitioner, but at the same time preferred new charges against him and gave him up to 4 May 2021 to respond ahead of an oral hearing on a date to be scheduled.
7. On 30 April 2021, the Board issued another show-cause notice to the Petitioner and the allegation was that the Petitioner had gained entry into the County Assembly premises unlawfully. A fresh charge sheet was issued.
8. Through a letter dated 1 May 2021, the Petitioner's advocate requested to be furnished with certain documents to facilitate his response.
9. The Board supplied the documents to the Petitioner through a letter dated 7 May 2021 and on 10 May 2021, the Petitioner filed a Motion under a certificate of urgency seeking orders:
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) This Honourable Court be and is hereby pleased to review its judgment of 14/4/2021 and decree of 21/4/2021 and clarify that the applicant's suspension from office of Clerk of the 3rd Respondent expired on or around 31/8/2019 and that the applicant is no longer on suspension.
 - (e) This Honourable Court be and is hereby pleased to review its judgment of 14/4/2021 and decree of 21/4/2021 and clarify that the 1st and or 2nd Respondents, more so as currently constituted, legally cannot initiate and or preside over a disciplinary proceedings against the applicant with a view to recommending his removal from office of Clerk of the 3rd Respondent hinged on the said bank withdrawal on or around 1/9/2015 from the 3rd Respondents car and mortgage fund.
 - (f) This Honourable Court be and is hereby pleased to review its order 4 of the judgment of 14/4/2021 and decree of 21/4/2021 and award the applicant costs of the Petition in light of the 1st and 2nd Respondents determination to sever the applicant's contractual relationship with the 1st Respondent.
 - (g) The 1st and or 2nd Respondents, more so as currently constituted be and are hereby permanently restrained from initiating and or presiding over a disciplinary proceedings against the applicant with a view to his removal from office of Clerk of the 3rd Respondent hinged on the said bank withdrawal on or around 1/9/2015 from the 3rd Respondents car loan and mortgage fund.
 - (h) The 1st and or 2nd Respondents, more so as currently constituted be and are hereby permanently restrained from instituting and or presiding over a disciplinary proceeding against the applicant with a view to disciplining the applicant including but not limited to recommending his removal from office of Clerk of the 3rd Respondent hinged on the applicant's said visit to the offices of the 3rd Respondent on 29/4/2021.
 - (i) The 1st and 2nd Respondents be and are hereby held liable in contempt of court for failing or refusing or neglecting to facilitate the applicant's resumption of his duties as Secretary of the 1st Respondent and Clerk of the 3rd Respondent with effect from on or around 14/4/2021.
 - (j) This Honourable Court, upon grant of order (i) above be and is hereby pleased to mete out the harshest applicable penalty upon the 1st and or 2nd Respondents.
 - (k) The 1st and or 2nd Respondents be and are hereby compelled to unconditionally and without demur facilitate the applicant's immediate resumption of his duties as Secretary of the 1st Respondent and Clerk of the 3rd Respondent.
 - (l) The Officer Commanding Station, Siaya Police Station be and is hereby directed to enforce this Honourable Courts order (k) above.
 - (m) The 1st Respondent and or 2nd Respondent be and are hereby compelled to immediately pay to the applicant all his withheld salaries and allowances from September 2019 to date or all his withheld salaries and allowances for such period that this Honourable Court shall find lawful and just.

(n) The costs of this application be provided for.

10. When the Motion was placed before the Court on 10 May 2021, it issued a temporary order restraining the Respondents from proceeding with the disciplinary hearing scheduled for 11 May 2021 and also directed the Respondents to file responses ahead of further directions on 27 May 2021. On this day, the Court indicated that it would deliver a Ruling on 24 November 2021 (the 2nd Respondent filed a replying affidavit in opposition to the Motion on 2 June 2021).

11. On the same day, a Proposed Interested Party filed Motion seeking leave to be joined to the Petition.

12. The Court directed him to serve the Motion and in an *ex-tempore* Ruling on the same day, the Court dismissed the Motion.

13. On 17 June 2021, the Court indicated that it would deliver its Ruling on the Petitioner's Motion dated 10 May 2021 on 24 November 2021 as earlier scheduled.

14. The Petitioner filed his submissions on 25 June 2021 while the Respondents filed joint submissions on 26 July 2021, and on 16 September 2021.

15. When the Court started preparing the Ruling, it discovered that 2 different sets of submissions had been filed on behalf of the Respondents (the Petitioner also indicated that the Respondent had not served him with their submissions).

16. The Court brought the anomaly of parallel submissions to the attention of the parties on 24 November 2021 and the Respondents opted to withdraw the submissions filed on 16 September 2021.

Petitioner's arguments

17. In support of the Motion, the Petitioner urged that the judgment needed to be clarified so as to establish the status of his suspension because the Court did not make a finding on when the suspension ended.

18. In the view of the Petitioner, it was necessary for the Court to clarify when the suspension ended so that his withheld salaries could be paid.

19. Closely linked to the above, the Petitioner took the view that his suspension lapsed on 31 August 2019, and that upon the judgment, the Respondents should have reinstated him to office but had deliberately so failed, hence they were in contempt of court.

20. To reinforce the contempt assertion, the Petitioner drew the attention of the Court to the fact that the Respondents interdicted him on the same day the judgment was delivered.

21. The Petitioner also sought a review of the judgment so that the Court could make a finding that the Disciplinary Committee as constituted could not validly preside over a second disciplinary process against him because the Court had quashed the first process on account of legal procedural improprieties.

22. The Petitioner contended that the contemplated second disciplinary process amounted to double jeopardy.

23. In respect to costs, the Petitioner asserted that the Respondents were fixated on removing him from office despite the Court quashing the recommendations of the Board.

Respondents' contentions

24. The Respondents countered the Motion on several fronts.

25. First, it was contended that the Court had not exonerated the Petitioner from the substance of the allegations against him and therefore it was open to them to commence the process in compliance with the procedures in place.

26. The Respondents also countered that the Court had not found the suspension of the Petitioner in 2019 unlawful and therefore it remained in force.

27. Thirdly, the Respondents argued that there were no exceptional circumstances to warrant the Court intervening in the Board's internal disciplinary processes.

28. Fourth, the Respondents stated that the Petitioner had been involved in further misconduct on 29 April 2021, which made it necessary to issue him with a second show-cause notice.

29. Fifth, the Respondents contended that the Petitioner had not met the test for review of judgment as contemplated in law and that the application was meant to reopen the Petition by introducing a new cause of action.

30. On the prayers for contempt, the Respondents contended that there was no contempt because the Court had not issued any orders directing them to refrain from doing anything or requiring them to take any action.

31. In any case, the Respondents submitted that the reinstatement of the Petitioner and or prayer for withheld salaries were not substantive issues which had been placed before the Court.

32. The Court has considered the Motion, affidavits and submissions.

New cause(s) of action

33. The show-cause notice dated 30 April 2021, requesting the Petitioner to respond to allegations of gross misconduct in that he unlawfully accessed the county assembly premises were anchored on facts which were not part of the Issues presented before the Court and addressed in the judgment delivered on 14 April 2021.

34. The facts having arisen post judgment can only be part of a fresh court action, and the Court therefore declines to entertain the same in this Ruling.

35. The net effect of the finding is that proposed order (h) is rejected.

Status of the Petitioner's suspension

36. In the Amended Petition, the Petitioner had put into legal focus the question of his suspension by seeking an order thus:

(v) A declaratory order that all the actions and/or proceedings undertaken by the Respondents with a view to revoking the appointment of the Petitioner as the Clerk of the 3rd Respondent including but not limited to initiating and acting on the special audit report dated 25/2/2019, suspension of the Petitioner with effect from 1/3/2019, disciplinary committee hearing on 20/5/2019, extension of his suspension with effect from 1/6/2019, presentation of the notice of Motion to the 3rd Respondent on 4/6/2019 seeking the revocation of the appointment of the Petitioner as the Clerk of the 3rd Respondent and tabling, debate and adoption by the 3rd Respondent of its Select Committees report on 13/6/2019 were illegal and/or violated the Petitioner's fundamental rights and freedoms and are consequently null and void, and that the Petitioner is still the bona fide and/or legal Clerk of the 3rd Respondent.

37. The Court did not grant the relief.

38. Nevertheless, the Petitioner was initially suspended through a letter dated 1 March 2019. The suspension was for 3-months.

39. On 25 March 2019, the Petitioner appealed against the suspension and on 1 June 2019, the suspension was extended for another 3-months.

40. On 10 June 2019, the Petitioner moved the Court to contest the suspension and ensuing disciplinary process and on 13 June 2019, the Court directed that the *status quo* be maintained pending the determination of the Motion.

41. The Motion was determined on 5 March 2020, when the Court found it lacked merit and was thus dismissed.

42. In the course of determination of the Motion, the 3-months extended suspension had lapsed on 31 August 2019.

43. In this Court's view, the Petitioner's suspension having been stated to lapse on 31 August 2019, was overtaken by events and it would be a mere jaunt into the jungle for this Court to purport to review its judgment on the issue.

Contempt

44. Contempt proceedings are *sui generis* and should not be made in a compounded application, that is, where other substantive orders are sought.

45. It was therefore irregular and misguided of the Petitioner to mix contempt prayers with review application.

46. It is however clear to the Court that the parties took inconsistent interpretations as to the effect of the remedies which were granted on 14 April 2021.

47. In the view of the Court, such differences of interpretation would not amount to contempt of the court but would require clarification or review if sufficient cause is demonstrated.

48. The Court will therefore examine the apparent different interpretations.

49. The Court did not issue any order directing the Respondents to refrain from doing any particular act or compelling them to take any action.

50. The Court merely issued a declaratory order, with an attendant order of certiorari quashing the recommendation by the Board to the County Assembly to revoke the Petitioner's appointment.

51. The effect of the declaration and certiorari was that the Court invalidated the substratum upon which the Respondents had purported to have the Petitioner removed from office.

52. It was therefore not legally tenable for the Respondents to commence or purport to continue with the removal or disciplinary process on the same allegations or facts.

Costs

53. The Court gave reasons why it did not award the Petitioner costs. It would be sitting on appeal of its own decision by venturing into the question under the guise of review.

Conclusion and Orders

54. From the foregoing, the Court makes the following findings:

(i) The Court has no jurisdiction to entertain the dispute arising from the show-cause dated 30 April 2021 within this Petition which has already been determined.

(ii) It was not legally tenable for the Respondents to commence or purport to continue with the removal or disciplinary process on the same allegations or facts which had been quashed.

55. Costs in the cause.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 9TH DAY OF FEBRUARY 2022.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR PETITIONER ROW ADVOCATES LLP

FOR RESPONDENTS GORDON OGOLA, KIPKOECH & CO. ADVOCATES

COURT ASSISTANT CHRISPO AURA