



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 45 OF 2019

(Originally Siaya High Court Petition No. 40 of 2019)

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: AN APPLICATION BY DOROTHY OWINO

AND

IN THE MATTER OF: VIOLATIONS OF THE FUNDAMENTAL RIGHTS OF THE PETITIONER UNDER ARTICLES 2, 3, 10, 20, 22, 27, 47, 50, 165, 179, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 14, 31 AND 40 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: STANDING ORDER NO. 73(9) AND 74(1))b) & (2) OF THE SIAYA COUNTY ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF: IMPEACHMENT OF THE PETITIONER FROM OFFICE AS COUNTY EXECUTIVE COMMITTEE MEMBER FOR HEALTH SERVICES

AND

IN THE MATTER OF: PRINCIPLES OF NATURAL JUSTICE

BETWEEN

DOROTHY OWINO..... PETITIONER

V

COUNTY ASSEMBLY OF SIAYA..... 1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF SIAYA2ND RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF SIAYA ...3RD RESPONDENT

JUDGMENT

1. Dorothy Owino (the Petitioner) was appointed as the County Executive Committee Member for Health Services by the Governor, County Government of Siaya on a date which was not disclosed.
2. On 25 July 2019, a member of the County Assembly of Siaya (the Assembly) gave notice of a motion for the removal of the Petitioner under section 40 of the County Governments Act and section 73(2) of the Standing Orders of the Assembly.
3. The alleged grounds for removal were stated as gross misconduct, incompetence, abuse of office and gross violation of the Constitution of Kenya, 2010, the Public Finance Management Act, 2012, the Public Officers Ethics Act, 2003, the Leadership and Integrity Act, 2012 and the Public Procurement and Asset Disposals Act, 2015.
4. The removal motion was tabled before the Assembly on 30 July 2019 and it was debated and approved. The Assembly also approved for the appointment of an Ad Hoc Committee to conduct investigations on the allegations with a directive to report back within 7-days.
5. The Assembly approved the appointment of the Ad Hoc Committee on 31 July 2019 and on the same day, the Committee wrote to the Petitioner inviting her to attend before it on 6 August 2019 at 10.00 am. The invitation was made pursuant to section 40(4) of the County Governments Act.
6. The invitation notified the Petitioner of a right to be represented. The Petitioner appeared before the Committee.
7. On the same day at 2.30 pm, the Ad Hoc Committee tabled a report of its investigations before the Assembly and the Assembly debated and approved the report.
8. On 15 August 2019, the Speaker of the County Assembly (the Speaker) wrote to the Governor to notify him that the Assembly had by a unanimous vote resolved that the Petitioner be dismissed in terms of section 40(6) of the County Governments Act as read with Standing Order no 73(10).
9. Feeling that her protected rights had been violated, the Petitioner moved the High Court in Siaya through a Petition on 20 August 2019.
10. Filed together with the Petition was a Motion under a certificate of urgency seeking conservatory orders staying the resolution of 6 August 2019.
11. The High Court certified the Motion urgent and ordered that the *status quo* be maintained pending the giving of further directions on 18 September 2019.
12. When the parties appeared before the High Court on 18 September 2019, and upon consent by the parties, the motion was abandoned in lieu of hearing the Petition.
13. The Court gave directions on filing and exchange of affidavits and submissions ahead of highlighting of submissions on 20 November 2019. The *status quo order* was however maintained.
14. Upon the Petition and Motion being served, the 1st and 2nd Respondents filed a Notice of Preliminary Objection challenging the jurisdiction of the High Court.
15. The Clerk of the Assembly filed a replying affidavit on 16 October 2019 while the Governor filed a replying affidavit on 17 October 2019.
16. The Petitioner filed her submissions on 15 November 2019 while the 3rd Respondent filed his submissions on 19 November 2019. The 1st and 2nd Respondents filed their submissions on 20 November 2019.
17. On 20 November 2019, the High Court, citing lack of jurisdiction transferred the Petition to this Court for hearing and determination.
18. The parties appeared before this Court on 4 December 2019 wherein the Court directed that the submissions be highlighted on 5 February 2020 but the Court did not sit on the scheduled date and the Deputy Registrar rescheduled the highlighting to 16 March 2020.
19. The next time the Petition was placed before the Deputy Registrar on 14 October 2020, she directed the parties to appear before the Court on 10 November 2020 when the Court scheduled judgment to today.
20. In her submissions, the Petitioner raised 3 Issues, being
 - i. Whether the Court has jurisdiction to hear and determine this Petition.
 - ii. Whether the 1st and 2nd Respondents followed the law in purporting to impeach the Petitioner.
 - iii. Who is to pay costs in this Petition?
21. On their part, the 1st and 2nd Respondents identified the following Issues

- i. Whether the Court has jurisdiction to hear and determine the Petition.
- ii. Whether the 1st and 2nd Respondents breached the law as alleged by the Petitioner.
- iii. Whether any rights and fundamental freedoms of the Petitioner have been infringed?
- iv. Who is to pay the costs of the Petition?

22. The Governor did not explicitly identify any Issues in his brief submissions but essentially supported the Petition.

Jurisdiction

23. The Petitioner initially filed the Petition before the High Court but the Court *suo moto*, in a Ruling delivered on 20 November 2019 declined jurisdiction and transferred the Petition to this Court.

24. At the time the High Court was declining jurisdiction, the Notice of Preliminary Objection by the 1st and 2nd Respondents was already on record (it was filed on 2 October 2019).

25. The Petitioner's submissions filed on 15 November 2019 were in effect in relation to the jurisdiction of the High Court, and the High Court having rendered itself on the question of jurisdiction, it is not within the province of this Court to revisit the question in substance (the 1st and 2nd Respondents submissions were also on record by the time of Ruling).

26. If at all any of the parties were dissatisfied with the Ruling of the High Court on jurisdiction, an appeal should have been proffered.

27. However, the Court notes that the Court of Appeal assumed (obiter) that a county executive committee member and the county government and governor have an employer and employee relationship (see paragraph 24 in *County Government of Garissa & another v Idriss Aden Mukhtar & 2 Ors* (2020) eKLR).

28. The Court further notes that the Court of Appeal in *County Assembly of Kisumu & 2 Ors v Kisumu County Assembly Service Board & 6 Ors* (2015) eKLR concluded that the position of a Speaker and the County Assembly was akin to that of an employer and employee (see paragraphs 52 and 53) to hold that the Employment and Labour Relations Court had jurisdiction in disputes on the impeachment of a Speaker.

The lawfulness of the impeachment

29. In challenging the lawfulness of the process leading to her impeachment, the Petitioner faulted the County Assembly for having failed to involve the public in the process and also failing to summon her to appear and defend herself before the plenary.

30. The Petitioner further alleged bias on the composition of the Ad Hoc Committee.

Public participation

31. In her submissions, the Petitioner relied on the ground of lack of public participation to fault the fairness of the removal process.

32. The Respondents objected to the introduction of this ground on the basis that it had not been pleaded.

33. The question of public participation is both a question of fact and law.

34. The Court has perused the Petition and the supporting affidavit which had been filed by the Petitioner. They did not raise the issue of public participation.

35. Logically, the Respondents could not respond to it in their affidavits.

36. The Court, therefore, declines to examine the lawfulness of the removal proceedings within the context of public participation.

Bias/composition of the Ad Hoc Committee

37. According to the Petitioner, the Ad Hoc Committee was biased because out of the 5 members, 3 had signed the motion seeking her removal and therefore had already formed an adverse opinion.

38. The proceedings before the Ad Hoc Committee, the Petitioner urged, citing *Francis Maliti v County Assembly of Machakos & 2 Ors* (2019) eKLR violated her right to fair administrative action and legitimate expectation.

39. Defending the impartiality of the Ad Hoc Committee, the Respondents countered that section 40(3)(a) of the County Governments Act does not prohibit a mover/proposer of a motion for the removal of a county executive committee member from being appointed to a select committee to investigate the removal allegations.

40. Nevertheless, the Respondents asserted that the mover and proposer of the removal motion were excluded from membership of the Ad Hoc Committee.

41. It was not disputed that Hon Samuel Siguru, Hon Booker Washington and Hon Jane Atieno Odhiambo signed the motion proposing the removal of the Petitioner and they were also appointed as members of the Ad Hoc Committee.

42. The rules of natural justice and the right to fair administrative justice are sacrosanct in our jurisdiction and the test for establishing bias and/or impartiality is that of the fair-minded and informed observer and whether the proceedings were seen to be fair (see *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge* (1995-1998) 1 EA 134).

42. In the case at hand, the mover and proposer of the removal motion were not appointed as members of the Ad Hoc Committee. However, 3 of those who signed the motion were appointed to the Committee.

44. The Petitioner attended the investigative proceedings accompanied by her legal adviser. They did not complain about the composition of the Ad Hoc Committee at the outset.

45. In the circumstances, the Court is of the view that the apparent bias on the part of the Ad Hoc Committee should not be decisive in the determination of the Petition.

Appearance before the plenary of the County Assembly

46. The Petitioner also challenged the lawfulness of the removal process on the ground that she was not afforded an opportunity to appear and defend herself before the plenary of the County Assembly on 6 August 2019.

47. According to the Petitioner, in terms of Standing Orders 73 and 74(2), she was entitled to a report of the Ad Hoc Committee at least 3 days before the plenary debate.

48. The failure to be availed an opportunity to appear before the plenary and to be furnished with the report of the Ad Hoc Committee, the Petitioner contended was a violation of her right to natural justice and fair administrative action.

49. Citing the Court of Appeal in *Stephen M. Masamo & 4 Ors v County Assembly of Taita Taveta & 2 Ors* (2017) eKLR, the Petitioner submitted that the decision of the County Assembly to recommend for her removal could not stand as it violated the protections assured her by the Standing Orders.

50. Contending that the process met the legal test, the 1st and 2nd Respondents asserted that the Petitioner was invited to appear and did appear before the Ad Hoc Committee in the company of 2 legal advisers and that she did make representations and therefore there was no basis for the Petitioner to be heard before the plenary.

51. On the protections assured persons such as the Petitioner by Standing Orders numbers 73 and 74, these Respondents were of the view that since section 40 of the County Governments Act did not provide for the appearance before the plenary, and in view of the fact that the Standing Orders were subordinate to the parent Act, the provisions of the Standing Orders were of no legal consequence.

52. The aforesaid provisions of the Standing Orders, it was asserted were in conflict with section 40(5) of the County Governments Act and to that extent were null and void.

53. These Respondents further submitted that the Petitioner did not plead that she had not been served with a copy of the report of the Ad Hoc Committee and these allegations were an afterthought introduced through the submissions.

54. The Court has looked at the supporting affidavit filed by the Petitioner and the Petition. In paragraphs 11, 12 and 18 of the supporting affidavit, the Petitioner deposed to the allegations on failure to furnish her with a copy of the report.

55. The County Governments Act provides a general framework for the powers, functions and responsibilities of the County Governments.

56. Under section 14 of the Act, the County Assembly is given the power to enact Standing Orders for the proper conduct of its business. The Standing Orders must be consistent with the norms, principles and values of the Constitution.

57. Some of the norms, principles and values of the Constitution are the right to fair administrative action and protection of public officers from adverse action without due process.

58. The County Assembly of Siaya enacted its Standing Orders which gave specific protections to county executive committee members facing removal proceedings.

59. The protections are consistent with the right to fair hearing and due process as enshrined in Articles 47 and 236 of the Constitution.

60. And in this respect, this Court would endorse as legally sound in our jurisdiction the opinion of the Supreme Court of Zimbabwe in **Tendai Laxton Biti and Ar v the Minister of Justice, Legal and Parliamentary Affairs and Another, Civil Application No 46 of 2002** that **Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because Standing Orders arise out of**

the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as “rules of a club”. Standing Orders constitute legislation which must be obeyed and followed.....

61. The County Assembly of Siaya failed to comply with the provisions of its Standing Orders which assured the Petitioner of certain added protections before removal from office.

62. It was a fundamental procedural misstep, and the Court so finds.

Conclusion and Orders

63. The Petitioner sought one order

(1) A declaration that the action by the 1st and 2nd Respondents to exclude the Petitioner from the Assembly proceedings of 6th August 2019 on the hearing of a motion to impeach the Petitioner as member of the County Executive Committee in charge of Health and the decision of the 1st Respondent to impeach the Petitioner as a consequence is unconstitutional, it violates the constitutional rights of the Petitioner under Articles 27, 41, 47 and 50 of the Constitution as read together with standing orders no. 73(9) and 74(1)(b) and (2) of the 1st Respondent and the same is null and void.

64. The Petitioner in the main challenged the process leading to the recommendation for her dismissal.

65. The County Assembly was carrying out a legally ordained duty but it got the process wrong.

66. Granting the order sought and as sought by the Petitioner would be overbroad in the circumstances.

67. From the foregoing, the Court finds and orders

i. A declaration is hereby issued that the action by the 1st and 2nd Respondents to exclude the Petitioner from the Assembly proceedings of 6th August 2019 on the hearing of a motion to impeach the Petitioner as member of the County Executive Committee in charge of Health and the decision of the 1st Respondent to recommend the dismissal of the Petitioner was procedurally unfair as it violated the constitutional rights of the Petitioner under Article 47 of the Constitution as read together with Standing Orders no. 73(9) and 74(1)(b) and (2) of the 1st Respondent and the same is null and void.

ii. The County Assembly and the Speaker are ordered to cause to be debated afresh the report of the Ad Hoc Committee strictly in compliance the provisions of section 40(5) of the County Governments Act as read with the Standing Orders.

68. The Petitioner has succeeded. There is a possibility of an on-going relationship with the Respondents. She is awarded costs on half-scale.

Delivered through Microsoft teams, dated and signed in Kisumu on this 27th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Osiemo Wanyonyi & Co. Advocates

For 1st – 2nd Respondents Carrey Joseph Advocates

For 3rd Respondent Wasuna & Co. Advocates

Court Assistant Chrispo Aura