



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT NAIROBI**  
**PETITION NUMBER E188 OF 2021**

**BETWEEN**

**JOHN MWIVITHI MUTIE .....PETITIONER**

**VERSUS**

- 1. THE SPEAKER, KIAMBU COUNTY ASSEMBLY**
- 2. THE KIAMBU COUNTY ASSEMBLY SERVICE BOARD**
- 3. SIMON KIMANI RUGU ..... RESPONDENTS**

**AND**

- 1. THE COUNTY SECRETARY, KIAMBU COUNTY GOVERNMENT**
- 2. THE KIAMBU PUBLIC SERVICE BOARD ..... INTERESTED PARTIES**

**RULING**

1. The Petitioner is the Clerk, Kiambu County Assembly.
2. He filed this Petition on 29<sup>th</sup> November 2021, alleging that the Respondents have interfered with his exercise of office as the Clerk to the County Assembly.
3. In particular, the Petitioner asserts that the Respondents alleged to have jointly resolved to permanently transfer the Petitioner's services from the County Assembly Service Board, to the Public Service Board.
4. He asks for the following orders: -
  - a. Declaration that the Petitioner is, and has been duly appointed as the Clerk of Kiambu County Assembly Service Board/Kiambu County Assembly, and can only be suspended or otherwise removed from office in accordance with the provisions of Sections 22 and 23 of the County Assembly Services Act.
  - b. Finding and holding that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have engaged in a malicious scheme of orchestrating the unlawful and unfair secondment, permanent transfer of service, suspension, termination and/or removal of the Petitioner from the office of Clerk, Kiambu County Assembly since September 2017.
  - c. Permanent injunction restraining the Respondent, whether acting directly or through third parties, agents and/or proxies from permanently transferring the Petitioner and/or transfer of his services from Kiambu County Assembly to the Kiambu County Executive/ Kiambu County Public Service Board, and/or otherwise from interfering with the Petitioner's contract of employment as the Clerk of the Kiambu County Assembly.
  - d. Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, whether acting directly or through 3<sup>rd</sup> parties, agents, and or/proxies from intimidating, harassing, threatening and bullying the Petitioner.

e. Certiorari, quashing the purported permanent transfer of the Petitioner and/or the Petitioner's service from the Kiambu County Assembly to the Kiambu County Executive/ Kiambu County Public Service Board, as communicated in the 1<sup>st</sup> Respondent's letter dated 7<sup>th</sup> May 2021.

f. Declaration that the purported initiation of disciplinary proceedings by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Petitioner, as communicated in their letter dated 23<sup>rd</sup> November 2021, is unlawful, illegal, capricious, arbitrary, malicious and therefore constitutes a violation of his constitutional rights under Article 236, his fundamental rights and freedoms under Article 41 and 47, and his employment rights.

g. Certiorari quashing the purported disciplinary proceedings against the Petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as communicated by the 1<sup>st</sup> Respondent in a letter dated 23<sup>rd</sup> November 2021.

h. Injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whether acting directly or through 3<sup>rd</sup> parties, agents and/or proxies, from illegally or irregularly advertising, interviewing, recruiting, employing, confirming and /or otherwise filling up the position of the Clerk Kiambu County Assembly when the Petitioner's contract is subsisting.

i. Costs.

j. Interest.

k. Any other suitable relief.

5. The Court issued interim orders on 16<sup>th</sup> December 2021, staying the decision by the Respondents to suspend the Petitioner. The Court directed that the Petitioner's Application be served upon the Respondents, and suitable hearing date be assigned at the Registry, upon filing of responses.

6. The Respondents filed Notice of Preliminary Objection, challenging the jurisdiction of the Court to hear the Petition, and give the remedies sought by the Petitioner, as outlined above.

7. The Objection was canvassed on 20<sup>th</sup> January 2022.

8. The Respondents argue that the Petition involves a County Public Office. Any person dissatisfied with the decision of the Public Service Board, should file an Appeal with the Public Service Commission.

9. The Petition is about a disciplinary matter. The Public Service Commission is mandated under Section 85 of the Public Service Commission Act, 2017, to hear and determine Appeals in respect of any decision relating to engagement of any person in a County Government.

10. This power is donated by Article 234 of the Constitution.

11. The Respondent submits that the dispute should therefore have gone before the Public Service Commission of Kenya, before being filed in Court.

12. The Petitioner was supposed to present himself before the Assembly, and if dissatisfied there, proceed to the Public Service Commission. He cannot skip these procedures.

13. The Respondents further submit that the County Assembly Service Board, is established under the County Governments Act. Under Section 77 of the County Governments Act, any person dissatisfied or affected by the County Public Service Board, or a person in exercise or purported exercise of disciplinary control against any public officer, may appeal to the Public Service Commission against the decision. The County Assembly Service Board, is a person. The Clerk is a person appointed by the County Government.

14. The Petitioner submits that the Respondents, concede he is an Employee of the County Assembly Service Board. The Public Service Commission does not have jurisdiction over him. Jurisdiction is with this Court. The Public Service Commission does not determine constitutional disputes. Section 77 of the County Governments Act is permissive. Separation of powers must be observed.

15. The Petitioner is Clerk of the County Assembly. He was seconded to the Executive without consultation. He was in permanent and pensionable position. The dispute is not premised on disciplinary issue. It is about protection of the Petitioner's fundamental rights.

16. Section 77 of the County Governments Act does not mention Boards; it is specific to County Public Service Board. County Assembly Clerks are not governed by Section 77. Public Service Boards are organs of the Executive. Without prejudice, the Petitioner submits, even if Section 77 is applicable to County Assembly Clerks, the provision is couched in permissive language.

17. The Public Service Commission is not mandated to issue interim reliefs. The Petitioner seeks interim reliefs.

18. Article 234 grants the Public Service Commission jurisdiction to entertain appeals from the Public Service. The Petition is based on the decision of the Speaker, County Assembly.

19. Jurisdiction is derived from the Constitution and Legislation. There is no nexus between the Public Service Commission and the County Assembly Service Board. The 2 County Service Boards are created by different legal regimes.

**The Court Finds:** -

20. The Petitioner is the Clerk, Kiambu County Assembly.

21. He was appointed as such, by the County Assembly Service Board, under Section 13 of the County Governments Act.

22. He is an Employee of the County Assembly Service Board.

23. The County Assembly Service Board is created by Section 12 of the County Governments Act, and is responsible for among others, under Section 12 [7] [b], appointment and supervision of officeholders, within the Assembly Service.

24. The County Assembly Service Board is a body corporate, with perpetual succession and a seal; and capable of suing and being sued in its corporate name.

25. The Petitioner is not an Employee of the County Public Service Board. He does not work in the County Public Service.

26. The County Public Service Board is established under Section 57 of the County Governments Act. Like the County Assembly Service Board, the County Public Service Board is a body corporate, with perpetual succession, its own seal; and capable of suing and being sued in its corporate name.

27. The County Public Service Board among other responsibilities, appoints persons in County Public Service, and exercises supervisory control of County Public Service Board Employees.

28. Section 77 of the County Governments Act, which requires appeals by disaffected persons to be filed with the Public Service Commission, relates to the County Public Service.

29. It falls under PART V11 of the County Governments Act, which regulates County Public Service.

30. The County Assembly and Service in the County Assembly falls under PART 111 of the County Governments Act. The Clerk of the County Assembly is created and regulated under this Part, not Part V11.

31. There is therefore no requirement that the Clerk of the County Assembly, submits his employment grievances on appeal, to the Public Service Commission under Section 77 of the County Governments Act. He does not fall within Public Service. He is in County Assembly Service.

32. Appeals under Section 85 of the Public Service Commission similarly, are with respect to decisions relating to engagement of any person in a County Government Public Service.

33. The provision does not extend to persons working in County Assembly Service.

34. The Petitioner is not required to submit his employment grievances on appeal, to the Public Service Commission under Section 85 of the Public Service Commission Act, 2017.

35. This distinction between County Assembly Service and County Public Service, is an aspect of the constitutional separation of powers, in devolved government.

36. It is anchored on objects and principles of devolved government, under Articles 174 and 175 of the Constitution of Kenya.

37. Article 174 [i] lists enhancement of checks and balances and the separation of powers, as one of the objects of devolution.

38. Article 175 [a] states that County Governments shall be based on democratic principles and the separation of powers.

39. The position taken by the Preliminary Objector, requiring the Court to decline jurisdiction, and direct the Petitioner to submit to the Public Service Commission, is in gross misapprehension of the concept of separation of powers, and distorts the objects and principles of devolution, under Articles 174 and 175 of the Constitution.

**IT IS ORDERED:** -

***a. Preliminary Objection is declined.***

***b. Parties to fix the pending Applications for hearing as soon as practicable.***

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT MOMBASA,**

**UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 4TH DAY  
OF MARCH 2022.**

**JAMES RIKA**

**JUDGE**