



REPUBLIC OF KENYA



**Akell v Clerk Migori County Assembly & another (Petition E012 of 2022)  
[2022] KEELRC 12767 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12767 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E012 OF 2022  
CN BAARI, J  
OCTOBER 6, 2022**

**BETWEEN**

**MEREZA ATIENO AKELL ..... PETITIONER**

**AND**

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

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

**JUDGMENT**

1. The petitioner lodged a petition dated February 25, 2022, seeking the following reliefs:
  - i. A declaration that the petitioner was lawfully appointed as a member of the Board of the 2<sup>nd</sup> respondent by virtue of section 12(3)(d) of the *County Governments Act 2012*.
  - ii. A declaration that the actions of the 1<sup>st</sup> respondent moving a motion dissolving the Migori County Service Board, debating and adopting the same on February 10, 2022, and dissolving the Migori County Service Board was tantamount to constructively dismissing the petitioner from her position as an appointed member of the board.
  - iii. A declaration that the petitioner's right to be heard and right to fair administrative action was infringed on by the actions of the 2<sup>nd</sup> respondents in moving the motion dissolving the Migori County Service Board and adopting the same on February 10, 2022.
  - iv. A declaration that the decision of the 2<sup>nd</sup> respondent made on February 10, 2022 dissolving the Migori County Service Board and any action taken as a result of the same was unconstitutional and illegal.
  - v. A declaration that the petitioner despite the actions of the respondents on the February 10, 2022 remained a valid employee of the 2<sup>nd</sup> respondent until her appointment is legally revoked



or comes to an end and is legally entitled to remuneration for the same for the period that she remains so.

**Or in the alternative**

- vi. Compensation of one year equivalent of the petitioner's salary as general damages for wrongful dismissal.
  - vii. An order that the 2<sup>nd</sup> respondent pays the petitioner such general damages or compensation as the court may deem fit for violations of her fundamental rights under the Constitution.
2. The petition is premised on the grounds that: -
- i. The petitioner was appointed by a letter dated 9<sup>th</sup> July, 2018, to serve as a member of the County Assembly Service Board of Migori under section 12(3)(d) of the County Government Act.
  - ii. By dint of the said appointment, the petitioner was gazetted as a member of the Board on the 26<sup>th</sup> of July, 2018, and that by virtue of that appointment the petitioner was entitled to a monthly salary of Kshs 177,000/-
  - iii. The petitioner has served in the said position from the year 2018 until February 10, 2022.
  - iv. Sometime on the February 10, 2022, a member of the 2<sup>nd</sup> respondent namely Graham Kagali presented a motion before the 2<sup>nd</sup> respondent, which motion intended to dissolve the County Assembly Service Board and reconstitute a Board including two Independent members serving in the County Assembly to replace two external members of the public, one of whom is the petitioner herein.
  - v. The motion was accordingly seconded by Samwel Orima – MCA North Kamagambo being a member of the 2<sup>nd</sup> respondent and subsequently debated and adopted by the 2<sup>nd</sup> respondent on the February 10, 2022.
  - vi. The aforesaid actions of the respondents, amounted to the petitioner being relieved of her duties by way of constructive dismissal.
  - vii. Premised on the approval, the 2<sup>nd</sup> respondent proceeded to elect the members they deemed fit to be members of the Board.
  - viii. The 2<sup>nd</sup> respondent accordingly selected Grace Oyamo & Christopher Onanda as representatives of the members of the Board appointed under section 12(3)(d) of the County Government Act.
  - ix. There was no particular petition filed to remove the petitioner herein as required by law, hence the petitioner was replaced without according her a right to be heard.
3. The respondents replied to the petition vide a replying affidavit sworn by Vincensia Kionge on June 13, 2022.
4. The respondents' case is That:
- i. The petitioner was charged with an ongoing anti-corruption case related to her office and capacity as a Board member in Anti-Corruption case 002 of 2021.



- ii. The petitioner having been charged could not remain in office, and was suspended by operation of law in accordance with section 62 of the [Anti-Corruption & Economic Crimes Act](#), Laws of Kenya.
- iii. There is no legal framework for the appointment of board members in an acting capacity and the petitioner was halted by operation of law after being charged with a graft-related offense. The respondents further aver that the removal process was carried out in a formal manner to ensure that the assembly's operations went smoothly.
- iv. The respondents aver that the 5 board members were axed due to the same cause and in similar manner but the petitioner is the only one who elected to challenge the process that was executed in public the interest.
- v. The respondents' aver that due to the petitioner's inability to carry out the duties of her office, the method adopted to remove the petitioner was proper.
- vi. The respondents aver that the petitioner has failed to establish the elements of the purported constructive dismissal.

### **The Petitioner's Submissions**

- i. It is the petitioner's submission that she was not suspended by operation of law as alleged by the respondents, but instead, that the actions of the respondents amounted to constructive dismissal for dismissing the petitioner from the position that she was duly appointed to. She placed reliance in the holding in [Coca Cola East & Central Africa Limited v Maria Kagai Lugaga](#) [2015] eKLR.
- ii. The petitioner further submits that according to the [County Government Act](#), removal of an appointed member is by revocation of the appointment by the County Assembly, yet in the instant case, there was a petition for removal of the members of Migori County Assembly Service Board, and the petition was debated by the 2<sup>nd</sup> respondent without informing the petitioner or other members of the Board contrary to the provisions of the Migori County Assembly Standing Orders.
- iii. It is submitted that the Board was dissolved and by extension the members of the Board removed office without giving them a hearing. It is further submitted that the 2<sup>nd</sup> respondent acted without considering any set down legal procedures that they ought to have followed in dismissing the members of the Service Board.
- iv. It is the petitioner's submission that she had legitimate expectation that she would be informed of the allegations against her, and given a chance to defend herself but this was not to be, instead, she was dismissed without a hearing.
- v. The petitioner further submits that the respondents were bound to follow Migori County Assembly Standing Orders in any of their proceedings. She submits that in exercising their mandate, the respondents completely ignored the provisions of section 64 of the [Migori County Assembly Standing Orders](#).

### **The Respondents' Submissions**

- i. It is submitted for the respondents that at the time of the filing this petition, the petitioner did not disclose to the court that she was charged with an Ethics and Anti-corruption case in Kisumu Anti-corruption case number 02 of 2021, and was thus suspended by operation of section 62 of the [ACECA Act](#) and on half salary.



- ii. The respondents further submit that by being charged in court, the petitioner was unable to continue serving, and since the entire board was also charged and suspended, the county assembly was unable to function, hence the dissolution was intended to ensure continuity of service at the assembly in accordance with section 10(b) of the *County Assembly Service Act*.
- iii. The respondents submit that for reason that the petitioner sought an equitable relief, she should have approached the court with clean hands and complete disclosure of all relevant information.
- iv. It is submitted for the respondents that the petitioner is not entitled to a discretionary 12 months salary award of damages for reasons she successfully secured a temporary restraining order to preserve the status quo, which order the respondents did not contest/oppose. It is further submitted that in view of the foregoing and the fact that the judgment is being rendered after the petitioner has concluded her term of office, it is appropriate to say that she has served term in office and has suffered no detriment.
- v. It is submitted that the petitioner has not demonstrated any damage she has suffered, and has indeed not suffered any damage other than costs if her petition is successful. They sought to rely on the holding in petition Number 86 of 2020; *Lilian W. Mbogo-Omollo v Cabinet Secretary*, ministry of public service and gender, attorney general, where, after concluding that the petitioner's right to due process was violated, and taking into account the circumstances surrounding the damages claimed, Justice Radido awarded Kshs 1 (Kenya Shillings one only) as damages.

### **Analysis and Determination**

5. I have carefully considered the petition herein, the respondents' replying affidavit, and the submissions by both parties. The issues that arise for determination are:
  - i. Whether the petitioner's Constitutional rights were violated
  - ii. Whether the petitioner is deserving of the remedies sought

### **Whether the petitioners' Constitutional rights were violated**

6. The petitioner contends that she was appointed to the officer of member of Migori County Assembly Service Board pursuant to section 12(3)(d) of the *County Governments Act* 2012. Her further case is that she was removed from office on the basis of a petition tabled and passed by the County Assembly of Migori on the February 10, 2022, without being afforded an opportunity to be heard.
7. The respondents on their part asserted that the petitioner was removed from office in the greater public interest for reason that she was on suspension having being charged with an economic crime being Anti-Corruption Case No 002 of 2021, and that the Board of the 2<sup>nd</sup> respondent needed to be operationalized in view of the fact that all its five members had been suspended.
8. The petitioner premised her petition on articles 10, 20, 47 and 50 of the *Constitution*, arguing that the respondents were bound to adhere to the national values and principles of good governance, and largely that the constitution entitles her to fair administrative action and the right to be heard.
9. In *Alex Kyalo Mutuku & 7 others v Ethics and Anti-Corruption Commission & 2Ors* (2016) eKLR the court held that suspension does not take away the right of the person so suspended to be presumed innocent, and the burden still lies on the prosecution to prove his or her guilt beyond reasonable doubt.



10. In the case of *Lillian W Mbogo-Omollo v Cabinet Secretary Ministry of Public Service and Gender & another* [2020] eKLR, Justice Radido stated thus:

“It is my view therefore that section 62 of ACECA does not violate the petitioner's rights under Article 50(2)(a).”
11. The fact that the petitioner was on suspension as required under the ACECA, did not take away her entitlement to fair process envisaged under articles 47 and 50 of the *Constitution*.
12. The respondents or any employer for that matter, retains their right to set in motion removal proceedings under their internal disciplinary mechanisms, where they deem an employee's continued suspension is untenable. They are however bound to do so within the confines of the law.
13. This was the decision of the Court of Appeal of England in *North West Anglia NHS Foundation Trust v Gregg* (2019) CA) where the court observed that an employer does not usually need to wait for the conclusion of any criminal proceedings before dismissing an employee or commencing or continuing internal disciplinary proceedings, and courts will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger (not just a theoretical danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene.
14. In *Narok County Government & Ar v Richard Bwogo Birir & Ar* (2015) eKLR, the Court of Appeal held that removal from public or state office was constitutionally chained to due process and the rules of natural justice.
15. As much as I agree with the respondents that the Board needed to operate in the interest of service delivery, the manner in which the petitioner was removed from office violated her rights under articles 41, 47 and 50 of the *Constitution*. She certainly deserved a hearing before the motion to remove her from office was debated and passed.
16. It is prudent for persons in authority to remember that no matter the reason(s) for their decision to relieve an employee of their duties, the constitutional and statutory tenets of fair process are paramount and must be complied with to the letter.
17. Consequently, I find and hold that although the respondents had seemingly justified reasons to remove the petitioner from office, the procedure they adopted in doing so, violated the petitioner's fundamental rights to be heard and fairly so.

### **Whether the petitioner is deserving of the remedies sought**

18. The petitioner has sought various reliefs premised on the violation of her constitutional rights, including a declaration that her right to be heard and right to fair administrative action was infringed upon by the actions of the 2<sup>nd</sup> respondents, a declaration that her appointment remained valid until legally revoked or comes to an end, compensation for wrongful dismissal and general damages.
19. For starters, the petitioner did not in her pleadings reveal to the court that she was on suspension on account of charges under the ACECA and the court only learnt this from the submissions filed by the respondents.
20. The court further notes that the petitioner was able to serve her full term of office on account of the orders of this court staying her removal pending hearing and determination of this petition.



21. Having made a declaration that the petitioner's rights were infringed upon, and considering that the petitioner served her full term of office, I subsequently grant the following reliefs: -
- i. That the petitioner is awarded Kshs 177,000/- for violation of her Constitutional rights.
  - ii. That the costs of the petition shall be borne by the respondents
22. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Apondi present for the petitioner

Mr. O. Obiero present for the respondents

Christine Omollo- C/A

