



**Owiti v County Assembly of Migori & another (Petition E007 of 2022)  
[2022] KEELRC 1780 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1780 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E007 OF 2022**

**S RADIDO, J**

**MAY 11, 2022**

**IN THE MATTER OF ARTICLES 178, 47, 48,  
AND 50(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION OF MIGORI COUNTY ASSEMBLY STANDING  
ORDER NO. 59 ON THE PROCEDURE OF REMOVAL OF THE SPEAKER**

**AND**

**IN THE MATTER OF UNPROCEDURAL, IRREGULAR,**

**AND**

**PURPORTED IMPEACHMENT OF THE SPEAKER OF MIGORI COUNTY ASSEMBLY**

**BETWEEN**

**BOAZ OKOTH OWITI ..... PETITIONER**

**AND**

**COUNTY ASSEMBLY OF MIGORI ..... 1<sup>ST</sup> RESPONDENT**

**CLERK COUNTY ASSEMBLY OF MIGORI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Hon Boaz Okoth Owiti (the Petitioner) moved the Court on 10 February 2022 contending that the decision of the County Assembly of Migori (the County Assembly) to impeach/remove him from the office of the Speaker on 8 February 2022 was illegal and a violation of his Constitutional rights (rights to fair administrative action and to a fair hearing).
2. The Petitioner prayed that:



- (a) A declaration that the decision of the Respondents to impeach the Petitioner was based on illegal, irregular, and unconstitutional process as the Petitioner was never given time to be heard and respond to the allegations contained in the impeachment motion dated and moved in the Assembly on 8<sup>th</sup> February 2022 and therefore the said impeachment process is null and void.
  - (b) An order of judicial review in the nature of Certiorari to bring before this Court for the purposes of being quashed the decision of the Respondents made on 8<sup>th</sup> February 2022 impeaching the Petitioner as the Speaker of the County Assembly of Migori.
  - (c) An order that the costs of this suit be provided for.
  - (d) Any other or further orders, writs, and directions this Court considers appropriate and just to grant for the purpose of the enforcement of *the Constitution* and fundamental rights and freedoms.
3. Simultaneously with the Petition, the Petitioner filed a Motion under a certificate of urgency seeking conservatory orders.
4. When the parties appeared before the Court on 15 February 2022, the Court granted interim conservatory orders.
5. The Court also directed that the Motion and Petition be taken together and that the parties file and exchange affidavits and submissions ahead of judgment on 11 May 2022.
6. On 17 February 2022, the County Assembly filed a Motion seeking the review or setting aside of the interim conservatory orders.
7. The Court heard the Motion on 22 February 2022 and vacated the orders because the Petitioner had not disclosed that he had been charged with a corruption offence and therefore by virtue of section 62(1) of the Anti-Corruption and Economics Crimes Act stood suspended from office.
8. On the same day, the Court directed the parties to comply with the directions given on 15 February 2022.
9. Consequently, the County Assembly through the Clerk filed a replying affidavit in opposition to the Petition and initial Motion on 25 February 2022 (the Petitioner lamented in his submissions that the Respondents did not serve him with the affidavit).
10. On 7 March 2022, the Petitioner moved the Court seeking a review of the order vacating the interim conservatory orders.
11. The Court declined to entertain the Motion at the time and indicated that it would make a determination thereof in this judgment.
12. The County Assembly filed a Notice of Preliminary Objection to the Petitioner's Motion on 11 March 2022, and Grounds of Opposition on 16 March 2022.
13. The Petitioner filed submissions on the Motion and Petition on 24 March 2022.
14. In the submissions, the Petitioner identified 2 questions for the Courts determination:
  - i. Whether the process which the Respondents used to impeach the Petitioner on 8<sup>th</sup> February 2022 was lawful or unlawful?
  - ii. Whether the Petitioner as Speaker of Migori County Assembly stands suspended by virtue of section 62(1) of the ACECA?



15. The Respondents filed their submissions on 26 April 2022. They did not explicitly set out the Issues for the Court’s adjudication.

### **Preliminary Objection: review of orders vacating interim conservatory orders**

16. The Petitioner sought the review of the order vacating the interim conservatory orders on the grounds that there was an error apparent on the face of the record because he had disclosed that he was facing corruption charges when he moved the Court on 10 February 2022.
17. The Petitioner took the view that section 62(1) of the Anti-Corruption and Economics Crimes Act which the Court relied on to vacate the interim orders did not apply to the position of a Speaker of a County Assembly because of the exemption outlined in section 62(6) of the Act.
18. The Petitioner further alleged that the County Assembly had threatened to stop his remuneration because of the vacation of the conservatory orders.
19. The Respondents challenged the competency of the review application on the ground that what the Petitioner was attempting to secure was not allowed by the provisions of law on review since the Court had already reviewed the order sought to be reviewed.
20. In paragraphs 2, 3, and 4 of the Ruling sought to be reviewed, the Court gave its reasons for vacating the interim conservatory orders.
21. In the Court’s view, the review application is no more than an attempt to relitigate an issue the Court had already heard the parties on and given a reasoned Ruling.
22. The Court declines to review the orders of 15 February 2022.

### **The lawfulness of the impeachment/removal**

23. On 8 February 2022, a member of the County Assembly notified the acting Clerk of a Notice of Intention to move a Motion for the removal of the Petitioner from the office of Speaker.
24. On the same day, a Motion for the removal of the Petitioner was debated and the County Assembly resolved to have him removed from office.
25. The removal of a County Assembly Speaker is governed partly by section 11 of the [County Governments Act](#) and the Standing Orders of the Assembly. Under section 11(1) of the Act, the Motion must get the support of at least 75% of all members of the County Assembly.
26. The Respondents did not put before the Court a scintilla of evidence that the Motion had the support of 75% of the members. Even evidence of a quorum was not placed before the Court.
27. Section 11(3) of the Act requires a notice of intention to remove the Speaker to be signed by at least one-third of the members of the Assembly.
28. A schedule containing the names and signatures of some 23 members of the County Assembly was filed and the Court will assume that the one third threshold was met since there was no disclosure from either party about the total membership of the Assembly.
29. The Petitioner also asserted that a copy of the Motion was not served upon him and that he was not afforded an opportunity to be heard before the plenary of the County Assembly. In this regard, the Petitioner deposed that on the material day, he had a scheduled Court appearance in Kisumu Anti-Corruption Case No. E002 of 2020 where he is one of the accused.



30. Apart from contending that the Petitioner was served, the Respondents did not disclose how and where the Motion was served upon the Petitioner.
31. In terms of Articles 41(1), 47 and 236 of *the Constitution*, the Respondents were under a normative duty to afford the Petitioner an opportunity to make representations.
32. The Respondents did not place any evidence before the Court that the Clerk served the Petitioner with the Motion, sought his response or invited him formally through a letter or otherwise to appear before the plenary of the County Assembly to defend himself.
33. It is telling that the Notice of Intention produced in Court was dated 8 February 2022, and that the County Assembly debated the substantive Motion on the same day and resolved to remove the Petitioner.
34. The County Assembly herein was in a mad rush to ensure that the Petitioner was removed from office.
35. However egregious the grounds or allegations facing a person holding the office of Speaker of a County Assembly, he or she should be allowed to make representations since the demand to be heard is a normative principle in our Constitution.
36. The norm is so cardinal that were the devil incarnate diabolos find time to visit this jurisdiction from his sojourns in the fiery place and was confronted with allegations of tormenting the son of man, *the Constitution* of Kenya demands that he be granted audience before his eternal damnation.
37. The County Assembly was in flagrant breach of the Petitioner's right to be allowed to be heard, and the Court has no hesitation in finding that the removal of the Petitioner from the office of Speaker was null and void.

Suspension under section 62 of the *Anti-Corruption and Economic Crimes Act*

38. The Petitioner, relying on *R v County Assembly of Kisumu & Ar ex parte Ann Atieno Adul* (2017) eKLR and *Moses Kasaine Lenolkulal v R* (2019) eKLR took the view that section 62(1) of the Anti-Corruption and Economics Crimes Act did not apply to the office of a Speaker of a County Assembly because Article 178 of *the Constitution* as read with section 62(6) of the *Anti-Corruption and Economic Crimes Act* had set out the grounds and manner of removal of persons holding offices such as that of the Speaker of a County Assembly (and other offices).
39. In the Court's view, the position expressed by the Petitioner is not legally sound. The suspension contemplated under section 62(1) of the Anti-Corruption and Economics crimes Act, does not equate to or amount to a removal from a constitutional office.
40. It is a transient measure or condition imposed by law to facilitate the integrity of judicial proceedings in a fair and impartial manner *moreso*, where the office holder is facing criminal or corruption charges.

### **Conclusion and Orders**

41. In fashioning an appropriate remedy, the Court is alive to the undisputed fact that the Petitioner was charged with a corruption offence and that under section 62(1) of the Anti-Corruption and Economics Crimes Act stands suspended.
42. The Court orders:
  - (a) A declaration be and is hereby issued that the decision of the Respondents to impeach the Petitioner was based on illegal, irregular, and unconstitutional process as the Petitioner was never given time to be heard and respond to the allegations contained in the impeachment



Motion dated and moved in the Assembly on 8<sup>th</sup> February 2022, and therefore the said impeachment process is null and void.

- (b) An order of judicial review in the nature of Certiorari to bring before this Court for the purposes of being quashed the decision of the Respondents made on 8<sup>th</sup> February 2022 impeaching the Petitioner as the Speaker of the County Assembly of Migori be and is hereby issued.
43. For purposes of clarity, the Court notes that the orders herein do not supersede or suspend the suspension of the Petitioner by operation of section 62(1) of the *Anti-Corruption and Economic Crimes Act*.
44. Each party to bear own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 11<sup>TH</sup> DAY OF MAY 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Petitioner Brian Mboya & Co. Advocates

For Respondents C. Obiero & Associates Advocates

Court Assistant Chrispo Aura

