



Nyaoga v Chairman, Kisii County Assembly Service Board & 3 others (Petition E036 of 2022) [2022] KEELRC 13279 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13279 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E036 OF 2022**

S RADIDO, J

NOVEMBER 23, 2022

IN THE MATTER OF ARTICLES 1, 2(1), 10(2), 22(1), 23(3), 27(1) & (2), 28, 35, 41, 47, 48, 50(1), 159(2), 162(2), 232 AND 258 OF THE CONSTITUTION, 2010

AND

**IN THE MATTER OF THE VIOLATION OF AND/OR
THREATENED VIOLATION OF THE CONSTITUTION, 2010**

AND

IN THE MATTER OF THE COUNTY ASSEMBLY SERVICE ACT, 2017

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, OF 2015

AND

**IN THE MATTER OF SUSPENSION ISSUED BY
THE SPEAKER, THE KISII COUNTY ASSEMBLY**

AND

IN THE MATTER OF THE KISII COUNTY ASSEMBLY

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

JAMES OMARIBA NYAOGA PETITIONER

AND



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

SPEAKER, KISII COUNTY ASSEMBLY 2ND RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD 3RD RESPONDENT

DANIEL OMWOYO MBAKA 4TH RESPONDENT

RULING

1. James Omariba Nyaoga (the petitioner) was appointed as the Clerk of the County Assembly of Kisii in 2013.
2. On or around July 25, 2022, Hon David Kombo acting as the Speaker and Chair of the County Assembly Service Board (Chair), issued a show-cause notice to the Petitioner.
3. The petitioner was requested to respond within 7 days.
4. When 2 members of the Board learnt of the show-cause, they wrote to the chair on August 5, 2022 to disown the notice.
5. On August 24, 2022, the Chair wrote to the petitioner to inform him of his suspension from office. The letter invoked section 22 of the [County Assembly Services Act](#).
6. On the same day, the chair appointed the 4th respondent to act as clerk.
7. The 2 board members again wrote to the chair to disown the suspension of the petitioner on the ground that the board had not sanctioned it.
8. The petitioner moved to court on August 30, 2022 to challenge the suspension.
9. Simultaneously filed with the petition was a motion under a certificate of urgency.
10. The court issued directions on the motion on August 31, 2022.
11. The court also issued a temporary injunction staying the contemplated disciplinary action against the petitioner.
12. An acting Deputy Clerk of the Assembly filed a replying affidavit on September 16, 2022 on behalf of the County Public Service Board.
13. When the motion came up for an inter-partes hearing on September 20, 2022, the respondents informed the court it wanted to raise a preliminary objection.
14. The court directed the respondents to file the objection and also granted leave to the petitioner to file a further affidavit. The parties were also directed to file and exchange submissions.
15. The chair filed a replying affidavit on September 27, 2022.
16. On the same day, the chair and the 4th respondent filed a notice of preliminary objection contending:
 - (1) That this honourable court is devoid of the requisite jurisdiction as the petitioner/applicant has not exploited the appeal mechanisms provided under articles 234(2) of the [Constitution of Kenya, 2010](#), section 77 of the [County Governments Act](#) as read with sections 85, 86 and 87(2) of the [Public Service Commission Act, Regulation 4\(c\) of the Public Service Commission \(County](#)



Appeals procedures) Regulations, 2022 and clause D36 of the Kisii County Assembly Human Resource Manual, 2016.

- (2) That, consequently, the notice of motion application together with the petition herein should properly lie before the Public Service Commission and not before this honourable court.
 - (3) That in the circumstances, the entire notice of motion application together with the petition herein is procedurally and substantively bad in law, frivolous, vexatious and an abuse of the process of the court, hence suitable to be dismissed and/or struck out with costs to the respondents.
17. The petitioner then filed a further affidavit on September 29, 2022.
 18. The petitioner's submissions were paid for on October 6, 2022 (but a copy on presented this morning), while the County Assembly Service Board filed its submissions on October 31, 2022.
 19. The 1st and 4th respondents filed their submissions on November 2, 2022.
 20. The court has considered the preliminary objection, the affidavits, and the submissions.
 21. Article 234(2)(i) of the Constitution, as read with section 77(1) & (2) of the County Governments Act and sections 85, 86 and 87(2) of the Public Service Commission Act, do not in the opinion of the court apply to employees of the legislative organ of government, whether at the national or devolved level of government.
 22. The court is of that view because of the doctrine of separation of powers. The Public Service Commission is a public body established for the purposes of the executive branch.
 23. However, the County Assembly of Kisii, through the County Assembly Service Board, expressly clothed the Public Service Commission with the power to hear and determine appeals from decisions of the Board in the exercise of its disciplinary control in clauses D.35 and D.37 of the Human Resource Manual, 2016.
 24. Clause D 35 provides where material:
 - (b) If the clerk does not furnish the reply to the charge/charges within the period specified, or if in the opinion of the board, the clerk fails to exculpate himself/herself, the Board shall notify the clerk of its decision in writing. upon receipt of the decision of the Board under subsection 3, the clerk may appeal to the Public Service Commission of Kenya as provided for in section D.37 with a copy to the Board. The Board shall allow the Public Service Commission sixty days to determine the appeal before taking any further action on the clerk.....
 25. Clause 37 of the manual, on its part, is in the following terms:

Any officer of the County Assembly Service dissatisfied or affected by a decision made by the County Assembly Service Board or a person in exercise of disciplinary control may appeal to the Public Service Commission against the decision within fourteen days of receipt of the decision letter, and the Service Board shall allow the Commission sixty days to respond before finalising the matter under appeal. The commission will communicate its decision in writing to the Board and the officer. If the Commission's decision agrees with that of the Board, the aggrieved officer shall comply with the decision. The Public Service Commission being an appellate body, its decision shall be binding to the County Assembly Service Board. The appeals may be on any decision relating to the employment of a person in the County Assembly Service, including a decision in respect of:-

 - (a) recruitment, selection, appointment and qualifications attached to the office;



- (b) remuneration and terms and conditions of service.
26. The above clauses lead to the conclusion that the County Assembly Service Board of Kisii clothed the Public Service Commission with appellate jurisdiction over its decisions while exercising disciplinary control over its employees.
27. The source of the Public Service Commission's jurisdiction does not, therefore, flow from statutory law but from the board's internal instruments.
28. The petitioner was challenging decisions made by the board or on behalf of the board, whether quorate or properly constituted, in the purported exercise of disciplinary control and under a chair who is no longer a member of the board, his term having ended with the election of a new speaker.
29. The challenge should have been placed before the Public Service Commission in the first instance or before the current County Assembly Service Board for review.
30. The jurisdiction of the court was invoked prematurely.
31. Before concluding, the court hopes that the change of guard at the County Assembly will bring to an end the myriad leadership disputes that have inundated the courts over time.

Conclusion and Orders

32. The court declines jurisdiction at this stage of the dispute.
33. The petition is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23RD DAY OF NOVEMBER 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For applicant Onsongo & Co. Advocates

For Respondents Ochoki & Co. Advocates

Court Assistant Chrispo Aura

