



Kaudo v Speaker Homabay County Assembly & another; Nyangi & 4 others (Interested Parties) (Employment and Labour Relations Petition 27 of 2020) [2022] KEELRC 12698 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12698 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS PETITION 27 OF 2020
CN BAARI, J
SEPTEMBER 29, 2022**

BETWEEN

DANIEL ODHIAMBO KAUDO PETITIONER

AND

SPEAKER HOMABAY COUNTY ASSEMBLY 1ST RESPONDENT

HOMABAY COUNTY ASSEMBLY 2ND RESPONDENT

AND

MICHAEL NYANGI INTERESTED PARTY

JUMA OWUOR INTERESTED PARTY

LILIAN OGONO INTERESTED PARTY

JOSEPH OKOTO INTERESTED PARTY

FAITH APOKO INTERESTED PARTY

JUDGMENT

1. The petitioner through an amended petition dated February 16, 2022, and filed on April 19, 2022, seeks the following orders amongst others:
 - i. A declaration that the unilateral decision by the respondents to suspend and/or remove him amounts to witch hunt and violates his right to a fair trial as envisaged under article 50 of the [Constitution](#).
 - ii. A declaration that the decision of the respondents to suspend and/or remove the petitioner as the clerk of the County Assembly of Homabay without due process was in violation of the petitioner's rights under article 47 of the [Constitution](#).



- iii. A declaration that the actions of the respondents, or any other person acting under them, in proceeding to hold a meeting and pass resolutions to suspend the petitioner is null and void *ab initio*.
- iv. A declaration that the action of the 1st respondent in purporting to act on the decision of the 2nd respondent made on July 24, 2020, to suspend the petitioner is illegal, biased and void.
- v. An order of judicial review in the nature of *certiorari* to remove into this court and quash the decision of the 2nd respondent to suspend the petitioner on July 24, 2020.
- vi. This honourable court be pleased and do hereby grant judicial review order of *certiorari* to remove into this court and quash the decision of the 2nd respondent purporting to dismiss the petitioner through a letter dated December 30, 2020.
- vii. An order of permanent injunction do issue restraining the respondents from illegally or unfairly suspending, terminating and/or otherwise removing the petitioner from office.
- viii. A declaration be and is hereby issued that the purported appointment of Ms Faith Apuko, the 5th interested party herein, as the new substantive clerk of the Homabay County Assembly by the 2nd respondent was illegal, unprocedural, unlawful, null and void.
- ix. This honourable court be pleased and do hereby issue an order reinstating the petitioner to the position of clerk of the County Assembly of Homabay.
- x. A conservatory order do issue prohibiting the respondents, their members or any person acting under their behest and directions, from interfering with the execution by the petitioner of his duties as clerk of the County Assembly of Homabay.
- xi. That in the alternative, this court be pleased to grant judicial review order of *mandamus* to remove into this court and compel the 2nd respondent to redeploy the petitioner to work in any other position of equal status within the County Assembly of Homabay.

2. The petition was supported by the following grounds:

- i. That the 1st respondent on the July 24, 2020, issued a communication on a decision of the 2nd respondent to immediately suspend the petitioner from the position of the clerk of County Assembly of Homabay.
- ii. That the petitioner who was the secretary of the 2nd respondent did not call the meeting of July 24, 2020, and that the other board members have denied participating in the meeting, hence the decision to suspend the petitioner is not a decision of the board.
- iii. That the *County Assembly Service Act*, 2017, provides the procedure that must be complied with before the clerk can be suspended or removed from office hence the procedure followed is a nullity.
- iv. That this court (Hon Justice Radido Stephen) in a judgment delivered on December 17, 2020, dismissed the petitioner's petition on the basis that the gazettement of the petitioner was made by a deputy clerk of the 2nd respondent, who was then the Acting Speaker, while there was an order reinstating the impeached speaker. The petitioner contends that gazettement is not a requirement for appointment of clerk under section 13(1) of the *County Government Act*.
- v. That the petitioner appealed against the judgment under Kisumu Court of Appeal civil appeal No E036 of 2021, wherein the court delivered its judgment on February 11, 2022, allowing



the appeal and directing that the petition be remitted back to this court for hearing and determination.

- vi. That prior to the delivery of the now overturned judgment, there was in place an order restraining the respondents from removing the petitioner from the position of Clerk of the Assembly. That soon after the judgment referred to herein, the respondents rushed to dismiss the petitioner through their letter of December 30, 2020, without adhering to due process.
 - vii. That no charges were framed against the petitioner, no statement of the charges was forwarded to the petitioner and that no invitation was made for the petitioner to respond to the charges.
 - viii. That the respondents adopted new procedures unknown to law where the assembly formed a committee to investigate the petitioner and recommend his removal from office.
 - ix. That the respondents ignored cases pending before court including the appeal and proceeded to appoint a new clerk of the County Assembly to defeat the substance of the appeal.
 - x. That the report on the recruitment of the new clerk was prepared by the office of clerk and not by 2nd respondent. That the Acting Clerk, Ms Faith Apuko was also interested and had applied to be retained as the substantive clerk-an obvious conflict of interest.
 - xi. That Ms Faith Apuko was picked as the substantive clerk and the report received in the office of speaker on February 9, 2022, and approved on the same day contrary to Standing Order No 44.
 - xii. That the now purported new clerk was thus not properly appointed by the board and hence the petitioner's prayer for reinstatement is thus available.
 - xiii. That the petitioner having been in the civil service, had his employment terminated by the illegal and unfair dismissal.
3. The legal foundation of the petition was stated to include: -
- a. Article 27 of the Constitution which protects the petitioner from discrimination on ground of ethnicity and political affiliation
 - b. Articles 28 and 29 of the constitution which guarantees the petitioner's security of the person, protection of the law and freedom from cruel inhuman and degrading treatment
 - c. Article 41 and 47 of the Constitution on fair labour practices, and the right to fair administrative action
 - d. Article 236 of the Constitution which protects the petitioner from victimization for performing the functions of his office and dismissal or demotion in rank without due process.
 - e. Sections 5, 45 and 46 of the Employment Act which protects employees against discrimination, harassment and unfair termination or removal from office.
 - f. Section 12(5) of the County Government Act which protects the tenure of office of members of the 2nd respondent
 - g. Sections 5, 11, 17, 19 and 22 of the County Assemblies Service Act, which provides for neutrality, statutory functions and security of office and suspension of the clerk of a County Assembly.
4. The petitioner relied on both the pleadings, the written submissions, and judicial decisions in buttressing his case.
5. The respondents and the 5th interested party opposed the amended petition.



6. The 1st respondent filed two replying affidavits, one sworn by Ms Elizabeth Ayoo, the 1st respondent and another by a Ms Miriam Dorcas Osuri, the County Attorney of the 2nd respondent.
7. The 2nd respondent filed grounds of opposition dated June 17, 2022. Also, on record is a replying affidavit sworn by Ms Faith Apuko, the 5th interested party herein.
8. Parties canvassed the petition through written submissions. submissions were received from the petitioner, both respondents and the 5th interested party.

The Petitioner's Submissions

9. It is submitted for the petitioner that the respondents unlawfully and unfairly suspended and subsequently terminated the petitioner's employment contract without adhering to the mandatory statutory and constitutional requirements.
10. The petitioner contends that the decision to suspend him was not made by the 2nd respondent as envisaged in law, and hence the suspension violated constitutional dictates spelt out under articles 47 and 50 of the Constitution.
11. The petitioner submits that the 2nd respondent never made a resolution to suspend him as required under section 23 of the County Assemblies Service Act, 2017 and section 41 of the Employment Act, 2007. He had reliance in the holding in Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR.
12. The petitioner submits that he was never informed of the charges levelled against him nor heard before he was unlawfully terminated. He sought to rely in Judicial Service Commission v Mbalu Mutava & another (2015) eKLR where the Court of Appeal emphasized the right to be heard before termination.
13. The petitioner submits that the appointment of the 5th interested party as clerk of Homabay County Assembly, was unprocedural, improper, illegal null and void for reason that the appointment did not conform with the provisions of section 18(2) of the County Assembly Service Act.
14. It is further submitted for the petitioner that the 5th interested party was never nominated for appointment as the clerk by the 2nd respondent, as no legal and valid meeting was held to nominate her for appointment.

The 1st Respondent's Submissions

15. It is submitted for the 1st respondent that the petitioner has never been a clerk of the County Assembly of Homabay appointed in accordance with the County Assembly Services Act, 2017, and was only purporting to act as such as consequence of an alleged appointment by a body other than the 2nd respondent lawfully constituted.
16. The 1st respondent submits that the orders of injunction being sought by the petitioner should not be granted as the amended petition and the grounds raised by the petitioner do not meet the basic tenets of granting the injunctive orders.
17. In the submissions by the Speaker of the Assembly, it is submitted that the assembly has not legally recruited a substantive Clerk of the Assembly.
18. It is submitted that the questions to be determined in this petition are not processes of the assembly that are still on going but processes that are complete and hence this court has the authority conferred upon it by the Constitution to determine their legality.



19. It is further submitted that the board that purportedly recruited the 5th interested party was illegally constituted in blatant violation of Political Parties Disputes Tribunal orders and this honourable court's orders.
20. It is submitted that the position of clerk of Homabay County Assembly is vacant and hence available for the petitioner in case he is successful.

The 2nd Respondent's Submissions

21. It is submitted for the 2nd respondent that without prove that he was ever lawfully appointed, the petitioner's petition is stillborn. They sought to rely in the case of *Clerk, Nairobi County Assembly v Speaker, Nairobi City County Assembly & another; Orange Democratic Party & 4 others (interested parties)* [2020] eKLR.
22. The 2nd respondent further submits that the purported gazettement of the petitioner by one E.D Marienga on March 29, 2019, was a nullity and a contumacious act taken in breach of two rulings of this honourable court. They called in aid the case of *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 where Lord Denning opined thus: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. it is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
23. The 2nd respondent further submits that the petitioner was suspended on July 24, 2020, to pave way for investigations into his conduct; including his holding out as the clerk of the Homa Bay County Assembly. It is the 2nd respondent's further submission that the petitioner has deliberately misconstrued and misrepresented the provisions of the law relating to removal from office and relied on them, yet he had been suspended, not removed from office. They had reliance in *Denis Musyoka Mutui v Kwale County Assembly Service Board & another* [2018] eKLR.
24. It is submitted that following the delivery of the judgment of Justice Radido, the status quo orders previously in force ceased to exist. It is further submitted that the 2nd respondent was well within its rights, as guaranteed by the *CASA* and *CGA*, to act as it did
25. The 2nd respondent submits that no clear violation of the *Constitution* or statute has been made out by the petitioner in the process that lead to the 5th interested party's appointment. His quibbles border on triviality and matters that can be characterized as de minimis.
26. It is further submitted for the 2nd respondent that the 5th interested party was properly appointed, having fully demonstrated the legality of her recruitment in her affidavit before this court.
27. The 2nd respondent submits that a permanent/perpetual injunction of the kind sought by the petitioner, cannot lawfully issue as it would inhibit the respondents from exercising functions lawfully assigned to them by the *Constitution*, the *CGA* and the *CASA*. They sought to rely in the case of *Denis Musyoka Mutui v Kwale County Assembly Service Board & another* [2018] eKLR, where Hon Justice Rika observe:

“A perpetual injunction as sought by the claimant would be against the law and contract to which the claimant is subject. No employee is a permanent fixture at the workplace.



A perpetual injunction, barring the removal of the claimant from office, would turn the claimant, into a lifelong Kwale County Assembly Clerk.”

28. It is submitted that the petitioner’s failure to prove that he was lawfully appointed, militates against the grant of reinstatement. It is further submitted that the position of clerk was filled and has been occupied by three clerks since the petitioner’s removal, hence reinstatement would be not be a judicious and efficacious remedy.

Determination

29. I have considered the petition, the replies, the parties’ submissions and the authorities cited. The issues that fall for determination are:

- i. Whether the petitioner was an acting clerk or a substantive clerk of the County Assembly of Homabay
- ii. Whether the petitioner is entitled to the reliefs sought.
- iii. Whether the 5th interested party should be removed from office

Whether the petitioner was an acting or a substantive clerk of the County Assembly of Homabay

30. The 1st respondent filed two replying affidavits to the petition before court. The speaker of the County Assembly by her affidavit told the court that the petitioner was first appointed to the position of clerk of the 2nd respondent in an acting capacity on September 4, 2018, and later on the March 26, 2019, substantively appointed as clerk.
31. In the reply by the County Attorney, the court was told that the petitioner has never been a clerk of the County Assembly of Homabay appointed in accordance with the [County Assembly Services Act, 2017](#), and was only purporting to act as such, as a consequence of an alleged appointment by a body other than the 2nd respondent lawfully constituted.
32. The evidence before court indicates that the petitioner served the 2nd respondent in various capacities, including as Director Information and Technology and acting clerk, before his disputed appointment as the Clerk of the Assembly *vide* an appointment letter dated March 26, 2019.
33. Section 18 of the [County Assemblies Service Act](#) provides thus on the appointment of clerk:
- “(1) The nomination of a person for appointment as a clerk of the county assembly under section 13 of the [County Governments Act](#) shall be done through an open, transparent and competitive recruitment process.
 - (2) The name of a person nominated by the Board for appointment as the clerk of the county assembly shall be submitted to the county assembly for approval in accordance with the standing orders of the County Assembly.
 - (3) The board shall, within seven days of receipt of the resolution of the county assembly approving a person for appointment as clerk of the county assembly, appoint that person as clerk of the County Assembly.”
34. Further section 13 of the [County Government Act](#) provides that the clerk shall be appointed by the County Assembly Service Board with the approval of the County Assembly.
35. The petitioner’s case is that he was interviewed for the position of clerk of the 2nd respondent on the March 25, 2019, and appointed to the position on March 26, 2019.



36. Upon nomination by the board of the County Assembly, it is by law expected that the name of the nominee will be submitted to the county assembly for approval before the nominee is appointed to the position.
37. The process of appointment as espoused in section 18 of the [County Assemblies Services Act](#), as read with section 13 of the [County Government Act](#), does not, and cannot in my view be one that can be concluded in a record two days.
38. This leads me to the conclusion that the petitioner's appointment to the office of clerk of the 2nd respondent, did not meet the statutory requirements and is therefore null and void.
39. I find and hold that the petitioner was not validly appointed to the position of clerk of the County Assembly of Homabay.

Whether The Petitioner Is Entitled To The Reliefs Sought.

40. The petitioner has sought a number of reliefs including, a declaration that his suspension is null and void, an order of *certiorari* to quash his suspension and subsequent dismissal, a permanent injunction restraining the respondents from suspending, terminating or otherwise removing him from office, an order for his reinstatement to the position of clerk of the 2nd respondent and in the alternative, redeployment to an any other position of equal status within the County Assembly of Homabay.
41. Having made a determination that the petitioner's appointment was a nullity, the reliefs sought are not available on account of the fact that the petitioner did not validly and lawfully hold the position of clerk of the 2nd respondent. In *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 Lord Denning stated: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
42. The petitioner's appointment to the position of clerk is void for having fallen short of the statutory requirement. The court cannot therefore declare the petitioner's suspension and subsequent dismissal unlawful nor order his reinstatement, premised on the fact that the appointment itself is void, as to do so, would amount to putting something on nothing.
43. I hold that the petitioner not having been lawfully appointed, is not deserving of the relief of reinstatement.
44. On the petitioner's alternative prayer that the court compels the 2nd respondent to redeploy him to work in any other position of equal status within the County Assembly of Homabay, it is not clear to this court what other position would be of equal status to that of Clerk of the Assembly.
45. The petitioner should in my view have sought reinstatement to his previous substantive position of Director Information Technology, but he did not. It is trite law that parties are bound by their pleadings and the court cannot grant prayers the Petitioner did not seek.
46. In the upshot, I would say that by knowingly accepting to benefit from an illegality, the petitioner made his bed, and the court is left no option but to have him lie on it.



Whether The 5th Interested Party Should Be Removed From Office

47. The petitioner sought that one Faith Apuko, the 5th interested party herein, be joined in the petition as an interested party, and proceeded in his amended petition to seek her removal from office on the basis that she was not properly appointed to the position.
48. Parties had earlier sought to consolidate this petition with petition numbers E010 of 2022 and E08 of 2022, filed before this court, and which challenge the recruitment of the 5th interested party to the position of clerk of the Homabay County Assembly.
49. The court in a ruling rendered on June 21, 2022, declined the prayer for consolidation and directed that each of the three petitions be heard and determined on their own merits.
50. The issues surrounding the recruitment of the 5th interested party being a subject of other suits pending before this court, will be dealt with and resolved within the suit where she is sued as a respondent.
51. I will therefore not determine the validity or lack thereof of the 5th interested party's appointment in this petition, and the prayer to declare her appointment unlawful is dismissed.
52. In conclusion I find the petitioner's amended petition lacking in merit and is hereby dismissed in its entirety
53. Parties shall bear their own costs of the suit.
54. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Makokha Present for the Petitioner
Mr. Oduor present for the 1st Respondent
Mr. Onderi Present for the 2nd Respondent
N/A for the 1st-4th Interested Parties
Mr. Obiero present for the 5th Interested Party
Ms. Christine Omollo-C/A

