



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO. E059 OF 2021

IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2, 19, 20, 21, 22, 23, 43, 47, 48, 50, 185 AND 251 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF THE MIGORI COUNTY PUBLIC SERVICE BOARD

BETWEEN

JARED ODHIAMBO OPIYO

MARTIN ARONDO SHIKUKU

JEMIMAH ADHIAMBO WERE

ENOCK ODHIAMBO ACHIENG

MWITA RANGE MAROA

PHOEBE ADHIAMBO NAHASHON

OMWA HESBON OTIENO (members of the Migori County

Public Service Board).....PETITIONERS

VERSUS

THE COUNTY ASSEMBLY OF MIGORI..RESPONDENT

JUDGMENT

1. The Petitioners (save for Martin Arondo Shikuku) were appointed to serve as members of the County Public Service Board, Migori (the Board) from 27 February 2020 for 6-year terms (Martin Arondo Shikuku was appointed as Secretary to the Board on 4 November 2016 for 6-years).
2. Around January 2021, the Board advertised for several positions within the county public service.
3. The Board conducted interviews and on or around 2 June 2021, 17 June 2021, 28 June 2021, and 30 August 2021, it notified the County Secretary of those appointed to the various offices.
4. On 7 October 2021, a member of the County Assembly presented a Motion before the Assembly seeking the censure of the members of

the Board for *irregular acts* during the recruitment process. The acts included appointing more persons than had been advertised and lack of transparency.

5. The Motion was placed before the Assembly on 19 October 2021, and it resolved that an Ad Hoc Committee be established to conduct investigations.

6. The Committee was established, and it commenced its work on 25 October 2021.

7. On 2 November 2021, the Clerk of the Assembly requested the Petitioners to supply the Committee with documents/evidence relating to the recruitment before 8 November 2021, and to appear before the Committee on the aforesaid date.

8. The Petitioners, save for the Secretary appeared before the Committee on 15 November 2021 and took oaths before giving evidence (the Secretary notified the Clerk on 15 November 2021 that he had been taken ill and could not appear). The Clerk requested him to appear before the Committee on 17 November 2021.

9. The Secretary appeared on the said date and gave evidence under oath (copy of Hansard dated 17 November 2021 was filed in Court).

10. The Petitioners then moved the Court on 22 November 2021, alleging that the Assembly had commenced a process to remove them from office contrary to the provisions of Article 251 of the Constitution as read with section 58 of the County Governments Act.

11. The Petitioners asserted that the process before the County Assembly violated their constitutional rights to equal protection of the law, human dignity, fair labour practices, fair administrative action, and fair hearing.

12. The Petitioners sought orders:

a. A declaration that the authority of the Respondent to commence the action of removal of the Petitioners as members of the Migori County Public Service Board under Article 251 only comes into operation upon a person presenting a Petition in accordance with the provisions of Article 251(1) & (2).

b. A declaration that the unilateral decision by the Respondent to proceed to set up an Ad Hoc Committee on 7th October 2021 to gather evidence for the removal of the Petitioners as members of the Migori County Public Service Board does not amount to a Petition as envisaged by Article 251(2) of the Constitution of Kenya but amounts to a violation of the Petitioners right to fair administration of justice and fair trial as envisaged under Article 47 and 50 of the Constitution.

c. An order of judicial review in the nature of a certiorari to remove into the Employment and Labour Relations Court for purposes of being quashed the Respondent's Ad Hoc Committee report looking into the conduct of the Chairperson, Chief Executive Officer (Secretary) and members of Migori County Public Service board.

d. A prohibitory order do issue restraining the Respondent, its Ad Hoc Committee or any Committee of whatever nature from looking into the conduct of the Petitioners herein for purposes of their removal as members of the Migori County Public Service Board, removing the Petitioners from office, declaring the Petitioners seats vacant, advertising the Petitioners positions or in any way interfering with the operations of the Migori County Public Service Board unless the Respondent complies with the mandatory provisions of the law on the ouster of members of the County Public Service Board.

e. Costs of the Petition and

f. Any other order that the Honourable Court may deem just and fit to grant.

13. Filed with the Petition was a Motion under a certificate of urgency.

14. On 23 November 2021, the Court gave directions and further issued a conservatory order restraining the Ad Hoc Committee from proceeding with its investigations pending the giving of further directions on 1 December 2021.

15. The Assembly caused a replying affidavit sworn by the Chairperson of the Ad Hoc Committee to be filed on 30 November 2021.

16. When the parties appeared in Court on 1 December 2021, the Court vacated the interim conservatory orders it had issued on 23 November 2021.

17. The parties were also directed to file and exchange submissions.

18. The Petitioners filed their submissions on 29 December 2021, while the Assembly filed its submissions on 31 January 2022.

19. The Court has considered the Petition, Motion, affidavits, and submissions.

Whether the Assembly unlawfully commenced removal proceedings against the Petitioners?

20. The removal of a member of a county public service board is governed by section 58(5) of the County Governments Act which provides:

58(5) The members of the Board may only be removed from office—

- a. on grounds set out for the removal of members of a constitutional commission under Article 251(1) of the Constitution; and
- b. by a vote of not less than seventy five percent of all the members of the county assembly

21. Article 251 of the Constitution provides:

Removal from office

251(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for -

- a. serious violation of this Constitution or any other law, including a contravention of chapter Six;
- b. gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
- c. physical or mental incapacity to perform the functions of office;
- d. incompetence; or
- e. bankruptcy.

22. Although not mentioned in section 58 of the County Governments Act, it is necessary to set out what is outlined in the next clause.

23. Article 251(2) provides A person desiring the removal of a member of a commission or a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

22. What emerges from the above provision is that the grounds upon which a member of a county public service board may be removed are those set out in Article 251(1) of the Constitution.

23. However, section 58 of the County Governments Act has not explicitly incorporated the provisions of Article 251(2) of the Constitution which sets out the removal process for a member of a commission or a holder of an independent office in the removal process of a member of a county public service board.

24. Nevertheless, the Petitioners, relying on *Nahashon Wilson Oguya & 6 Ors v County Assembly of Kisumu & 3 Ors* (2018) eKLR and *Hussein Roba Boru v County Government of Isiolo & 2 Ors* (2015) eKLR contended that the removal process could only lawfully be commenced upon the presentation of a Petition to the County Assembly by a person.

25. The Petitioners asserted that no Petition had been presented before the Assembly.

26. To further advance their case, the Petitioners contended that they were entitled to the benefit of the right to fair administrative action (Article 47 of the Constitution) and due process (Article 236 of the Constitution), which they had been denied.

27. In this respect, the Petitioners stated that they were not invited to appear before the Ad Hoc Committee nor given sufficient time to prepare and defend themselves.

28. The Petitioners also argued that the County Assembly was both the complainant and judge in its own cause because there was no evidence of public outcry over the recruitment process.

29. For the County Assembly, it was contended that the Motion was an exercise of the peoples' sovereign power through its elected representative as set out in Article 1(2) of the Constitution and that the Ad Hoc Committee was to establish the facts and possible violations of the law.

30. According to the County Assembly, the Petitioners were invited and did in fact appear before the Ad Committee on 15 November 2021 (and 17 November 2021 for the Secretary) and that they made representations.

31. The County Assembly also took the position that the requirements of Article 251(2) of the Constitution were not mandatory because of the use of the word *may*.

32. The County Assembly further accused the Petitioners of material non-disclosure in that they had failed to disclose to the Court when they moved the Court that they had appeared before the Ad Hoc Committee and made representations.

33. On the question of being a judge in one's cause, the Assembly countered that it had a lawful mandate under Article 195, section 58(5) of the County Governments Act and Standing Orders 59 to 64 to conduct investigations and debate on removal proceedings of the Petitioners.

34. The Court has keenly looked at the Motion dated 15 October 2021. After narrating the background, it prayed:

NOW THEREFORE, this Honourable House approves that:

i. the Board Chairperson, the Board C.E.O. and Board members to take full responsibility by not adhering to the sections of the law mentioned.

ii. the Chairperson, C.E.O. and members of the Public Service Board investigated by a 5-member Ad Hoc Committee mainly to look into their conduct with a view of establishing possible violation of the Constitution or gross misconduct in respect to their functions in the Board and

iii. commences the process to censure the Chairman, C.E.O and the Board members for the irregular acts at the Board during and in the process of the recruitment. (emphasis added).

35. From the stated outcomes of the Motion, it is clear to this Court that what was placed before the County Assembly and referred to the Ad Hoc Committee was not a removal proceeding as contemplated by section 58 of the County Governments Act as read with Article 251 of the Constitution.

36. The purpose of the motion was to censure the Petitioners for alleged misconduct in the recruitment process.

37. Censure has been defined in Black's Law Dictionary, Tenth Edition as:

vb. To reprimand; to express official disapproval of the Senate censured the senator for his inflammatory remarks .

38. As a noun, the Dictionary defines censure as:

An official reprimand or condemnation: an authoritative expression of disapproval or blame; reproach the judge's careless statements subjected her to the judicial council's censure .

39. Although the parties did not place before the Court a copy of the Standing Orders of the Assembly, it is not a matter of conjecture that a legislative organ has the power to censure members of the executive after affording such member an opportunity to be heard.

40. Upon a consideration of the prayers which were set out on the face of the Motion placed before the County Assembly, this Court finds that the removal of the Petitioners was not under consideration and therefore Article 251 of the Constitution was not implicated.

41. The Petitioners should have waited for the Ad Hoc Committee to conclude its work and make appropriate recommendations to the plenary of the County Assembly.

42. And since the Ad Hoc Committee was still in the process of conducting investigations and had invited and called the Petitioners to make representations, the Court is unable to conclude that the Petitioners rights to fair Kisumu Petition No. E059 of 2021 labour practices, administrative action, due process, or fair hearing had been violated.

Conclusion and Orders

43. From the forgoing, the Court finds and declares that the Petitioners not only moved the Court prematurely, but they have not proved that the proceedings before the Assembly were removal proceedings as contemplated by section 58 of the County Governments Act as read with Article 251 of the Constitution.

44. The Petition is dismissed with costs.

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

RADIDO STEPHEN JUDGE

Appearances

For Petitioners Bruce Odeny & Co. Advocates

For Respondent Nelson Jura & Co. Advocates

Court Assistant Chrispo Aura