



Ongeri v Chairman, County Assembly Service Board Nyamira & 2 others; Onyari (Interested Party) (Petition E022 of 2022) [2022] KEELRC 12954 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12954 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E022 OF 2022**

S RADIDO, J

OCTOBER 19, 2022

**IN THE MATTER OF ARTICLES 2(1), 10(2)(B) & (C), 22(1), 23(1), 27, 41(1),
47(1), 48, 165 AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
AND VIOLATION OF THE CONSTITUTION OF KENYA, 2020**

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS,
PARTICULARLY ARTICLES 3, 10, 20, 21(1), 22, 23, 25(B), 27(1) & (2), 28, 30, 35,
41(1), 47, 48, 162(2) (A), 232 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE DECISION
BY THE RESPONDENTS OF REFUSING, FAILING AND/OR NEGLECTING TO
CONFIRM THE ACTING CLERK OF THE COUNTY ASSEMBLY OF NYAMIRA IN
VIOLATION OF ARTICLES 27 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

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AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE COUNTY ASSEMBLY SERVICES ACT, 2017

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT



BETWEEN

GEOFFREY ONGERI PETITIONER

AND

**CHAIRMAN, COUNTY ASSEMBLY SERVICE BOARD NYAMIRA 1ST
RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD, NYAMIRA COUNTY 2ND
RESPONDENT**

COUNTY ASSEMBLY OF NYAMIRA 3RD RESPONDENT

AND

MR. DUKE ONYARI INTERESTED PARTY

JUDGMENT

1. Mr Duke Onyari (the interested party) was appointed as the deputy clerk county assembly of Nyamira in 2014.
2. On or around April 3, 2018, the county assembly service board (the board) appointed the interested party as acting clerk. The acting appointment was extended on October 6, 2020 for 3 months. Another extension was made on January 6, 2021.
3. On May 23, 2022, Geoffrey Onger (the petitioner) lodged a petition with the court alleging that the failure to confirm the interested party to the office of clerk despite acting for over 4 years violated the interested party's right to legitimate expectation, was discriminatory and violated articles 10, 28, 29, 41 and 47(1) of the Constitution.
4. The petitioner sought the following remedies:
 - (1) A declaration issuing that the interested party be deemed as duly appointed as the clerk of the county assembly of Nyamira upon the expiry of six months from the date of appointment in acting capacity on April 3rd 2018.
 - (2) If order (1) above comes into force, the court does issue an order of mandamus compelling the respondents to swear into office the interested party immediately.
 - (3) A declaration that the respondent (sic) have violated the interested party's right to legitimate expectation by not confirming or appointing him as the clerk to the county assembly of Nyamira.
 - (4) An order for general damages for discrimination, violation of the petitioner's right to human dignity and self-worth, violation of the interested party's right of access to information, fair labour practices, fair administrative action, and freedom from servitude.
 - (5) A permanent injunction restraining the respondent (sic) from taking the interested party back to the position which is lower than his current position of the clerk or victimising or treating the petitioner unfairly on account of this petition.



- (6) A declaration that the interested party herein is the most qualified, competent, and suitable applicant to occupy the position of the clerk as per the requirements in the [County Assembly Services Act](#).
 - (7) A declaration that the respondent (sic) violated the petitioner's rights under articles 27, 28, 35, 41 and 47 of the [Constitution of Kenya](#).
 - (8) Costs of this petition.
5. Filed at the same time was a motion under a certificate of urgency.
 6. The court issued directions on the motion and the petition on May 23, 2022 and directed the parties to appear for further directions on June 9, 2022.
 7. The directions included the service of the motion and petition and that the motion and petition be heard together and filing and exchanging responses and submissions.
 8. Despite being present during the session when the directions were issued, the respondent did not file any responses or submissions.
 9. The petitioner filed his submissions on 3 June 2022 (should have been filed and served before May 27, 2022).
 10. The petitioner identified the Issues in dispute as:
 - i. Whether the members of a county assembly can be sworn in by an acting clerk?
 - ii. Whether by failing to have a clerk, the respondents are likely to cause a conundrum?
 - iii. Whether the petitioner is entitled to the reliefs sought in the application?
 - iv. Which party bears the cost of the application?
 11. The court has considered the motion, petition, affidavit(s), and submissions on record.
Can an acting clerk of a county assembly swear members of the county assembly?
 12. The petitioner took the view that section 9(3) of the [County Governments Act](#) was explicit regarding the officer who could swear in members of a county assembly.
 13. The section provides as follows:
Members of a county assembly shall be sworn in by the county assembly clerk on the first sitting of the county assembly, in the manner set out in the schedule to this act.
 14. The petitioner further took the position that the interested party being an acting clerk, was powerless and not capable of performing the functions assigned to the office of the clerk as envisioned under section 20 of the [County Assembly Services Act](#) because he held a temporary office, waiting for the appointment of a substantive clerk.
 15. The answer to the question posed by the petitioner does not require much to unravel.
 16. Sections 43 and 45 of the interpretation and general statutes act provide the answers to the question.
 17. Section 43 of the act states:
Powers and duties of holder of office



Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised, and the duty shall be performed by the person for the time being holding that office.

18. In the same vein, section 45 of the act prescribes: reference to holder of office includes a person discharging functions of that office

In this act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.

19. There is a person acting in the office of the clerk of the county assembly. He is the interested party.
20. In this court's view, there is no legal impediment stopping the interested party or any other person duly appointed to act as the clerk from swearing in members of the county assembly.
21. In this respect, the court notes that the members of the county assembly have already been sworn in.

Unfair labour practice/conundrum

22. The Interested party was appointed to act as clerk of the county assembly on April 3, 2018. By the time the petitioner was moving the court, some 4 odd years later, he was purportedly still acting.
23. Citing the case of *Silas Kaumbuthu Mbutura v Central Dairy Cooperative Union Ltd* (2015) eKLR, the petitioner urged that the extended acting appointment amounted to unfair labour practice.
24. The petitioner also contended that the failure to extend the interested party's acting appointment and not providing him with a specific contract/duration of work went contrary to section b, paragraph 10, and section f, paragraph 5 of the county public service human resource manual, 2013.
25. The petitioner did not file a copy of the county public service human resource manual, 2013, in court.
26. Nevertheless, it is doubtful, in the view of the court, whether such a manual which by its title suggests applicability to the executive organ of the county government, applied or applies in the case of staff of the legislative arm of the county government.
27. The sum of the above is that the petitioner did not prove his case to the required standard.
28. Before concluding, the court would like to observe that the petition did not raise any constitutional questions which could not be determined by approaching the court in the normal way.
29. Further, the petitioner did not indict or include a necessary party to the litigation. The appointing or employing authority within the county assembly service is the county assembly service board.
30. Instead of directing his case against the county assembly service board, the petitioner sued the chair of the county assembly service board, the county public service board, and the county assembly.
31. Constitutional litigation needs a little more care and diligence in drafting and prosecution. Both were lacking, and the petition was doomed from the onset. It was not only frivolous but incompetent.

Conclusion and Orders

32. The court finds no merit in the motion and petition, and both are dismissed with costs.

DELIVERED VIRTUALLY FROM KWALE, DATED AND SIGNED ON THIS 19TH DAY OF OCTOBER, 2022.



RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Gogi & Associates Advocates

For 1st and 3rd Respondents

For 2nd Respondent

For Interested Party

Court Assistant Chrispo Aura

