



**Ondijo Owiti & another v Kisumu County Governor & 2 others (Cause 101 of 2019) [2022] KEELRC 12779 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12779 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE 101 OF 2019**  
**S RADIDO, J**  
**OCTOBER 5, 2022**

**BETWEEN**

**THOMAS ONDIJO OWITI ..... 1<sup>ST</sup> CLAIMANT**

**RICHARD DICK OGENDO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**KISUMU COUNTY GOVERNOR ..... 1<sup>ST</sup> RESPONDENT**

**KISUMU COUNTY SECRETARY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Thomas Ondijo Owiti (1<sup>st</sup> claimant) was appointed as County Executive Committee member for Public Works, Roads, and Transport while Richard Dick Ogenido (2<sup>nd</sup> claimant) was appointed as County Executive Committee member for Economic Planning and Development on or around December 6, 2017 by the Governor, County of Kisumu.
2. On or around February 19, 2019, the Governor reorganised his cabinet, and the 2<sup>nd</sup> claimant was re-assigned to a new Department of Business, Cooperatives and Marketing.
3. Yet again, on October 16, 2019, the Governor reorganised the cabinet, and a press release was issued on the same day. According to the press release, the claimants' fate was not disclosed.
4. However, the media reported soon after that that the claimants had been sacked.
5. Consequently, the claimants moved the court on November 4, 2019, alleging:
  - (i) Constructive termination.
  - (ii) Unlawful termination.



6. The respondents filed a joint response on January 13, 2020, and after several false starts, the hearing commenced on March 10, 2022. The hearing continued on April 25, 2022 and ended on May 26, 2022.
7. The claimants filed joint submissions on July 12, 2022, and the respondents on August 2, 2022.
8. The court has considered the pleadings, evidence, and submissions.
9. The court had, on March 18, 2021, adopted the issues as proposed by the claimants being:
  - (i) Whether the 1<sup>st</sup> claimant resigned from the position of County Executive Committee member for Public Works, Roads, and Transport with effect from October 16, 2019?
  - (ii) Whether the 2<sup>nd</sup> claimant resigned from the position of County Executive Committee member for Economic Planning and Development with effect from October 16, 2019?
  - (iii) Whether the claimants' services with the respondents were unlawfully terminated or ended through constructive termination?
  - (iv) Whether the claimants are entitled to the reliefs sought in the statement of claim?
  - (v) Who is to bear the costs of the suit?

### **Constructive dismissal**

10. Although the claimants advanced a case for constructive dismissal, in the humble view of the court, the evidence presented did not suggest constructive dismissal.
11. Constructive dismissal denotes that the employee leaves with or without notice because of the intolerable work environment or conduct of the employer (see *Western Excavating Ltd v Sharp* [1978] ICR 221 and *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR).
12. The claimants here did not place before the court evidence to demonstrate constructive dismissal.

### **Unlawful termination of appointment**

13. The claimants' first contention was that on or around October 17, 2019, they learnt through the media that the Governor had reorganised his cabinet and that upon getting copies of the press release, they found that their dockets had been assigned to other persons (their names were missing from the new cabinet list).
14. In the view of the claimants, the decision of the Governor to remove them from office under the guise of reorganisation of the cabinet was a scheme to get rid of them without complying with the procedures for the removal of a County Executive Committee member as set out in section 40 of the *County Governments Act*.
15. It is not in dispute that the Governor did not comply with the requirements of section 40 of the *County Governments Act* before purporting to remove the claimants under the guise of reorganisation of the county executive.
16. The court would, therefore, have made a finding that the removal of the claimants was unlawful.
17. However, since the respondents' primary defence was that the claimants had resigned, the court must examine the defence before making a determinative finding on the lawfulness of the separation.



## **Voluntary resignation**

18. The respondents' primary contention was that the claimants voluntarily resigned.
19. The case will, therefore, turn on whether the claimants voluntarily signed the resignation letters.
20. To support the contention of resignation, the County Secretary testified that the claimants visited his office on October 16, 2019 and handed over the resignation letters to his secretary, who acknowledged the same by stamping and signing thereon.
21. The respondents also called a Forensic Document Examiner from the Directorate of Criminal Investigations, who produced a report confirming that the claimants signed the resignation letters.
22. The claimants strongly resisted the respondents' assertions that they had resigned voluntarily and testified that the resignation letters were forgeries.
23. The claimants also impugned the resignation letters on the ground that they were on the letterhead of the County Government and not their respective dockets and that the advocate who allegedly witnessed their signatures did not input the witnessing date.
24. The 2<sup>nd</sup> claimant also challenged the genuineness of his resignation letter on the basis that it referred to a docket he no longer held/did not exist at the time of the purported resignation.
25. The claimants, despite gruelling cross-examination, did not manage to impeach the credibility of the Forensic Document Examiner or the authenticity of the report(s) he produced in court.
26. In this respect, the claimants did not provide evidence that their signatures were superimposed on the resignation letters or that there was electronic manipulation of the signatures.
27. The court has no reason to doubt that the claimants signed the resignation letters.
28. What is not clear is when they signed the letters. Clarity on the date of signing could have been made by calling the advocate who witnessed the claimants append their signatures.
29. None of the parties deemed it fit to call the advocate.
30. In the court's view, it is more probable that the claimants signed the letters as part of an arrangement or a political handshake with the Governor in anticipation of later parting of ways. At the time of signing the letters, none of the parties anticipated that there could be a reassignment of roles.
31. The probability is also borne out by the fact that the office from which the 2<sup>nd</sup> claimant was resigning had ceased to exist, and he had been assigned to a differently named docket.
32. With the conclusion that the resignation letters were part of a political arrangement, the court declines to find that the resignations were involuntary or that there was unlawful termination of employment.

## **Conclusion and Orders**

33. Flowing from the above, the court finds no merit in the cause, and it is dismissed with an order that each party bears own costs.
34. The claimants' submissions were filed by the firm of O J Okoth & Co Advocates The record does not have notice of change of advocates.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 5TH DAY OF OCTOBER 2022.**



**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

**For Claimants Bruce Odeny & Co. Advocates**

**For Respondents Manyonge Wanyama & Associates LLP Advocates**

**Court Assistant Chrispo Aura**

