



Ojako v County Assembly Service Board, Homa Bay & 2 others (Petition E004 of 2022) [2022] KEELRC 1174 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1174 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E004 OF 2022**

S RADIDO, J

MAY 11, 2022

BETWEEN

STEPHEN OTIENO OJAKO PETITIONER

AND

COUNTY ASSEMBLY SERVICE BOARD, HOMA BAY 1ST RESPONDENT

COUNTY ASSEMBLY SPEAKER 2ND RESPONDENT

COUNTY ASSEMBLY CLERK 3RD RESPONDENT

JUDGMENT

1. Stephen Otieno Ojako (the Petitioner) was at all material times a Deputy Clerk Legislative and Committee Services with the County Assembly of Homa Bay (the County Assembly).
2. On 24 September 2021, the Clerk of the County Assembly allegedly wrote to the Petitioner informing him of interdiction for engaging in political activities. The interdiction was to facilitate investigations into the allegations.
3. On 6 February 2022, the Petitioner sued the Respondents alleging that his interdiction through the letter dated 24 September 2021 was unlawful as the procedures set out in the [County Assembly Service Act](#) and the County Assembly Human Resources Manual, 2015 had not been followed.
4. Simultaneously filed with the Petition was a Motion under a certificate of urgency seeking interim interdicts.
5. On 15 February 2022, the Court directed the parties to file and exchange responses/affidavits on the Motion and Petition before the giving of further directions on 17 February 2022.
6. The Petitioner filed a further affidavit on 15 February 2022.



7. When the parties appeared in Court on 17 February 2022, the Court gave directions including on the filing and exchange of submissions on the Petition with judgment reserved for 11 May 2022 (the Court stayed the interdiction of the Petitioner pending judgment).
8. On 3 March 2022, the Petitioner filed a contempt application against the Respondents, and on 7 March 2022, the County Assembly Service Board (the Board) through the Clerk filed a replying affidavit in opposition to the Petition and Motion.
9. The Court directed the Petitioner to serve the contempt application and on 14 March 2022, the Court ordered the filing and exchange of affidavits on the contempt application and submissions on both.
10. The Speaker filed a replying affidavit to the Motion and Petition on 21 March 2022. On the same day, the Petitioner filed a further supporting affidavit.
11. The Respondents filed submissions on the contempt application on 23 March 2022. The Petitioner filed submissions on the Petition on the same day.
12. The Board and Clerk filed a replying affidavit to the contempt application and their submissions on 19 April 2022.
13. The Court has considered the Petition, motions, affidavits, and submissions placed before it.

Jurisdiction

14. The Respondents urged the Court to decline jurisdiction on the ground that the Petitioner had not exhausted the appellate procedures envisaged by section 77 of the *County Governments Act* and sections 85, 86, and 87 of the *Public Service Commission Act*.
15. The Court finds the jurisdictional objection misplaced because the appellate function of the Public Service Commission under the *County Governments Act* and the *Public Service Commission Act* is restricted to decisions or purported decisions of county public service boards which are organs of the executive. The Public Service Commission is also an organ of the executive.
16. The aforesaid legal provisions do not lend themselves to an interpretation where the legislative or judicial arm would be subjected to the processes of the said Acts which are meant to address disputes within the executive arm of government.

Contempt application

17. For a finding of contempt to be made, the party alleging contempt should demonstrate the existence of a court order, that the contempt citee was served with the court order or was aware of the court order, and that there was willful disobedience of the court order.
18. On 17 February 2022, the Court issued an order to stay the interdiction of the Petitioner through a letter dated 24 September 2021. The advocate for the Board and the Clerk were present when the order was issued.
19. The Petitioner asserted that despite being notified of the order, the citees had declined to allow him access to the workplace by instructing the guards not to allow him within the assembly precincts.
20. The Petitioner also contended that his functions had been assigned to another employee and that he had been demoted/redesignated.
21. The Respondents denied that they were in contempt and contended that they were not privy to the interdiction letter dated 24 September 2021. According to the Board and Clerk, the Petitioner was



interdicted through a letter dated 25 September 2021. The Petitioner denied receiving the interdiction letter dated 25 September 2021.

22. The Respondents denied that the Claimant had been replaced.
23. The Speaker of the County Assembly disowned being present at a purported meeting held on 22 September 2021 where the resolution to interdict the Petitioner was reached. She also denied signing the minutes of the said meeting which were filed in Court.
24. The Court has diametrically opposed facts from the parties. The Petitioner did not disclose how the persons sought to be cited gave instructions to the guards to deny him access to the workplace. The particulars of the guards given the instructions were also not disclosed.
25. Further, the Petitioner did not also divulge the name of the person allegedly assigned his role. The letter of re-designation was written before the court order and was not placed before the Court by the time of granting the stay order. It cannot be the basis of a contempt order.
26. On the state of the evidence before it, the Court declines to find contempt.

Unlawful interdiction

27. The Board and the Clerk asserted that the Board met on 22 September 2021 and resolved to have the Petitioner interdicted pending investigations. Minutes of the meeting were exhibited to the replying affidavit of the Clerk.
28. The Speaker of the County Assembly who also doubled up as the chairperson of the Board denied in her replying affidavit filed in Court on 21 March 2022 that she chaired the meeting held on 22 September 2021 where it was resolved to interdict the Petitioner. She also denied signing the minutes.
29. The Board and the Clerk did not file any further affidavits to respond to the denials by the Speaker on the alleged meeting of 22 September 2021.
30. The Court, therefore, finds the authenticity of the minutes as evidence doubtful.
31. Nevertheless, the Court will examine the interdiction powers under the County Assembly Human Resource Manual.
32. Under clause D.33 of the Manual an officer may be interdicted where misconduct likely to lead to dismissal has been reported, or where the officer has been charged with a criminal offense.
33. Where the misconduct is not of a criminal nature, the interdiction should be followed with a show-cause notice, or the interdiction and show-cause may be communicated in one letter.
34. The letter of interdiction dated 24 September 2021, and placed before the Court and disowned by the Respondents set out an allegation of misconduct.
35. The interdiction was to facilitate further investigations and it informed the Petitioner of the entitlements during the interdiction.
36. Since the alleged interdiction of the Petitioner had a contractual foundation in the Human Resource Manual, the Court is of the view that it was not unlawful nor violative of the Petitioner's rights to equal treatment of the law, labour fair practices, fair administrative action, or fair hearing.



Delay/failure in concluding investigations

37. The Petitioner challenged the lawfulness of his interdiction on the grounds that the processes contemplated under the County Assembly Human Resource Management Policy Manual had not been followed in that an Investigations Committee had not been established, and that the interdiction had delayed, and investigations were not concluded within a reasonable time.
38. The Petitioner was interdicted on 24 September 2021 to facilitate investigations. Clause D 30 of the County Assembly Human Resource Manual required the Clerk to establish an Investigation Committee comprising of not less than 3 officers senior to the Petitioner.
39. The Manual requires the Investigation Committee to submit a report before further action is taken by the Board.
40. Section 29 of the *County Assembly Services Act* demands that the Board puts in place a Staff Advisory Committee to advise on among other issues disciplinary control.
41. The Respondents attempted to argue that such a Committee had been established under the name Leadership Committee.
42. The Show-cause notice dated 21 September 2021, which the Respondents asserted demonstrated the formation or existence of a Staff Advisory Committee, does not lend itself to such suggestion. It did not refer to any Committee by whatever nomenclature.
43. The Respondents did not place any evidence before the Court to show that an Investigation Committee had been promptly established as required by the Manual by the time the Petitioner moved to Court. The Petitioner moved the Court some 5-months after the interdiction.
44. The Respondents did not also place any material before the Court to show that the Petitioner's case passed through the Staff Advisory Committee.
45. Without any explanation on the delay from the Respondents to establish the Investigations Committee or why the Staff Advisory Committee had not processed the Petitioner's case, the Court finds that the delay to investigate the allegations or process the case through the Staff Advisory Committee was not only malicious but an affront to the Petitioner's right to fair administrative action as contemplated by Article 47 of *the Constitution*.
46. It is more telling that there were no minutes to evidence the Board as having met after the Petitioner's interdiction to discuss the status of the case.
47. Before concluding, it would be remiss for the Court not to observe that the Petition did not raise any constitutional questions warranting approaching the Court through the mode chosen instead of the normal manner as provided for under the *Employment and Labour Relations Court (Procedure) rules, 2016*.

Conclusion and Orders

48. From the foregoing, the Court finds and declares:
 - i. The Respondents' failure to establish an Investigation Committee to investigate the allegations against the Petitioner violated his rights to fair administrative action and fair labour practices.



- ii. The Respondents' failure to process the Petitioner's case through the Staff Advisory Committee or plenary of the Board violated his rights to fair administrative action and fair labour practices.
- iii. An order of mandamus be and is hereby issued lifting the Petitioner's interdiction and reinstating him to office without loss of any benefits.

49. The Petition did not raise any constitutional questions and each party is directed to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF MAY 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Sala & Co. Advocates

For 1st and 3rd Respondents Oscar Otieno & Co. Advocates

2nd Respondent Omondi, Abande & Co. Advocates

Court Assistant Chrispo Aura

