



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW NO. E016 OF 2021

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 2, 3, 10(1) & (2)(A), (B) & (C), 19, 20, 21, 22, 23, 41(1), 47,
201 AND 232**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF THE PUBLIC OFFICERS ETHICS ACT, NO. 4 OF 2003

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF HOMA BAY COUNTY ASSEMBLY STANDING ORDERS

AND

**IN THE MATTER OF THE CHALLENGE OF THE UNLAWFUL INVITATION TO THE APPLICANT TO RESPOND TO A
NOTICE OF INTENTION TO MOVE A MOTION FOR A RESOLUTION TO REMOVE HER AS SPEAKER OF HOMA BAY
COUNTY ASSEMBLY BY LETTER DATED 2ND DECEMBER 2021**

AND

**IN THE MATTER OF THE CHALLENGE TO A COMMUNICATION BY THE CLERK, HOMA BAY COUNTY ASSEMBLY
BARRING THE APPLICANT FROM PERFORMING THE FUNCTIONS OF THE OFFICE OF SPEAKER BY LETTER DATED
6TH DECEMBER 2021**

BETWEEN

REPUBLIC

APPLICANT

v

CLERK, COUNTY ASSEMBLY OF HOMA BAY

1st RESPONDENT

HOMA BAY COUNTY ASSEMBLY

2nd RESPONDENT

RULING

1. On 9 December 2021, the Court granted Hon Elizabeth Ayoo (the applicant) leave to commence judicial review proceedings (seeking orders of certiorari and prohibition) to bring into the Court and quash a decision by the Clerk, County Assembly of Homa Bay to invite the applicant to respond to a Notice of Intention of removal from office of Speaker.
2. The leave was to operate as stay of the Notice of Intention to remove the applicant from the office of Speaker.
3. On the same day, the Court issued directions for the filing of a Substantive Motion and responses to the Motion within set timelines with mention scheduled for 3 February 2022, to confirm compliance and give further directions.
4. The substantive Motion was filed on 14 December 2021.
5. On the same day, the acting Clerk of the County Assembly wrote to the applicant bringing to her attention another Notice of Intention to move a Motion for a Resolution to remove her from the office of the Speaker.
6. The acting Clerk requested the applicant to respond within 7-days.
7. Alarmed with the turns of events, the applicant moved the Court under a certificate of urgency on 17 December 2021, seeking to cite some members of the County Assembly for contempt.
8. The applicant also sought injunctive orders restraining some named members of the County Assembly from moving forward with the Notice dated 14 December 2021, pending the hearing and determination of the contempt Motion.
9. When the Motion was placed before the Duty Judge in Bungoma (it was filed during recess), the Judge issued the following *ex-parte* orders:
 - (1)...
 - (2) An order of injunction be and is hereby issued restraining the Respondents/contemnors to wit: Faith A Apuko, Homa Bay County Assembly, Dan O. Were, Jane O Kiche, Amina Ismail Hillon, Phoebe Okoth, Judith Omogi, Evans Marieba, Jessica Otieno, Onyango Kevin, Sophie Akinyi Salim, Nelly A Odek, Philemon O. Onditi, Philemon Okombo, Mary Osalla, Nicholas Ayieta, Monoflorita Ondiek, Pamela Akinyi Okoth, John Matunga Mireri, Millicent Nyaboke, Peter Asoyo Oriema, Elias O. Oketch, Michael Odira, Paul Ongoro Wamunga, George Okello, Morice Ogwang Odeny, Ouma Oscar, David Oloo and any members of the Homa Bay County Assembly from taking any action against the applicant pursuant to the Notice of Intention to move a motion for a resolution to remove the Speaker dated 14th December 2021 or taking any steps towards the removal of the applicant until this application is heard and determined.
 - (3) An injunction be and is hereby issued restraining Hon Jeff Ongoro, the 29th Respondent from serving as Chairman of the 2nd Respondent's County Assembly Service Board, a position which is by law reserved for the applicant pending the hearing and determination of this application.
 - (4) The application be served on the Respondents.
 - (5) Mention on 3rd February 2022 before Judge Radido for further directions.
10. The Respondents were not amused with the *ex-parte* orders and on 21 December 2021, they filed a Motion seeking orders:
 - (1) ...
 - (2) THAT the Honourable Court be pleased to vacate/set aside the orders of injunction issued on the 20th day of December of 2021.
 - (3) Costs of the application be provided for.
11. This application is the subject of this Ruling.
12. The Respondents advanced 2 primary grounds in support of the application.
13. The first ground was that in terms of Order 40 Rule 4 of the Civil Procedure Rules, the shelf life of an *ex-parte* injunction was 14-days and in disregard of that legal provision, the Court had granted *ex-parte* orders for an indefinite duration (beyond the 14-days).
14. Secondly, the Respondents contended that the Notice of Intention to file a Motion for the removal of the applicant dated 14 December 2021 was not the subject of the leave and stay granted on 9 December 2021 and therefore could not validly form the basis of an injunctive order.
15. The Respondents were in effect submitting that the Notice of 14 December 2021 should have been the subject of fresh legal proceedings, distinct from the Notices of 2 December 2021 and 6 December 2021.

16. The Respondents cited the authority of *Director of Public Prosecutions v Justus Mwendwa Kthenge & 2 Ors* (2016) eKLR in support of their arguments and further urged that the injunctive orders were illegal.

17. The applicant filed a replying affidavit in opposition to the Motion on 19 January 2022, in which she contended that it was not her fault that the Court may have issued *ex-parte* orders which appeared to supersede the term set by law.

18. The applicant further submitted that since the orders were issued during recess, computation of time (14-days) should run from the end of the recess on 14 January 2022 and would have lapsed on 28 January 2022.

19. The applicant urged that the Respondents had moved the Court prematurely in the circumstances.

20. It is not in doubt in the mind of the Court that the injunctive orders issued on 20 December 2021 should have subsisted in the first instance for 14-days as demanded by Rule 17(4) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (similar provision in Order 40 Rule (4)(2) of the Civil Procedure Rules).

21. The Court is also alive to the fact that the orders were issued during the recess of the Court, and which recess was to end on or around 14 January 2022, and computation of time for purposes of the procedural rules is stayed during the recess.

22. The Court therefore agrees with the applicant that the 14-days technically started running on 14 January 2022 and would have lapsed on 28 January 2022.

23. Noting the above and also considering that the Court had ordered that the leave granted on 9 December 2021 do operate as stay of the Notice of Intended Motion for the removal of the applicant and further considering that the Notice of 14 December 2021 was eerily similar in content and grounds with the Notice of 2 December 2021, save for substitution of names of the intended mover of the Notice and the need to preserve the *status quo* pending the determination of the substantive Motion filed on 14 December 2022, the Court orders:

(1) The injunctive orders issued on 20 December 2021 are amended by vacating the words *until this application is heard and determined*, and substituting thereof the words *pending the inter-partes hearing of the Motion and/or further orders of the Court*.

24. The Court will issue the further orders immediately after the delivery of this Ruling.

25. Costs of the Motion in the cause.

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

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For applicant Mr Otieno instructed by Owiti, Otieno & Ragot Advocates

For Respondents N.E. Mogusu & Associates

Court Assistant Chrispo Aura