



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Clerk, County Assembly of Homa Bay & another; Elizabeth Ayoo (Exparte)  
(Judicial Review E016 of 2021) [2022] KEELRC 1152 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1152 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**JUDICIAL REVIEW E016 OF 2021**

**S RADIDO, J**

**MAY 25, 2022**

**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

AND

CLERK, COUNTY ASSEMBLY OF HOMA BAY ..... 1<sup>ST</sup> RESPONDENT

HOMA BAY COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT

AND

ELIZABETH AYOO ..... EXPARTE

## JUDGMENT

1. On 9 December 2021, the Court granted Hon Elizabeth Ayoo leave to commence judicial review proceedings against the Clerk, County Assembly of Homa Bay and the County Assembly of Homa (the Respondents).
2. The leave was to operate as a stay of a request dated 2 December 2021 to the applicant asking her to respond to a Notice of Intention to move a Motion for a resolution to remove her from the office of Speaker dated 3 December 2021, and a letter dated 6 December 2021 barring her from performing the functions of Speaker of the County Assembly.
3. The applicant filed a substantive Motion on 14 December 2021 and on 16 December 2021, she filed a contempt application seeking to cite some named 28 members of the County Assembly.
4. The Court gave directions on both the substantive and contempt applications on 9 February 2022. The Court gave further directions on 21 March 2022 with judgment reserved to today.
5. The Clerk filed a replying affidavit in opposition to the judicial review Motion on 17 February 2022, and the applicant filed a further affidavit on 24 February 2022.
6. The applicant filed her submissions on 1 March 2022 and the County Assembly on 9 March 2022. The Clerk filed her submissions on 25 March 2022, and the applicant filed further submissions on 29 March 2022.

### The facts

7. The applicant was elected as a Speaker of the County Assembly on a date not disclosed in the Statement of Facts.
8. On 3 December 2021, the Clerk delivered to the applicant a letter dated 2 December 2021. The letter informed the applicant of a Notice of Intention to move a Motion to remove her from the office of Speaker.
9. The removal Motion was dated 3 December 2021.
10. On 6 December 2021, the Clerk wrote to the applicant reminding her that under section 7(6) of the *County Governments (Amendment) Act, 2020*, she could not continue performing the functions of the office of Speaker pending a resolution of the County Assembly on the removal Motion.
11. The applicant challenged the notices and the Court stayed the proceedings on 9 December 2021.
12. However, on 14 December 2021, a different member of the County Assembly introduced a new Motion to have the applicant removed from office.



## **The contempt application**

13. On 9 December 2021, the Court issued an order staying an attempt by the County Assembly to remove the applicant from the office of the Speaker.
14. The Respondents were the County Assembly and the Clerk of the County Assembly. The order was served upon the Clerk.
15. On or around 14 December 2021, a member of the County Assembly sought to introduce a new Notice of Intention to move a Motion to remove the applicant from the office of the Speaker.
16. On the same day, the Clerk wrote to the applicant to notify her of the fresh Notice of Intention for removal.
17. The applicant asserted that the fresh removal attempt was in contempt of the stay orders granted by the Court on 9 December 2021.
18. Save for change of dates, the new Notice was a replica of the first Notice and letter the Court had stayed on 9 December 2021.
19. The question, therefore, arises whether the new attempt was in disobedience of the Court orders of 9 December 2021.
20. For a finding of contempt to be made, the party asserting must show the existence of a court order, that the party sought to be cited was served or was aware of the court order and that there was wilful disobedience of the order.
21. It is not in doubt that the Court issued stay orders.
22. The pertinent issue, then, is whether the Court order was served upon the members of the County Assembly or whether it was brought to their attention and whether there was wilful disobedience.
23. Under the traditions and practices of the legislature in this jurisdiction, communications to members of the legislature are ordinarily made by the Speaker and more so where the communication is in respect to legislative work or quasi-judicial functions.
24. The applicant herein did not place before this Court any evidence that the orders of 9 December 2021 were brought to the attention of the members of the Assembly, or that the Assembly had sat from 9 December 2021 to 14 December 2021.
25. The Court is consequently not ready to find wilful disobedience of the orders of 9 December 2021 on the part of the members of the County Assembly.
26. Regarding the Clerk, the applicable statutory provisions in section 11 of the *County Governments Act* and the Standing Orders required her to communicate or bring to the attention of the person holding the office of the Speaker, notices and motions lodged with her office.
27. Although there is a whiff of mischief in the second Notice of Intention, the applicant did not present any evidence that the Clerk was part of the seeming warfare within the organs of government of Homa Bay county.
28. The Court, will, again not find contempt against the Clerk as she was performing a statutory function by alerting the applicant of the new motion.
29. The Court will now examine the merits of the substantive judicial review Motion.



## **The arguments**

### **The position of the applicant**

30. The applicant's arguments were straightforward.
31. One, she contended that the law purportedly relied on by the Respondents to deny her access to the office of the Speaker had been suspended by the High Court in Nairobi Constitutional and Human Rights Petition No. E242 of 2020, *County Assemblies Forum & Ors v the Attorney General*.
32. The High Court had issued a conservatory order suspending the operation of section 11(1)(c) and (6) of the *County Governments Act, 2012* as amended on 27 July 2020, pending the hearing and determination of the Petition.
33. The applicant submitted that consequently, the Respondents had no legal authority to purport to deny her access to the office or to perform the functions of the office of the Speaker.
34. Second, and on the question of removal, the applicant asserted that the Notice of Intention was dated 3 December 2021, while the letter bringing to her attention the Notice was dated 2 December 2021.
35. According to the applicant, the inconsistencies in the dates and logical sequence of events was a manifestation of malice and unlawfulness in initiating the removal Motion.
36. The process, the applicant urged, contravened the provisions of the *County Governments Act* and the Standing Orders of the County Assembly.

### **Respondent's arguments**

37. The first point taken by the Respondents was that the Notice of Motion filed in Court on 14 December 2021 was defective for want of a supporting affidavit.
38. Secondly, the Respondents argued that since the letter dated 2 December 2021 was only meant to convey a communication, it was not a decision amenable to the judicial review powers of the Court.
39. Concurrently, the Respondents asserted that the Notice of Intention Motion was received on 3 December 2021, and it was forwarded to the applicant on the same day and the date of 2 December 2021 in the forwarding letter was a typographical error.
40. With respect to the letter purporting to suspend the applicant from performing the functions of the office of the Speaker, it was contended that it was merely advisory.
41. The Respondents also urged that the removal process had just begun, and the applicant had been given adequate notice of the allegations through the Notice of Intention to move the Motion and that because of separation of powers, the Court should not intervene lightly and dictate how the Assembly was to conduct its business.
42. The Court has considered the Motion, affidavits, and submissions.

### **Lack of supporting affidavit**

43. The Respondents challenged the competence of the Motion herein on the ground that it lacked a supporting affidavit.



44. The Respondents did not disclose which provision of law required a Motion seeking a judicial review to be supported by a fresh supporting affidavit after the grant of leave. No case law was placed before the Court to support the challenge.
45. Order 53 rules 3 and 4 of the *Civil Procedure Rules* which regulates such Motions does not have a requirement for a supporting affidavit.
46. The Court is therefore of the view that the lack of a supporting affidavit did not render the Motion fatally defective.

#### **Suspension of applicant from accessing office**

47. The statutory anchor to the suspension of a Speaker of County Assembly while facing removal proceedings was stayed by the High Court in Nairobi Constitutional and Human Rights Petition No. E242 of 2020, *County Assemblies Forum & Ors v the Attorney General*.
48. Consequently, the letter dated 6 December 2021 purporting to suspend the applicant or offer an advisory had no lawful basis.
49. The letter was in the form of a command and is therefore susceptible to being quashed through an order of certiorari.

#### **Letter of notification preceding Notice of intention to move a Motion**

50. The Respondents attempted to explain the anomaly of the letter bringing to the attention of the applicant the Notice of Intention being dated early because of an error, a typing error.
51. There was no deposition as to the error in the first replying affidavit filed by the Respondents on 9 December 2021.
52. The Respondents did not also advert to the error in the affidavits in support of the applications (they) filed in the litigation.
53. The explanation was only made in an affidavit filed in Court on 24 February 2022.
54. The Court finds the explanation not satisfactory because it was only brought forth much later into the proceedings despite being at the heart of the complaint by the applicant.
55. The Court concludes that this is a suitable case to allow the Motion for judicial review.

#### **Conclusion and Orders**

56. From the foregoing, the Court finds and orders:
  - (i) An order of judicial review by way of certiorari is hereby issued to remove into the Employment and Labour Relations Court at Kisumu for quashing the decisions contained in the letters dated 2 December 2021 from the Clerk of the County Assembly inviting the applicant to respond to a Notice of Intention to move a Motion for a Resolution to remove the Speaker dated 3 December 2021.
  - (ii) An order of judicial review by way of certiorari is hereby issued to remove into the Employment and Labour Relations Court at Kisumu for quashing the decision of the Clerk of the County Assembly contained in the letter dated 6 December 2021 barring the applicant from performing the functions of the office of the Speaker of the County Assembly of Homa Bay.



57. Each party to bear own costs considering the functional relationships between the parties.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 25<sup>TH</sup> DAY OF MAY 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

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

For 1<sup>st</sup> Respondent Mr Mwamu instructed by Mwamu & Co. Advocates

For 2<sup>nd</sup> Respondent Mr Nyamweya instructed by N.E. Mogusu & Associates

Court Assistant Chrispo Aura

