



Oloo v Governor, Homabay County & 3 others; Salaries & Remuneration Commission (Interested Party) (Petition E044 of 2022) [2022] KEELRC 13348 (KLR) (1 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13348 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E044 OF 2022
CN BAARI, J
DECEMBER 1, 2022**

BETWEEN

EVANS OTIENO OLOO PETITIONER

AND

GOVERNOR, HOMABAY COUNTY 1ST RESPONDENT

COUNTY GOVERNMENT OF HOMABAY 2ND RESPONDENT

HOMABAY COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

COUNTY ASSEMBLY OF HOMABAY 4TH RESPONDENT

AND

SALARIES & REMUNERATION COMMISSION INTERESTED PARTY

RULING

1. The petitioner's motion is dated November 8, 2022, and filed in court on November 9, 2022. It is brought pursuant to articles 2, 3, 10, 27, 73, 159, 165, 179, 226, 232, 236, 258 and 259 of the Constitution, the provisions of the County Government Act, the Public Finance Management Act, Public Service (values and Principles) Act and the Salaries and Remuneration Commission Act.
2. The petitioner seeks an order that:
 - a. That after hearing of this application, an order be issued staying the effect of the notice dated October 11, 2022, by the respondents, their agents, proxies or anybody acting on their behalf from appointing, continuing with the process of appointment as Advisors, Liaison Officers and Governors Delivery Unit; Charles Odhiambo, Erastus Randusi, Silas Jakakimba, Nicholas Ayieta Odawa, Paul Onditi, Patrick Were, Silas Nyachoroh Rabah, Rachel Adhiambo Ogotu, Bernard Omuga, George Okoth Mboya and Gordon Oketch Kendo, Erick Jakim, William



Abonyo Onditi, Collins Kalee, Kennedy Dede, Magdalene Owino, Lucy Odwar, Eng Daniel Onyango Ogenga, Thomas Nyonje, Omondi Ayieko and Jared Omondi Omolo until the substantive petition is heard and determined.

3. The application is supported by grounds on the face of the motion and the affidavit of Evans Otieno Oloo, the petitioner herein. The motion is premised on alleged illegal, unconstitutional, unprocedural appointments effected by the respondents in disregard of the Constitution and statutory provisions on appointment.
4. The petitioner avers that tax payers' monies are at risk of being spent to remunerate persons who have been put in office illegally.
5. The petitioner avers that the appointments violate article 179(3)(b) of the Constitution which provides that members appointed by the Governor as County Executive Members upon approval by the County Assembly, shall not exceed ten (10) if the Assembly has thirty or more members.
6. Counsel for the petitioner argued that the position of Advisors has not been provided for in law, hence the appointments are irregular. Counsel further submitted that the Homabay County Public Service Board (CPSB), whose mandate it is to establish offices and carry out recruitment, was not involved in the appointments subject of this motion and petition.
7. It is further urged for the petitioner that the appointments are in breach of the 2/3rd gender principles, hence unconstitutional.
8. It is argued that the application meets the grounds set out in *Giella v Cassman Brown*, for grant of temporary orders. The petitioner further argues that he has a *prima facie* case with high chances of success and that the damages that will be suffered out way any potential damage that the appointees will suffer if the orders sought are granted.
9. The 1st, 2nd and 3rd respondents opposed the motion vide a replying affidavit sworn by George Ila on November 20, 2022, and the oral submissions by Mr Ochieng, Counsel for the respondents at the interparties hearing.
10. The respondents aver that this being a constitutional petition, it is incumbent upon the petitioner to have articulated the articles of the bill of rights alleged to have been infringed and the particulars of the breaches, but which he has not.
11. The respondents further aver that the appointment of Advisors and other officers in the Executive Office of the Governor was meant to enhance the effective functioning of the office of HE the Governor.
12. The respondents state that Advisors and other officers appointed are not constitutional office holders, instead, they form part of the normal every day employees of the County Government, whose numerical numbers can only be set in the context of all other county employees.
13. Counsel told the court that the application herein is overtaken by events for reason that the County Executive Committee Members have already been vetted and appointed.
14. It is Counsel for the respondents' assertion that a County Government cannot operate without County Executive Committee Members, and thus the balance of convenience tilts in favour of not granting the orders sought.



Determination

15. I have considered the application, the grounds in support, the replying affidavit in opposition, and the oral submissions by both Counsels. The singular issue for determination is whether the appointment of Advisors and other officials in the Executive Office of HE the Governor should be stayed pending determination of the petition herein.
16. The petitioner's reasons for seeking the suspension of the appointment is that the County Public Service Board, which is charged with the mandate of establishing offices and recruit persons to those offices was not involved in the now impugned appointments.
17. The legal principle of securing injunctions is pillared on the famous Court of Appeal decision in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 which requires that an applicant demonstrates a *prima facie* case with a probability of success, show that they will otherwise suffer irreparable injury, and where the court is in doubt, then it can decide the application on a balance of convenience.
18. The court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002, described a *prima facie* case thus: "In civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter"
19. Section 60 of the *County Government Act*, clearly spells out the criteria for establishment of offices in the County Public Service. The respondents vide their replying affidavit have told the court that the Advisors and other officers subject of the appointments in issue herein, are employees in the county public service like any other employees of the county government.
20. The respondents have however not demonstrated whether and how the office of Advisor was established, and how the offices were filled. Questions also arise on what the approved number of Advisors in a County Government is, and whether their remuneration has been set and/or approved by the Salaries and Remuneration Commission.
21. Although the County Public Service Board of Homabay is the 3rd respondent herein, it did not tell the court whether it was in any way involved and/or consulted in the establishment of the office of Advisor, and whether it recruited the persons named by HE, the Governor of Homabay to the position of Advisors.
22. It is also not clear what the functions and roles of the Advisors is, and how they interface with County Executive Committee Members and Chief Officers, whose offices and functions are clearly spelt out in the law.
23. The replying affidavit and oral submissions by Counsel for the 1st, 2nd and 3rd respondents refers to the nomination and appointment of County Executive Committee Members, who are not the subject of the instant application. The application herein, only concerns the appointment of Advisors and Members of the Governor's Delivery Unit.
24. The respondents did not thus address the court on the procedure or the status of the appointment of Advisors which is the subject of the motion herein.
25. The issues concerning the remuneration attendant to the appointments herein, coupled with the questions of establishment of offices and the number of persons a Governor can appoint in the name of Advisors, no doubt demonstrates a *prima facie* case between the parties herein. The damages likely to be suffered by the County Government, and by extension the people of Homabay, is an irreparable



injury that cannot adequately be compensated by an award of damages. (See [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR)

26. I find the petitioner's motion to have merit, and falls squarely within the threshold set in *Giella v Cassman Brown* (supra) for grant of temporary orders of injunction, following which, I make orders as follows: -

- a. That an order be and is hereby issued staying the effect of the notice dated October 11, 2022, issued by the 1st respondent appointing or continuing with the process of appointment or the continued being in office of Charles Odhiambo, Erastus Randusi, Silas Jakakimba, Nicholas Ayieta Odawa, Paul Onditi, Patrick Were, Silas Nyachoroh Rabah, Rachel Adhiambo Ogutu, Bernard Omuga, George Okoth Mboya and Gordon Oketch Kendo, Erick Jakim, William Abonyo Onditi, Collins Kalee, Kennedy Dede, Magdalene Owino, Lucy Odwar, Eng Daniel Onyango Ogenga, Thomas Nyonje, Omondi Ayieko and Jared Omondi Omolo, as Advisors, Liaison Officers and Governors Delivery Unit, until the petition herein is heard and determined.
- b. The costs of the application shall abide the petition.

27. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 1ST DAY OF DECEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Otunga present for the Petitioner

Mr. Ochieng present for the Respondents

N/A for The Interested Party

Ms. Christine Omollo-C/A

