



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 28 OF 2019

SAMWEL ONYANGO OKELO & ANOTHER.....1ST PETITIONER

OBWARE KENNEDY AKOKO.....2ND PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

THE GOVERNOR, COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

JUDGMENT

1. The Petition was filed on 3/9/2019 by the two (2) petitioners praying for an Order in the following terms:-

(a) **THAT** a Declaration do issue that the termination of their appointment as Members of the Kisumu County City Board was Illegal, null and void and contrary to Articles 1; 2; 21; 27; 28; 41; 47; and 50 of the Constitution of Kenya 2020 as read with the Employment Act of Kenya and the Fair Administrative Action Act.

(b) **AN ORDER** of compensation do issue pursuant to Article 23 of the Constitution directing the County Government of Kisumu and the Governor of the County Government of Kisumu to pay damages to **SAMUEL ONYANGO OKELLO** and **KENNEDY OBWARE AKOKO**, the Petitioners herein, for the violation and contravention of their fundamental rights and freedoms.

(c) **AN ORDER** do issue pursuant to Article 23 of the Constitution directing the County Government of Kisumu and the Governor of the County Government of Kisumu to reinstate the Petitioners herein, **SAMUEL ONYANGO OKELLO** and **KENNEDY OBWARE AKOKO** as **Members of the Kisumu County City Board**.

(d) In the alternative to prayer (3) and without any prejudice thereof, **AN ORDER** do issue pursuant to Article 23 of the Constitution directing the County Government of Kisumu and the Governor of the County Government of Kisumu to pay the Petitioners herein, **SAMUEL ONYANGO OKELLO** and **KENNEDY OBWARE AKOKO** the equivalent allowances, salaries and benefits they ought to have earned during the entire appointment period of five years as Members of the Kisumu County City Board.

(e) **AN ORDER** awarding costs of the Petition to the Petitioners.

2. The Petition is founded on facts set out in paragraphs 6 to 13 of the Petition and on Constitutional provisions 27, 41 and 47 alleged to have been violated by the respondents.

Summary of Facts

3. The Petitioners are members of the Kisumu City Board appointed by letters dated 9/7/2018 pursuant to open advertisement and interviews conducted by the County Government of Kisumu.

4. On 28/8/2019, the respondents wrote to the two petitioners to the effect that their appointments had been terminated. The termination was without any notice, and/or opportunity to be heard. That the petitioners allege that the said termination was arbitrary and in gross violation of the Constitution of Kenya, 2020, in that their right to equality before the law and the right to equal protection and equal benefit of the law was violated by the respondent.

5. That the right to fair Labour practice was also violated by the respondents and their right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was violated.

6. The Court issued interim Conservatory Orders on 11/12/2019 in favour of the petitioners.

7. The Petitioners pray to be granted reliefs sought.

Response

8. The 1st and 2nd respondents filed replying affidavit to the Petition dated 16/9/2019 and sworn by George Omondi, Acting County Secretary who deposes that there is no employer-employee relationship between the Petitioners and the respondent, and that the petitioners only received allowances as determined by the Kisumu County Executive Committee in accordance with Section 25 of the Urban Areas and Cities Act, 2011.

9. **THAT** the Petitioners with approval of the Kisumu County Assembly were appointed to the Kisumu City Management Board by the 2nd respondent on a part-time basis in accordance with Section 13 of the Urban Areas and Cities Act, 2011. That the Board is a creation of the said Act and is a body corporate regulated by the said statute.

10. That the Urban Areas and Cities Act, 2011 did not provide for the qualification –requirements of the Board members.

11. That sometimes on 28/3/2019, the Urban Areas and Cities (Amendment) Act, 2019 came into force and with it Section 13 of the Urban Areas and Cities Act, 2011 was amended with regard to the qualification requirements for the board members.

12. **THAT** under Section 9 of the Amendment Act, 2019 a member of a City Board must be a person holding a Bachelors degree from an institution recognized in Kenya, has a distinguished career in a medium level management position in either the private or public section, holds at least seven years' Post –Qualification Professional experience and satisfies the requirements of Chapter six of the Constitution.

13. **THAT** the Council of Governors sought an advisory opinion from the Hon. The Attorney General of Kenya, pursuant to the said amendment and the Attorney General provided an advisory opinion dated 16/5/2019 produced before Court.

14. In terms thereof, the Hon. Attorney General advised as follows:-

1. “The appointing authority of Board members effected by the amendment specified under Section 14 ought to appoint the requisite (new) members in accordance with the Amendment Act immediately.

2. In utilization of the literal interpretation of the law, all members who do not qualify therefore cease to be members of the Board by operation of the law. Those who met the criteria set out in the law can complete their remaining terms and any further appointments should be undertaken in accordance to section 14 of the Amendment Act.”

15. Be that as it may, the Hon. Attorney General did not advise on the procedure, if any to be followed in exiting members who do not meet the new criteria of Board Members and have not yet completed their term of office.

16. *A fortiori*, an advisory opinion cannot stay and/or nullify provisions of the Constitution which guarantee rights to persons such as the Petitioners to be accorded due process equally and protection of the law before being subjected to a punitive decision; to be accorded fair labour practice; and to be accorded fair and efficient administrative action.

17. From the replying affidavit of the respondent the respondents simply terminated the appointments of the Petitioners without affording them the right to be heard and/or providing the petitioners with any fair administrative procedure to show why the new provisions of the law do not apply to them and why they should not be removed from office and/or they should be compensated for the remaining term of office.

18. The Petitioners have clearly adduced credible evidence that their appointments were simply terminated without notice to show cause and/or any form of hearing.

19. The Urban Areas and Cities (Amendment) Act, 2019, did not automatically end the terms of subsisting board members by operation of the law. The end of term of members found not to qualify in terms of the new provisions was only implied by the law subject to a verification process that must be inclusive and involve the affected members to demonstrate why they should remain in office.

20. The respondents clearly did not follow any due process in the removal of the petitioners and the Court finds that the respondents violated Article 27 & 41 and 47 of the Constitution in the manner of removal of the petitioner as Board members.

21. The case of Ridge –vs- Baldwin (1963) All ER 66 at 81 is in Point here as per Lord paid.

“Time and again in the cases I have cited it has been stated that a decision given without the principle of natural justice is void.”

22. The decision by the respondents concerning the removal of the petitioners from the board is therefore void.

23. The petitioners remained in office by dint of the conservatory Orders issued by the Court on 11/12/2019.

24. Accordingly, the petitioners are to remain in office as members of the Kisumu County City Board as appointed by letters dated 9th, July,

2018, until the full term of appointment expires and/or they are lawfully removed from the office following due process of the law.

25. The Court issues the final Orders in favour of the petitioner as against the respondents as follows:-

(a) The decision contained in the letters dated 28/8/2019 and directed to the petitioners is removed into Employment and Labour Relations Court and quashed for being in violation of Article 27, 41 and 47 of the Constitution of Kenya, 2010.

(b) The respondents to pay the costs of the suit.

Dated and delivered at Nairobi this 28th day of January, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Muga Apondi, Advocate for Petitioners

Mr. Omondi for the respondents

Chrispo: Court clerk.