



**Vincent v Akosi; Kakamega County Assembly Service Board &
another (Interested Parties) (Constitutional Petition E010 of 2022)
[2022] KEELRC 13380 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13380 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CONSTITUTIONAL PETITION E010 OF 2022**

**JW KELL, J
DECEMBER 1, 2022**

BETWEEN

LUMITI VINCENT PETITIONER

AND

BONIFACE SAKWA AKOSI RESPONDENT

AND

KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD INTERESTED PARTY

COUNTY ASSEMBLY OF KAKAMEGA INTERESTED PARTY

RULING

1. The petitioner *vide* a petition dated October 21, 2022 and received in court on the October 27, 2022 sought the following reliefs:-
 - a. A declaration that the membership of the respondent to the CASB has the potential to engender grave conflicts of interest situations which are likely to cripple the operations of the CASB, and as a result, the respondent is unfit to continue serving in the CASB.
 - b. That consequently, the respondent be removed from the membership of the CASB under provisions of section 10 (1) (a) of the CASA.
 - c. That the minority side of the county assembly of Kakamega be at liberty to proceed and replace the respondent with a suitable candidate to take up the slot reserved for it in the CASB under the provisions of section 12(3) (c) of the CGA.



- d. That the minority side of the county assembly of Kakamega be at liberty to proceed and replace the respondent with a suitable candidate to take up the slot reserved for it in the CASB under the provisions of section 12 (3) (c) of the CGA.
 - e. Costs of the petition be borne by the respondent.
2. The petitioner on the October 27, 2022 filed notice of motion dated October 21, 2022 brought under certificate of urgency seeking the following reliefs:-
 - a. That this matter be declared as urgent in nature and service in the first instance be dispensed with.
 - b. That pending the *inter-partes* hearing of this motion, this honourable court be pleased to bar the respondent from participating in any discussions, deliberations and/or decisions touching on the issues contained in the suspension letter of the then substantive clear (sic) dated the December 6, 2022.
 - c. That pending the final determination of the petition herein, this honourable court be pleased to bar the respondent from participating in any discussions, deliberations and/or decisions touching on the issues contained in the suspension letter of the then substantive clear(sic) dated the December 6, 2021.
 - d. That costs be provided for.
 3. The application and petition are opposed by the respondents and interested party. The interested parties entered appearance through law firm of Okumu Kubai & Co Advocates and filed grounds of opposition to the application and the petition dated November 9, 2022.
 4. The respondents entered appearance through the law firm of GS Law LIP and filed notice of preliminary objection to have suit dismissed dated November 6, 2022 raising the following grounds:-
 - a. The honourable court lacks the jurisdiction to entertain the petition and application herein since membership to and removal from the county assembly service board (an independent body) does not fall under article 162 (2) of the Constitution and section 12 of the Employment and Labour Relations Court Act. In Attorney General & 2 others -vs- Okiya Omtata Okoiti & 14 others (2020)eKLR the Court of Appeal held:-

What all this suggest to us is that the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the FIRC erroneously held, but a special constitutional innovation , a *sui generis* devise to address challenging governance needs and gaps. The appointment of the chairperson and members of the commission. Did not involve any of the parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act. With due respect, it was completely off the mark for the learned judge to hold that the recruitment of the chairperson and members of the commission raised employment and labour relations issues merely because they were to be remunerated from the consolidated fund. On the parity of that reasoning, the election of removal from office of the president of the republic or appointment and removal of judges of the superior courts would amount to employment and labour relations issues. Merely because they are remunerated from the consolidated fund”. Emphasis in bold and underline ours”.



- b. The petition violates the mandatory provisions of section 12 (5) of the County Governments Act and section 10 (2) & (3) of the county Assembly Services Act which provide that:
- (2) Any person may petition the county assembly for the removal of the member of the board on the grounds specified under subsection (1).
 - (3) The procedure for the removal of a member of the board under this section shall be as prescribed in the standing orders of the county assembly.

The petition therefore violates the established and severally reiterated principle and doctrine of exhaustion. In Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others (2015)eKLR the Court of Appeal stated that:-

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be for a of last resort and not the first part of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of juridical consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. (emphasis in bold and underline ours).

- c. The court lacks the jurisdiction to do that which is a preserve of the county assembly and the court (High Court) can only have jurisdiction to review the decision of the county assembly on removal from office.
 - d. The petition is in violation of the constitutional principle of *trias politica*, separation of powers, as it is inviting the judiciary to do that which is statutorily and constitutionally a preserve of the county assembly. This court is not the county assembly of Kakamega to vote on the removal of the respondent.
5. The court ordered the notice of preliminary objection dated November 6, 2022 be canvassed first by way of written submissions.
 6. The respondents relied on the law and authorities cited under their notice of preliminary objection.
 7. The interested parties filed written submissions dated November 15, 2022 and received in court on November 16, 2022.
 8. The petitioner filed through their advocates KN N Wesutsa & Co Advocates written submissions to the preliminary objection dated November 14, 2022 and received in court on November 15, 2022.

Determination

9. The notice of preliminary objection is to effect that the court lacks jurisdiction to entertain the application and petition herein since membership and removal of county assembly service board (independent body) does not fall under article 162 (2) of the Constitution and section 12 of the Employment and Labour Relations Court Act and relies on the decision in Attorney General & 2 others v Okiya Omutata Okotti & 17 Others (2020) eKLR where Court of Appeal held that the appointment of chairperson and members of the commission did not involve any parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act.



10. Secondly that the petition violates the mandatory provisions of Section 12 (5) of the [County Governments Act](#) and section 10(2) & 3 of the [County Assemblies Act](#) which provide for method of removal of members of the board.
11. The objector to buttress their submissions relied on the decision of [Geoffrey Muthinja Kabiru & 2 others v Samuel Murunga Henty & 1756 others](#) (2015) eKLR where the Court of Appeal upheld the principle and doctrine of the exhaustion to effect that the petition ought to have exhausted the existing dispute resolution mechanism outside the court.
12. That the court lacks jurisdiction to what is the preserve of county assembly and the High Court.
13. That the petition is a violation of the constitutional principle of *trias politica*, separation of powers as it is inviting the judiciary to do that which is statutorily and constitutionally a preserve of the county assembly.
14. The interested parties in support of the preliminary objection submits that the petition violates the provisions of section 12(5) [County Governments Act](#) and section 10(2) and (3) of the [County Assemblies Services Act](#) which contain elaborate procedures for removal of members from the county assembly services board.
15. That it is not in dispute that the petitioner in formal prayers seeks an order that the respondent be removed from the membership of the county assembly service board, under the provisions of section 10 of the [County Assembly Services Act](#).
16. That the county assembly service board is capable of suing and being sued in own name and independent entity premised on the concept of separation of powers as held in [John Muwivithi Mutie v Speaker Kiambu County Assembly & 2 Others](#) (2022) eKLR
17. That the process of removal of the members of the county assembly service board is as prescribed under section 10 of the [County Assembly Service Act](#), statutory orders of the assembly and section 58 (5) of the [County Governments Act](#) as held in paragraph 20 of the High Court decision in [Republic v Speaker, County Assembly of Elgeyo Marakwet & 2 Others; ex-parte Applicant Lavi Kibire & Another](#) (2020) eKLR.

The Petitioners Submissions.

18. The petitioner submits that the decision relied on by the respondents in Civil Appeal Cause No 621 of 2019 related to the procedure in recruitment into offices of members of the commission and independent offices under chapter 15 and article 248 (2) of the [Constitution](#) and not applicable to instant case of removal of members of county assembly service board which is neither a commission or independent office.
19. That the respondent's membership is under section 12 (3) of [County Government Act](#) to represent interest of minority side of the assembly in the county assembly services board. That holistic reading of section 10(1)(2) and (3) of the Act leaves no doubt that the members of the board to be removed under this provisions are those appointed by the assembly under section 12 (3) (d) of the [County Government Act](#) and not the respondent.
20. That the respondent under section (12) (3) (a) (i) (ii) of the [County Governments Act](#) ceases to be a member of the board in 2 instances only.
 - a. If the term of the assembly comes to an end or he somehow loses his membership to the assembly. That is obvious that there is no provision in law which provides for the removal from



the board. of the respondent by the assembly and that negates the grounds of the preliminary objection.

Decision

21. It is not in dispute that the respondent is a member of the county assembly services board nominated by the assembly to represent the minority side of the assembly under section 12 (3) (c) of the [County Governments Act](#). There are other members appointed from the general public under section 12 (3) (d) of the [County Governments Act](#).
22. The dispute appears to the court to be the interpretation of whether section 10 (1)(2)(3) of the [County Assembly Service Act](#) is applicable to the respondent, who is also a member of the county assembly, nominated by the assembly to represent the minority side of the assembly.
23. The court first finds that the assembly board is not a commission or independent office as defined by the [Constitution](#) . It is an independent entity under the county assembly agreeing with the petitioner that the case law in Civil Appeal No 621 of 2019. [Attorney General & 2 Others v Okiya Omutata Okioti & 14 Others](#) (2020) eKLR are not applicable in the instant case.
24. Section (12) (3) of [County Government Act](#) describes membership of the county assembly service board to include 2 members of the county assembly nominated by the political parties represented in the county assembly according to their proportion of members of the county assembly. It is under this provision the respondent was nominated by the county assembly to represent the minority side of the assembly to represent the majority and minority side of the assembly.
25. Section 12 (5) describes composition of the assembly services board which includes the above 2 members of the assembly as nominated by the assembly.
26. Section 58 (5) (b) of the [County Governments Act](#) provides that members of the board may only be removed from office:-“by a vote of not less than seventy five percent of all members of the county assembly”.
27. Section 10 of the [County Assemblies Services Act](#) provides for removal of persons appointed as a member of the Board under section 12 (3) (d) of the [County Governments Act](#).
28. Section 12 (3) (d) of the [County Governments Act](#) reads: “ one man and one woman appointed by the county assembly from amongst persons who are experienced in public affairs but are not members of the county assembly”. The court agrees with the petitioner that section 10 of the [County Assembly Services Act](#) is not applicable to the removal of the respondent.
29. The question of lack of jurisdiction of the court on basis that removal of the respondent lies with the county assembly still remains . The petitioner submits there is no provisions of the law for removal of the respondent by the assembly.
30. To answer that proposition the court considers that section 58 (5) (b) is the appropriate provision of the law for removal of members of the county assembly services board nominated like the respondent to represent sides of the assembly in the instant case the minority side.
31. Section 58 (5) (b) reads. “ The members of the board may only be removed from office by a vote of note less than seventy five percent of all the members of the county assembly”.
32. The court finds and determines there is a clear procedure for removal of the respondent from the county assembly service board under section 58 (5) (b) of the [County Governments Act](#) vide a vote in the assembly.



33. The court then agrees with the respondent that it has no jurisdiction to entertain the application and the petition as it seeks for the court to exercise statutory powers of the county assembly being removal of the respondent from the county assembly service board of Kakamega county assembly. That would be a direct violation of the law. The court upholds the Supreme Court decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR which held that jurisdiction flows from either the *Constitution* or legislation or both.
34. The court also upholds the decision cited by the respondent on doctrine of exhaustion as held in *Geoffrey Muthinja Kabiru & 20 Others v Samuel Murunga Henry and 1756 Others* (2021) eKLR and the Court of Appeal decision in *Speaker of the National Assembly v James Njenga Karume*. (1992) eKLR
- (Kwach, Cocker and Muli JJA) where the court held:- “ 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”.
35. The court holds the notice of preliminary objection dated November 6, 2022 is merited and is upheld to extend that the court has no jurisdiction to entertain the application dated October 21, 2022 and petition of even date.
36. The court dismisses the application dated October 21, 2022 and strikes out the petition of even date with costs to the respondent and the interested parties.
37. It is so ordered.

DATED, SIGNED & DELIVERED THIS 1ST DAY OF DECEMBER, 2022 IN OPEN COURT AT BUNGOMA.

**J. W KELI,
JUDGE.**

In the presence of:-

Court Assistant :-Brenda Wesonga

Petitioner:-Ikhumba (Ms)

Respondent:- Kubai holding brief for Sore

1st & 2nd Interested Parties:-Kubai

