



**Tinga v Speaker, County Government of Homa Bay & 8 others; Ethics and
Anti-Corruption Commission (Interested Party) (Petition E008 of 2022)
[2022] KEELRC 13534 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E008 OF 2022
CN BAARI, J
DECEMBER 15, 2022**

BETWEEN

FELIX MESHACK ONYANGO TINGA PETITIONER

AND

SPEAKER, COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

COUNTY ASSEMBLY OF HOMA BAY 3RD RESPONDENT

ELIZABETH AYOO 4TH RESPONDENT

JEFF ONGORO 5TH RESPONDENT

RICHARD OGINDO 6TH RESPONDENT

LILIAN OGONO 7TH RESPONDENT

JOSEPH OKOTO 8TH RESPONDENT

FAITH APUKO 9TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

1. The petitioner lodged this petition on February 16, 2022, seeking the following reliefs:
 - i. A declaratory orders declaring that the actions of the 1st – 7th respondents violated the [Constitution](#) and are null and void ab initio.



- ii. An order declaring the appointment of the 9th respondent herein as unconstitutional therefore null and void *ab initio*.
- iii. An order declaring the whole recruitment exercise as an unconstitutional and an order for fresh advertisement, interviews and selection of the substantive holder of the office of the clerk of the County Assembly of Homa Bay.
- iv. A declaration be issued that the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th respondents, their representatives and assigns contravened the Constitution of Kenya, the County Governments Act 2012, The County Assembly Service Act No 24 of 2017, the Employment Act 2007 and the Leadership and Integrity Act 2012.
- v. A declaration be issued that the 9th respondent is not compliant with the provisions of chapter 6 of the Constitution due to the ongoing investigations hence is not fit to hold any public office.
- vi. The respondents be ordered to pay costs of this petition.
- vii. Such further orders and directions be issued to facilitate just, expeditious and fair determination of this petition.

2. The petition is premised on the grounds that:

- i. On the December 3, 2021, the Homa-Bay County Assembly issued an advertisement calling for applications for the position of Clerk of the County Assembly, pursuant to section 13 of the County Governments Act 2012 and section 18 of the County Assemblies Service Act 2017.
- ii. The advertisement set out the mandatory requirements for appointment which included leadership and integrity as set out in chapter 6 of the Constitution.
- iii. The County Assembly issued another advertisement on 9th December, extending the deadlines for submission of applications to the December 28, 2021.
- iv. A total of 14 applicants submitted their applications including the 9th respondent herein, out of whom 6 applicants met the minimum prerequisites for the position and were shortlisted for interviews on the January 6, 2022.
- v. The 9th respondent emerged as the best candidate, scoring an average score of 89.3%, and was therefore recommended for appointment and her name was forwarded to the County Assembly in accordance with section 18(2) of the County Assemblies Service Act, 2017.
- vi. On February 9, 2022, in the 6th session of Homa-Bay County Assembly the report of the 2nd respondent on the appointment of the 9th respondent was laid before the floor of the house for debate, wherein, it was debated and approved.
- vii. On February 9, 2022, a letter addressed to the 2nd respondent and referenced Ref: Hbca/Hr/02/06/01/ Vol.1: The house resolution of the approval of Ms. Faith Adhiambo Apuko to the position of the clerk of the County Assembly of Homa-Bay, which letter was addressed to the chairperson Homa-Bay County Assembly Service Board, informing the board of the approval of the 9th respondent for the appointment as the County Assembly Clerk.
- viii. The call for interviews of December 3, 2021, as well as the shortlisting report, set as mandatory requirements a certified clearance certificate from the Ethics and Anti-Corruption Commission.



- ix. The grading criteria set the production of the clearance certificate at 5% of the total score of 100%, and according to the initial score sheet from the shortlisting report the 9th respondent was given a total score of 5% without the clearance certificate from the Ethics and Anti-Corruption Commission.
 - x. The report of the County Assembly Board on the recruitment dated January 6, 2022, the respondent is given a full score of 7 by all commissioners of the 2nd respondent for complying with the mandatory requirements.
 - xi. The documents submitted, reveals that while all other documents were available, the mandatory clearance from the interested party herein did not exist.
 - xii. The interested party on the December 17, 2021 commenced investigations into irregular spending by the County Assembly as communicated in its letter of the December 17, 2021, and copied to the 1st and 9th respondents.
 - xiii. The 9th respondent was not cleared nor did she receive a clearance certificate from the interested party making her not compliant with the mandatory dictates on leadership and integrity.
 - xiv. The 9th respondent who was serving as the Ag Clerk of Homa-Bay County Assembly was directly implicated. It therefore cannot be that the same person would be fit to hold the office of the Clerk of the County Assembly.
 - xv. The 1st to 7th respondents demonstrated lack of leadership, integrity, observance of the constitutional mandate and carelessness by proceeding to appoint the 9th respondent, being aware of the ongoing investigations by the interested party.
 - xvi. The appointment is characterized by procedural infirmities and illegalities where communication of the appointment was done by the appointee, 9th respondent herein, who ought not to have been in office executing mandates or duties that were assigned for the substantive holder of that office.
 - xvii. The decision to irregularly and illegally appoint the 9th respondent without obtaining the necessary clearances, violated and continue to violate the dictates of the Constitution, and fundamental principles of the Constitution rendering the act unconstitutional hence invalid.
3. The respondents replied to the petition vide various replying affidavits, sworn on different dates by Jeff Ongoro, Elizabeth Ayoo and another by Faith Apuko, the 9th respondent herein. The 2nd and 3rd respondents' case is that:
- i. Following the advertisement for the appointment of the Clerk of the County Assembly, the 9th respondent filled a declaration form as required of her together by the interested party, and submitted the forms in duplicate to the interested party's offices making them fully aware of her application.
 - ii. It is the duty of the Ethics and Anti-Corruption Commission (the interested party herein) to investigate and give a clearance certificate to the 2nd and 3rd respondents, once they are satisfied that there is no cause for alarm and which is demonstrated by appending the official stamp on the declaration form presented by the 9th respondent.
 - iii. Section 13(2) of the County Government Act provides for the requirements a person must meet to be able to apply for the position of Clerk in the County Assembly, one of them being compliance with chapter 6 of the Constitution of Kenya, 2010.



- iv. The 2nd and 3rd respondents ensured that all the applicants duly complied with the provisions of the Constitution.
- v. Through an advertisement in a newspaper with nationwide circulation, the 2nd respondent invited applicants to submit applications for the position of Clerk of the Homa Bay County Assembly, and a total of 14 applicants, including the 9th respondent herein submitted their applications.
- vi. Out of the 14 applications received, 6 applicants met the minimum qualifications for the position, and as a result, were shortlisted for interviews on January 6, 2022. The interviews were conducted at Great Lakes Hotel in Kisumu county by the 2nd respondent.
- vii. Following the interview process, the 9th respondent was notified of her progress, where she emerged as the best candidate scoring an average of 89.3% and was therefore recommended for appointment and her name forwarded to the 3rd respondent in accordance with section 18(2) of the County Assemblies Act, 2017.
- viii. The 2nd respondent through a letter dated February 10, 2022 notified the 9th respondent of her approval on the floor of the house of the 2nd respondent, and the 3rd respondent proceeded to appoint her as the Homa Bay County Assembly Clerk pursuant to the provisions of section 18(3) of the County Assembly Services Act, 2017
- ix. The 9th respondent being given a score of 7, is as a result of the documents that she presented to the panel during the interview, which were all the certificates from government bodies as stipulated in chapter 6 of the Constitution of Kenya, 2010, and the County Government Act, which means that she complied fully with all the procedures of the law.
- x. The duty of the County Assembly in regards to the appointment of clerk is limited to approving the person by the County Assembly Service Board.
- xi. The petitioner has no *locus standi* against the 2nd and 3rd respondents in regards to the clearance forms, and that the onus of proof of whether the 9th respondent was cleared for appointment lies with the interested party and not the respondents herein.
- xii. Nothing barred the interested party from either giving a report on the alleged corrupt activities or giving a report as to the 9th respondent's unfitness and/or inability to hold office, prior to the interview.
- xiii. The Ethics and Anti-Corruption Commission office has not commenced any proceedings against the 2nd and 3rd respondents for abuse of office, and the letters annexed in the petition are mere invitations for investigative interviews, and there is no evidence in those letters implicating the two offices for abuse of office.
- xiv. The 9th respondent has been undertaking her official duties on an acting capacity from the time Mr Hannington Ochieng' resigned from office to the time she was appointed as the substantive clerk of Homa Bay County Assembly.
- xv. That there is no provision of the law that limits any person performing duties in an acting capacity to six months.
- xvi. The respondents beseech the court to dismiss this petition as it lacks the locus to sue against the 2nd and 3rd respondents, and has since been overtaken by events. Further the petitioner has



not proved to this honourable court that the 2nd and 3rd respondents lacked integrity and/or have misused their offices in any manner.

Reply to Petition by the 1st Respondent

4. In an affidavit sworn by Ms Elizabeth Ayoo, the 1st respondent supported the petition on the following grounds that: -
 - i. On December 3, 2021, the 9th respondent, who was acting clerk at the time delivered to the office of the 1st respondent, a letter dated December 2, 2021 purporting to notify her that her office had received a notice of the intention to move a motion for a resolution to remove the 1st respondent from office pursuant to the provisions of section 11 of the County Governments Act, 2012, and Standing Order No 14B of the 2nd respondent's Standing Orders, and which notice had been signed by one third of all the members of the County Assembly as stipulated in the County Governments (Amendment) Act, 2020
 - ii. On December 6, 2021, the 9th respondent delivered to the 1st respondent's office a letter of even date by which she purported to suspend her from performing the functions of the office of speaker of the 2nd respondent on the basis of the notification of the intention to move a motion for her removal, citing a law whose operation has been suspended by a court of law.
 - iii. On receipt of the documents, the 1st respondent filed in this court, judicial review No E016 of 2021, seeking orders removing into the court the decisions contained in the two documents aforesaid for the purposes of their being quashed and prohibiting the 2nd respondent from moving on with debate on the subject motion.
 - iv. Judicial review No E016 of 2021 was eventually determined in favour of the 1st respondent, yet the advertisement for the position of clerk was sent out without her knowledge, permission or involvement.
 - v. The 1st respondent avers that she did not take part in, and was not invited to the meeting of the 2nd respondent alleged to have taken place at Great Lakes Hotel Kisumu, and does not know in what circumstances the 9th respondent was sworn in as the clerk, when she did not given her an appointment letter.
 - vi. The 1st respondent states that during the course of her service as the acting clerk, the 9th respondent has displayed gross insubordination and a refusal to take instructions or reply to correspondence from her office at a level that borders on disrespect to her and her office, and hence her support for the petition.
5. The 9th respondent responded to the petition through a replying affidavit dated February 21, 2022, a further affidavit dated June 4, 2022, and a supplementary affidavit dated June 24, 2022. She opposed the petition on the grounds that: -
 - i. The recruitment process was subcontracted to LESNA Consultants Limited, who addressed a letter to the Ethics and Anti-corruption requesting for a clearance report for all candidates on December 31, 2022, which was attached to the 9th respondent's supplementary affidavit of June 24, 2023
 - ii. That LESNA Consultant did not receive a response from the Ethics and Anti-Corruption Commission, and so they proceeded to clear the applicants based on the absence of a negative report, as required by policy and procedure.



- iii. The 9th respondent further states that the absence of clearance does not imply a negative report, and that the petitioner has not proven that the outcome would have been different if report (if any) had been presented.
- iv. The 9th respondent states that she did fill a self-declaration form which was received by the interested party and that there is nothing in law called a clearance certificate from Ethics and Anti-Corruption, instead, the commission issues a confidential report to the employing agency, and only in circumstances where the applicant had a negative report.
- v. The petitioner did not write to the Ethics and Anti-Corruption body to seek independent proof to support their claim of the 9th respondent's incapacity to hold office, despite the fact that it is a cardinal rule that the alleging party must gather evidence and prove it, and has instead opted to engage in a fishing expedition.
- vi. The fact that the Ethics and Anti-Corruption Commission, who are parties to this lawsuit, and have not filed a response, might have declared their stance and put an end to this battle, being that the documents being discussed are their documents and as a public body, the 9th respondents labour rights should not be violated due to their silence and indolence.
- vii. The petition is based on the false assumption that "absence of a report implies a negative report"; the respondents have demonstrated that the report was indeed requested, but the Ethics and Anti-Corruption agency that are parties to this case did not provide any adverse report against any of the applicants
- viii. The 9th respondent presented a police clearance report stating that she has not been charged with a crime that would prevent her from holding public office, and that prior to this appointment, she was an officer at the assembly and even served in an acting capacity as Ag Clerk of County Assembly.

The Petitioner's Submissions

- 6. The petitioner submits that chapter 6 of the [Constitution](#) of Kenya is predicated upon the assumption that state officers are the nerve of the republic and carry the highest level of responsibility in the management of state affairs and therefore, their conduct should be beyond reproach.
- 7. It is the petitioner's submission, that a body charged with exercising mandate as a recruiting and vetting entity and responsible for the hiring of officers to public offices, carries a higher duty in the enforcement of the constitutional provisions and cannot turn a blind eye to this responsibility under the pretext that yet another entity has a similar responsibility, particularly in the face of glaring evidence that questions and/or indicts the character of a would-be appointee.
- 8. The petitioner submits that it has not been denied that there were serious unresolved questions with regards to the integrity of the 9th respondent, which were disregarded by the respondents in making the appointment.
- 9. The petitioner further submits that the 1st to 9th respondents, while recruiting, recommending and appointing the 9th respondent into the Office of the Clerk of Homabay County Assembly, did not show how she attained a full score of 7 marks for providing all mandatory certificates without a clearance certificate from the interested party especially amidst the investigations and scrutiny into her financial probity.



10. The petitioner submits that it was the duty of the respondents to consider the unresolved integrity issues in the exercise of their functions and powers under the [County Governments Act](#), and make a determination on the suitability of the 9th respondent under chapter 6 of the [Constitution](#). The petitioner had reliance in [Benson Ritbo Mureithi v V.J.W Wakhungu & 2 others](#) [2014] where the court while holding that the appointment was unconstitutional stated that:

“In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the interested party which do not appear to have been considered by the 1st respondent in making the appointment to the chairmanship of the Athi Water Services Board. It is the duty of the 1st respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the interested party under chapter 6 of the Constitution. The court has found that no inquiry was made with regard to the suitability of the interested party under the Constitution, a responsibility that fell on the 1st respondent under the provisions of the Water Act as read with section 7 of the 6th schedule of the Constitution. The responsibility still remains to make that inquiry.”

11. The petitioner submits that a reading of chapter 6 of the [Constitution](#), together with the enabling provisions of other legislations, such as the [County Government Act](#), 2012, the [County Assembly Act](#), the [Leadership and Integrity Act](#), contemplates the procedure for clearance for appointment into public office.

12. The petitioner submits that the moral, ethical and integrity standards required while seeking appointment into public office are higher compared to those of any other person and as such, the Office of the Clerk of Homa Bay County Assembly, being a public office, any person, including the 9th respondent, while applying to be considered for appointment to the said office is required to meet the requisite standard of integrity.

13. The petitioner submits that the Ethics and Anti-Corruption Commission, the interested party herein, was established to realize the provisions of the [Constitution](#) on integrity, and its mandate is to oversee and enforce implementation of chapter six of the [Constitution](#) and the [Leadership and Integrity Act](#).

14. The petitioner submits that the clearance certificate from the interested party herein was a mandatory requirement for application for appointment to the position of Clerk of Homa Bay County Assembly, and it was required before interviewing and shortlisting. As such, it was mandatory for the 9th respondent to provide a clearance certificate from the interested party herein, to prove that her integrity and ethical standards were unquestionable, and hence fit to be appointed into the Office of the Clerk of the County Assembly, a public office.

The Respondents' Submissions

15. It is submitted for the respondents that section 133(1) of the [County Government Act](#) protects members and staff of the board from personal liability, action, claim or demand in relation to any act or thing done in good faith in the exercise of functions of the board. The respondents further submit that arising from this protection, they have been wrongly joined to these proceedings.

16. The respondents submit that the position of assembly clerk was advertised, applicants were interviewed, an evaluation report prepared, a recommendation was made and the county assembly approved the nominated candidate for appointment.



17. The respondents submit that candidates scoring and scoring matrices are matters within the sole preserve of the evaluation panel and which cannot be adjudicated upon by this honourable court.
18. The respondents submit that the 9th respondent complied with the mandatory requirements for appointment to the position of Clerk of the County Assembly, and that the petitioner has failed to show any unlawfulness in the 9th respondent's recruitment.
19. The respondents submit that the Leadership and Integrity Act has a prescribed procedure for investigation and prosecution of breaches of the Integrity code. It is their further submission that section 42 of the Leadership and Integrity Act, provides for the process of making complaints and their investigation, and that section 43 proceeds to provides that matters may be referred to the EACC, the AG for civil proceedings or the DPP for criminal proceedings. They sought to rely in James Gacheru Kariuki & 69 others v William Kabogo Gitau & 104 others [2019] eKLR to buttress this position.
20. The respondents submit that this court is the wrong forum to make complaints of breach of chapter 6 of the Constitution, the Leadership & Integrity Act, having already prescribed the procedure to be followed. They had reliance in the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, for this proposition.

Analysis and Determination

21. This petition concerns the appointment of the 9th respondent to the position of Clerk of the County Assembly of Homabay, and not the 8th respondent as has been variously stated in the petition, and going by the name cited in the petition.
22. Appointment of clerk of a county assembly, is a statutory process that is well regulated. Section 13 of the County Government Act, establishes the office of Clerk of County Assembly, and goes on to spell out the qualifications for the holder of that office, in the following words: -
 - (1) There shall be a clerk of the county assembly, appointed by the county assembly service board with the approval of the county assembly.
 - (2) A person shall not be qualified for appointment as a clerk of the county assembly unless such person—
 - (a) is a citizen of Kenya;
 - (b) holds a degree from a university recognised in Kenya or its equivalent;
 - (c) has had at least five years relevant professional experience;
 - (d) meets the requirements of leadership and integrity set out in chapter six of the Constitution.”(emphasis mine)
23. Further, section 18 of the County Assemblies Service Act, states thus on appointment of Clerk of the Assembly: -
 - (1) “ The nomination of a person for appointment as a clerk of the county assembly under section 13 of the County Governments Act (No 17 of 2012) 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.”
24. The issue in this petition is whether the 9th respondent herein, met the requirement of leadership and integrity set out in chapter six of the Constitution prior to her appointment and accession into office of Clerk of the County Assembly of Homabay.
25. The petitioner contends that the 9th respondent did not meet the requirements of chapter six of the Constitution on the basis that she did not submit a certificate of clearance by the Ethics and Anti-Corruption Commission (EACC) together with her other documents during the recruitment process.
26. Section 13 (2)(d) of the County Government Act, no doubt makes compliance with chapter 6 of the Constitution a qualification for appointment to the position of Clerk of the Assembly. The question for this court is what this compliance to chapter six entails.
27. Section 4 of the Leadership and Integrity Act, states as follows in respect of its implementation of the Act:
- “(2) The commission is responsible for overseeing and enforcing the implementation of this Act.”
28. Further, section 42 (1) of the Leadership and Integrity Act states:
- “A person who alleges that a state officer has committed a breach of the code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint.”
29. In James Gacheru Kariuki & 69 others v William Kabogo Gitau & 104 others [2019] eKLR, Lady Justice C. Meoli held:
- “If indeed the petitioners believed the respondents had violated the Public Officers Ethics Act or chapter six of the Constitution as they seem to assert through their averments in the petition, nothing stopped them from availing themselves of the procedure in section 42 of the Leadership and Integrity Act so that investigations could be carried out and if appropriate, recommendations made to prosecute in accordance with section 43 of the Act.”
30. The petitioner did not take up the matter of the purported violation of chapter six of the constitution with the interested party as required under section 42 of the act, and opting instead to come to court contrary to the express provision of the Act. In Speaker of the National Assembly v James Njenga Karume [1992] eKLR, the court stated:
- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
31. The first schedule to the Leadership and Integrity Act, is a self-declaration form used for purposes of compliance with chapter six of the Constitution. The form and the Act are silent on how and the timeline within which the EACC will convey their certification/approval or otherwise of a job applicant for appointment to public office.



32. In the instant case, the 9th respondent presented her self-declaration form to the EACC and evidently, EACC did not give any feedback on not only the 9th respondent, but all the applicants for the impugned position. The issue then is whose role is it to present the EACC clearance to a recruiting agency, and whether EACC's silence like in this matter, amounts to an approval/clearance.
33. The EACC was sued herein as an interested party for obvious reason. It did not however deem it fit to respond to the petition. The practice as I understand it, is that communication on clearance or otherwise is not given directly to the candidate/applicant unlike the other clearances under chapter 6 of the *Constitution*, instead, the EACC relays the information to the recruiting agency as confidential information and the applicant usually does not get to know the information, unless an adverse report is made that requires their response.
34. In my view, the fact that the EACC did not give an adverse report or a report at all on the suitability of the 9th respondent to hold public office, should not and cannot be visited upon her. It is not her fault that the report/clearance was not given; it might be that there was no report to give on account of her clean record. Suffice it to say, that by submitting her self-declaration duly filled, witnessed and commissioned, the 9th respondent fulfilled that which was her duty to do in compliance with chapter six of *Constitution*.
35. Further, the letters on investigations by EACC of some members of the respondents, did not include the 9th respondent, yet the petition herein seeks the removal of the 9th respondent premised on the investigations.
36. It is also true to say that the fact that an individual is under investigation does not take away their right to be presumed innocent until otherwise proved.
37. The petitioner has also challenged the scoring in the recruitment interview. In my view, how marks or scores are awarded in a recruitment process is entirely a decision of the recruiting panel and not a constitutional requirement. Violation of the *Constitution* cannot be pegged on such grounds.
38. In my view, the petitioner has not proved substantive procedural defects or specific constitutional violations in the recruitment of the 9th respondent that would render the recruitment and the subsequent appointment and accession into office of clerk unconstitutional. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the court held thus;

“The general evidentiary standard applicable in judicial review of the procedural propriety of appointment process is that there must be a showing by the claimant that there were substantive defects in that procedure, fundamental omissions, or a consideration of extraneous considerations as to render the cumulative process unconstitutional.”
39. The petition lacks merit and is dismissed with no orders as to costs.
40. Judgment of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 15TH DAY OF DECEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Kehonji present for the Petitioner



Mr. Obiero present for the 1st, 3rd to 9th Respondents

N/A for 2nd Respondent

Christine Omollo- C/A

