



REPUBLIC OF KENYA



**Orata & another v County Assembly Service Board, Homabay County & another
(Petition E010 of 2022) [2022] KEELRC 103 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 103 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E010 OF 2022**

CN BAARI, J

JUNE 9, 2022

BETWEEN

HEZRON OCHIENG ORATA 1ST PETITIONER

ELLY ODOYO OYIER 2ND PETITIONER

AND

**COUNTY ASSEMBLY SERVICE BOARD, HOMABAY COUNTY 1ST
RESPONDENT**

COUNTY ASSEMBLY CLERK, HOMABAY COUNTY 2ND RESPONDENT

RULING

1. Before court is a Notice of Motion application dated 17th February, 2022, brought pursuant to Articles 73(2), 174(a) and 175(a) of *the Constitution*, Order 40 Rules 1,2 & 3 and Order 51 of the *Civil Procedure Rules*, Sections 3A & 63(c) of the *Civil Procedure Act* and Sections 13(1) (d), 65, 75 and 88 of the *County Government Act*. The Applicants seeks the following Orders:
 - i. Spent
 - ii. Spent
 - iii. That Pending the hearing and determination of this petition the Honourable Court be pleased to grant an Order staying and/or nullifying the appointment and recruitment of the 2nd Respondent as the office of the County Assembly Clerk of Homa Bay, by the 1st Respondent
 - iv. Spent
 - v. That Pending the hearing and determination of the petition the Honourable Court be pleased to grant an order barring the 2nd Respondent from stepping into the office, conducting, carrying out and/or exercising the duties of Homabay County Assembly Clerk.



- vi. That pending the hearing and determination of the petition the Honourable Court be pleased to grant an order declaring a fresh appointment and recruitment for the position of Homabay County Assembly Clerk
 - vii. That the costs of this application be provided for.
2. The Motion is supported by grounds on the face thereof, and the affidavit of Hezron Ochieng Orata, the 1st Petitioner herein. The crux of the motion being that the 2nd Respondent did not prior to her nomination, and subsequent appointment to the Office of Clerk of Homabay County Assembly, meet the mandatory requirements of Leadership and Integrity set out in Chapter Six of *the Constitution* of Kenya, 2010.
 3. The Respondents opposed the application vide a Replying Affidavit sworn by Ms. Faith Adhiambo Apuko, the 2nd Respondent herein, on 28th February, 2022.
 4. The application was urged interparties on 28th March, 2022. The Counsels for the Applicants/ Petitioners argued that the 1st Respondent did not follow due procedure in the recruitment of the 2nd Respondent and seek that the court stays the appointment and bar the 2nd Respondent from carrying out the functions of the office of Clerk of the 1st Respondent.
 5. It is the Applicants' further assertion that one Ms. Faith Apuko did not comply with the requirements of Chapter Six of *the Constitution* of Kenya, 2010, so as to warrant her appointment to the position of Clerk of Homabay County Assembly. It is the Applicants' position that the 2nd Respondent was not cleared by the Ethics and Anti-Corruption Commission prior to her appointment to the impugned position.
 6. The Applicants further contend that the 1st Respondent was not properly composed during the recruitment process under question.
 7. The Applicant aver that they have a prima facie case with chances of success, that they stand to suffer irreparable loss as residents of Homa Bay County, and that it is in the public interest that the orders sought are granted. They sought to rely in the holding in the case of *George Odera v Lake Victoria Environment Management Programme & 3 Others* (2015) eKLR to buttress this position.
 8. The Applicants argued that the exhibit produced by the Respondents is a self-declaration form and not a clearance certificate envisaged under Chapter Six of *the Constitution*. It is their positions that the 2nd Respondent being the custodian of the records of the 1st Respondent, should have been in a position to access the clearance certificate if at all the same was issued, but did not, hence an indication that the 2nd Respondent was not cleared by the EACC for the impugned appointment.
 9. The counsel further argued that the 2nd Respondent did not meet the 15 year experience requirement that was set in the advertisement.
 10. The Counsel for the Respondents argued that the application does not meet the established principles for the grant of temporary orders. It is the Respondents' further assertion that the Applicants have not established a prima facie case with possibility of success as their case is premised on corruption inquiry correspondences made against the 2nd Respondent by virtue of her office, and that the 2nd Respondent has never been charged in any court as to bar her from holding public office.
 11. The Respondents further aver that the orders sought are final orders which seek to injunct that which has already happened and that it is not in the interest of justice to grant the orders sought. They placed



reliance in the holding in the case of *Daniel Odhiambo v. Speaker County Assembly of Homa Bay* to support this position.

12. It is the 1st Respondents position that the 2nd Respondent was cleared by the EACC for appointment to the position of Clerk, and that the authenticity of the clearance produced before court has not been challenged.
13. The Respondents argue that the Applicants have not demonstrated a possibility of injury if the orders sought are not be granted, and hence their application falls short of the principles set out in the case of *Giella vs Cassman Brown*[1973] E.A 358. It is the Respondents' further argument that they stand to suffer irreparably as the 2nd Respondent has already taken up the position of Clerk of the 1st Respondent, and that a lot of public resources have been expended in the recruitment process that the Applicants seek to re-start.
14. The Respondents further argued that the Applicants/Petitioners did not apply for the position of Clerk and hence are not aggrieved parties in this petition and further that they have not demonstrated the public interest they seek to safeguard.

Determination

15. I have considered the application, the grounds and affidavit in support thereof, the Respondents Replying affidavit and the arguments by Counsels for both parties. The issue for determination is whether the application meets the threshold for grant of interim orders.
16. The criteria for the grant of interlocutory injunctions was well stated in *Giella v.Cassman Brown & Co. Ltd.*[1973] E.A. 358. The principles set out in this case are that first, the applicant must establish a prima facie case with a probability of success at the trial; secondly, that an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages; and thirdly, that if the court is in doubt, it will decide the application on the balance of convenience.
17. The Applicants' prayers are that this court nullifies the appointment of the 2nd Respondent and bar her from stepping into office or carrying out the functions of the office of Clerk. It is not disputed that the 2nd Respondent has already been appointed and sworn into office of Clerk of the County Assembly of Homa Bay, which appointment then means she is already carrying out the functions of that office.
18. The 2nd Respondent has produced in evidence a self-declaration form, being evidence of having sought the EACC's clearance for appointment. The 1st Respondent has however not told this court whether or not the clearance was granted, and if not, the reasons it was denied. These in my view are issues that need to be finally determined upon hearing of the main petition.
19. Further, I agree with the submissions by counsel for the Respondents that the orders sought are final in nature and granting them at this juncture will conclude the petition and deny the Respondents their day in court.
20. In conclusion, I find and hold that for the reasons foregone, the Applicants' application does not meet the threshold set in *Giella v Cassman Brown & Co. Ltd.*[1973] E.A. 358 and is hereby dismissed.
21. Costs shall abide the petition

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF JUNE, 2022.

CHRISTINE N. BAARI



JUDGE

Appearance:

Mr. Odeny and Ms. Odinga present for the Applicants/Petitioners

Mr. Otieno Obiero present for the Respondents

Ms. Christine Omollo-C/A

