



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 21 OF 2020

HAMISI BWENI DZILA.....CLAIMANT

- VERSUS -

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

COUNTY ASSEMBLY OF KWALE.....2ND RESPONDENT

SAMMY NYAMAWI RUWA.....3RD RESPONDENT

OMAR KITENGELE.....4TH RESPONDENT

ANTONY YAMA.....5TH RESPONDENT

MWAKARIBU HAMISI.....6TH RESPONDENT

CELINE LUSWETI.....7TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 01st April, 2022)

RULING

The Court delivered the judgment in the suit on 25.02.2022 for the claimant against the respondents for:

- 1) The injunction hereby issued against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them by themselves or by their agents or servants from, suspending the claimant from his office as clerk of the County Assembly of Kwale on the basis of the issues raised in these proceedings or other disciplinary proceedings commenced as the case may be, unless, as the claimant may be found culpable in accordance with section 23 of the County Assembly Service Act, 2017 and in accordance with other applicable law.
- 2) The declaration hereby issued that “**suspend**” in section 22 of the County Assembly Service Act means “**remove**” (and is not an interlocutory administrative measure that may be imposed pending investigations) and “**suspend**” under the section shall not be imposed by the County Assembly Service Board unless in accordance with and after conclusion of the due process prescribed under section 23 of the Act.
- 3) The 1st respondent to pay 50% of the claimant’s costs of the suit.

The claimant being dissatisfied with part of the judgment filed a notice of appeal on 10.03.2022 through Aboubakar, Mwanakitina & Company Advocates and, which was duly lodged on 14.03.2022. While the claimant is satisfied with the final orders, he is dissatisfied that the Court founds thus, “**In view of those findings, the Court returns that the claimant has failed to establish a justification for grant of prayer 3 being a declaration that the undated notice to show cause why removal proceedings should not be commenced against the claimant are also a violation of the values and principles of public office as provided for under Articles 232 and 236 of the Constitution of Kenya, 2020. The Court returns that the alleged violations have not been established.**” The effect of that finding that the claimant is dissatisfied with is that the respondents, and particularly the 1st and 2nd respondents are entitled to continue with the disciplinary proceedings herein as already commenced against the claimant.

The respondents on their part are also partly dissatisfied with the judgment and they equally filed a notice of appeal on 10.03.2022 through Muturi Gakuo & Kibara Advocates and, which was duly lodged on 14.03.2022. The respondents are dissatisfied with the judgment to the extent that the Court ordered thus, “**2.The declaration hereby issued that “suspend” in section 22 of the County Assembly Service Act**

means “remove” (and is not an interlocutory administrative measure that may be imposed pending investigations) and “suspend” under the section shall not be imposed by the County Assembly Service Board unless in accordance with and after conclusion of the due process prescribed under section 23 of the Act.” The effect of that order is that the respondents are thereby not entitled to impose a suspension (an interlocutory administrative suspension) during the continuance of the disciplinary proceedings against the claimant because section 23 of the Act, in the findings of the Court, must be complied with prior to imposition of any suspension against the claimant.

The claimant has now filed an application on 10.03.2022 by way of the notice of motion brought under Order 42 Rule 6 of the Civil Procedure Rules. Section 1A, B of the Civil Procedure Act, and all enabling provisions of the law. The claimant has prayed for orders:

- 1) (spent)
- 2) The Honourable Court do stay the disciplinary hearing by the respondents against the claimant (applicant) herein pending the hearing and determination of the appeal.
- 3) The Honourable Court do grant prayer 2 above in the interim pending the hearing and determination of the application.
- 4) Costs be in the cause.

After hearing counsel for both parties and in view of prayer (3), the Court on 16.03.2022 ordered inter alia, “**2. That pending the hearing and determination of the application the disciplinary hearing against the applicant by the 1st respondent scheduled for 21.02.2022 or as may be adjourned is hereby stayed pending the hearing and determination of the application or further orders by the court.**” On 22.03.2022 the Court heard the parties’ counsel and further ordered, “**2. That pending the ruling or further orders by the Court, the order number two (2) given on 16.03.2022 is hereby extended with further orders that until ruling or further orders, the claimant may not report at office but retain full pay and benefits attached to the office of clerk as held.**”

The application is based on the annexed supporting affidavit of Yusuf M. Aboubakar Advocate and upon the following grounds:

- a) The applicant is aggrieved with by the judgment and has filed a notice of appeal.
- b) The appeal has high chances of success particularly in view of the following grounds:
 - i. The Court had found that the board was not biased whereas, the applicant had shown that the 1st respondent had upon similar allegations arrived at the finding that the applicant’s contract of service was to be terminated.
 - ii. The applicant had proved that the dispute arose as a result of his being a county officer and the disciplinary process should be that which is provided under section 156 of the Public Finance Management Act and not the one provided by section 23 of the County Assembly Service Act so that the Court erred in its findings in the judgment.
 - iii. The Court failed to take into consideration relevant facts adduced before it therefore causing a miscarriage of justice to the claimant.
 - iv. The Court misinterpreted, misapplied and misapprehended the law causing it to fall into grave error by reaching wrong conclusion of the law.
- c) The application be granted in the interests of justice.
- d) The respondents will suffer no prejudice if the application is granted.

The 1st to 7th respondents filed on 15.03.2022 the replying affidavit of Sammy Nyamawi Ruwa, the Speaker of the 2nd respondent and Chairperson of the 1st respondent, also being the 3rd respondent. The grounds of opposition were as follows:

- a) The present application is under Order 42 Rule 6 of the Civil Procedure Rules under which no stay of execution shall be granted under sub-rule 6 (1) unless the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and, such security as the Court orders for the due performance of such decree or order as may ultimately be binding in him has been given by the applicant. The applicant has not established substantial loss he will suffer if the application is not allowed and the supporting affidavit is by his advocate on record and not by the applicant. Further the applicant has established no irreparable loss he will suffer if the disciplinary proceedings are allowed to go on.
- b) The application is based on the grounds that the proposed applicant’s appeal is not frivolous and it has high chances of success which are grounds in Rule 5(2) (b) to be considered by the Court of Appeal in a proper application for stay of execution before that Court.
- c) The Court found in the judgment that the respondents are entitled to exercise disciplinary control over the applicant and the Court is thereby functus officio.
- d) The suit commenced in March 2020 when the disciplinary proceedings against the applicant were halted by interim Court order and which orders lapsed on 25.02.2022 when the judgment was delivered. The effect of the judgment was that the respondents have

disciplinary mandate over the applicant and the administrative suspension against the applicant was lifted. Thus by that judgment the respondents are entitled to carry on with the disciplinary process against the applicant and, the claimant is to report back at work. Accordingly, the claimant reported back at work on 14.03.2022 and the 1st respondent conveyed that it was keen to carry on with the disciplinary process and the claimant to continue reporting at work as per the judgment. The claimant then completed leave application forms for leave from 15.03.2022 to 18.03.2022 presumably to prepare for the disciplinary hearing. At the meeting held on 14.03.2022 the 1st respondent granted the applicant 4 days of leave as requested. On 15.03.2022, the 1st respondent met and fixed the disciplinary hearing on 21.03.2022 at 10.00am. the letter dated 15.03.2022 was duly served upon the claimant inviting him to the disciplinary hearing on 21.03.2022. the applicant had failed to disclose to the Court that he had been granted the 4 days' leave to prepare for the disciplinary hearing.

e) The application seeks that the Court sits on appeal on its own decision and which is an abuse of due process.

f) Allowing the application will facilitate the claimant to interfere with witness who have been anxious for two years; may enable the claimant to tamper with evidence especially documents about the alleged financial impropriety; and, the claimant may frustrate the integrity of the disciplinary process.

g) By granting the application the Court may contradict its own findings in the judgment which would amount to setting aside the judgment.

the respondents prayed that the application be dismissed with costs.

The applicant had been granted leave to file and serve a further supporting affidavit by close of 18.03.2022 and instead filed his replying affidavit on 18.03.2022. The claimant urged as follows:

a) If the application is not granted his appeal will be nugatory and an academic exercise because the disciplinary proceedings he seeks to challenge will any way have continued and may be his appointment as clerk already revoked by the time of decision by the Court of appeal. Further he would have stayed out of work for long and without due professional development, his performance would be adversely impacted. If dismissed, he would have lost his salaries which are not recoverable in law.

b) The issue of security for prompt performance of the decree if the appeal fails does not arise because, there is no money decree which is subject of order 42 rule 6 (1) of the Civil Procedure Rules, 2010.

c) The board was biased because it had previously resolved to dismiss the applicant upon the same grounds and the Court erred in finding that there was no bias.

d) The dispute concerns the applicant's duties as accounting officer under section 16 and 17 of the County Assembly Service Act and section 148 (4) of the Public Finance Management Act so that the disciplinary process should be that stipulated under section 156 of the Public Finance Management Act and not the one preferred by the Court in the judgment.

e) Section 17 of the Employment and Labour Relations Act and Article 50(2) (q) of the Constitution entitles the applicant to appeal and to a stay of execution as prayed for pending the outcome of the appeal.

f) He confirmed to have reported back to work on 14.03.2022 but he could not access files and his previous office space had been converted to a lounge so that he could not discharge duties of the office held as Clerk. He was told he would not be assigned duties until the disciplinary process was over. The minutes of the meeting of 14.03.2022 had been doctored in that regard and were not accurate as they did not capture his concerns and complaints about no proper work space and that he would not be assigned duties.

g) The respondents all along knew about the intention of the applicant to file for stay as a temporary stay order had been applied for immediately judgment was delivered and obtained until 11.03.2022. The present application is solid in law and in good faith.

h) If disciplinary process is to be under section 23 of the County Assembly Service Act, then the 1st respondent is biased and the same should be conducted by the Court.

i) He has not interfered with witnesses throughout the pendency of the suit and he will not do so if prayers made are granted.

j) The respondents equally intend to appeal the judgment and are keen to proceed with the part that is favourable to them and challenge the unfavourable part.

The 3rd respondent then file the 1st to 7th respondents' further affidavit. It was urged as follows:

a) The replying affidavit had been sworn by a person different from one making the supporting affidavit and therefore inconsistent with the Court's leave that a further supporting affidavit be filed.

b) The applicant had not demonstrated irreparable loss or substantial loss to be suffered if the application was declined. Such substantial loss must be actual and not speculative as urged for the applicant. The applicant alleges substantial loss consequential to his removal from office, a speculative fact which has not crystallised.

c) Section 23 of the County Assembly Service Act provides for the roles of the 1st respondent, the 2nd respondent's committee, and

then the 2nd respondent's full house in the disciplinary procedure against the applicant so that due process and justice is assured.

d) The applicant knows that the 1st respondent will adjourn sittings in May 2022 and there will be no sittings until after the General Elections of August 2022. Thus the applicant is keen to frustrate conclusion of the initiated disciplinary process by the present members of the 1st respondent whose tenure will lapse in May 2022.

e) The lack of sufficient or proper office space is widespread affecting all 1st respondent's staff and not unique to the applicant.

f) The respondents are appealing on the issues of costs and suspension and there is already a pending appeal on the issue of suspension flowing from the ruling of the Court herein.

g) The application offends the doctrine of finality and should be dismissed. The applicant is seeking an injunction to stop the disciplinary proceedings but which was declined in the judgment. The Court is functus officio after delivery of judgment on 25.02.2022.

h) The applicant's averments in paragraph 6 of his replying affidavit are agreed upon that there is no money decree but is for the applicant to demonstrate on a balance of probability the substantial loss he will suffer if prayers made are not granted.

Parties filed submissions on the application and made oral highlights. The Court has considered the material on record and the parties' respective submissions and makes findings as follows.

First, the respondent attacks the applicant's further affidavit headed replying affidavit and filed on 18.03.2022 because it was not made by a person not being the maker of the initial affidavit. It is true that the affidavit is erroneously headed as a replying affidavit but that error is not the issue. The issue is that the applicant has made the affidavit whereas he was not the maker of the initial affidavit. At paragraph 2 of that replying affidavit the applicant states that he is making it in response to the replying affidavit for the 1st to 7th respondents sworn by Sammy Nyamawi Ruwa on 15.03.2022. It is in view of that affidavit by Sammy Nyamawi Ruwa sworn on 15.03.2022 that the Court ordered on 16.03.2022 thus, **"1. The applicant is granted leave to file and serve a further supporting affidavit by close of 18th March 2022."** The Court finds that by terms of that order, leave was specifically granted to the claimant to file a further affidavit which he then styled as a replying affidavit. The Court finds that the impugned affidavit being by the applicant and within the terms of the order of leave to file the same, the same is properly on record and the styling of the same as a replying rather than a further supporting affidavit is excusable under Article 159 (2) (d) that justice be administered without undue regard to procedural technicalities. Further, the respondents have had an opportunity to file a further affidavit in response to that applicant's impugned replying affidavit and no prejudice is established on the part of the respondents. Thus, the oral objection to the applicant's replying affidavit is found unjustified. The Court has considered **Nyamu & 3 Others –Versus- Muema & 21 Others [2004]eKLR** where Wendo J struck off the two affidavits by deponents who had not earlier on sworn affidavits in the suit and which had been filed without leave. The Court finds that the situation in that case is clearly distinguishable because in that case leave had not been obtained whereas in the instant case leave had been obtained and the further, respondents have had an opportunity to respond to the affidavit.

Second, the Court has considered the parties' concurrence that there is no money decree and the Court returns that the application may not be strictly determined upon the provisions of Order 42 Rule (6) prescribing promptness in application, due security for satisfaction of the money decree in event the appeal fails, and substantial loss in that regard. In exercising its discretion in the instant case, it is not in dispute that the application was filed promptly without undue delay. Whether the application should be granted or not, in the Court's opinion, should be guided by the preservation of the applicant's genuine demonstration to appeal against the judgment, reluctance of the Court to entertain an appeal against its own decision, and balancing of the parties' established genuine concerns in light of the judgment to be appealed against. The applicant and the respondents have filed their respective notices of appeal and by that reason there exist demonstrated genuine proposal to exercise the right of appeal against the judgment.

Third, the Court has considered that both the applicant and the respondents have filed their respective notices of appeal against part of the judgment delivered herein. The Court has also considered that as submitted for the respondent, the main grounds in the application are that the applicant has an arguable appeal and which may be rendered nugatory if the stay of execution orders are not granted as prayed. As submitted for the respondents, the Court should not entertain an appeal against its own decision as it is *functus officio* as relates the arguments now urged for the applicant that the appeal is not frivolous. As submitted for the respondent, the Court should not re-evaluate its findings in the judgment upon specific issues the applicant mentions as grounds of an arguable appeal. The Court considers that such are matters to be considered and decided upon by the Court of Appeal in accordance with its rules and applicable law. The Court has considered the respondents' concerns about the potential of the applicant interfering with witnesses and documents in the pending administrative disciplinary proceedings. The Court has also considered the applicant's concern that if the disciplinary proceeding is allowed to continue then his proposed appeal may be rendered academic. The Court has further considered the respondents' concern that the applicant has continued to earn for a long time without working but yet, the Court has already found in the judgment that the 1st respondent cannot suspend the claimant pending the conclusion of the disciplinary process.

As submitted for the respondent the Court must be careful not to entertain an appeal against its own judgment. In that regard the Court refrains from entertaining the issue whether the applicant has an arguable appeal and further the Court will not revisit the issues already decided in the judgment such as whether the respondents are biased or not, or fair, and, whether the applicant should face the disciplinary process as commenced or otherwise.

To balance justice for the parties, the Court considers that the parties should be placed in a fair position pending prompt consideration of their respective concerns and grievances by the Court of Appeal as may be moved appropriately. The Court finds that it should be just for a temporary stay of execution to issue that the disciplinary proceedings against the applicant initiated by the respondents be stayed upon the conditions that the applicant to retain full remuneration without reporting at the office; the deputy registrar to cause the typed and certified proceedings in the case to be expeditiously ready and not later than 08.04.2022 so as to facilitate parties to move the Court of Appeal as soon

as possible and not later than 29.04.2022; and in any event, the stay of execution orders now granted herein to lapse on 29.04.2022. Parties will bear own costs of the application.

In conclusion, the application by the notice of motion dated 10.03.2022 and filed on the same 10.03.2022 is hereby determined with orders:

1. The disciplinary proceedings against the applicant initiated by the respondents be and are hereby temporarily stayed upon the conditions that:

a. the applicant to retain full remuneration without reporting at the office;

b. the deputy registrar to cause the typed and certified proceedings in the case to be expeditiously ready and not later than 08.04.2022 so as to facilitate parties to move the Court of Appeal as soon as possible and not later than 29.04.2022; and,

c. in any event, the stay of execution orders now granted herein to lapse upon close of 29.04.2022 and subject to the outcome as may be ordered by the Court of Appeal, parties to otherwise comply with the judgment.

2. Parties to bear own costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01ST APRIL, 2022.

BYRAM ONGAYA

JUDGE