



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MALINDI

PETITION NO. E001 OF 2020

IN THE MATTER OF ARTICLES 1, 2, 3(1), 4, 10,19,20, 21, 23,27, 33, 35,47,48,50,73,165 AND 232 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ARTICLE 35 OF THE CONSTITUTION ON THE PROTECTION OF FUNDAMENTAL RIGHTS OF ACCESS TO INFORMATION

IN THE MATTER OF ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010 ON NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

IN THE MATTER OF SECTION 66,68, AND 78 OF THE COUNTY GOVERNMENT ACT

IN THE MATTER OF ARTICLE 75(1) A OF THE CONSTITUTION ON CONFLICT OF INTEREST BY PUBLIC OR STATE OFFICER HOLDING TWO DIFFERENT POSITIONS SIMULTANEOUSLY

IN THE MATTER OF PUBLIC RIGHT TO INFORMATION AND ADHERENCE TO DUE PROCESS ON APPOINTMENT OF COUNTY ATTORNEY, KILIFI COUNTY GOVERNMENT

-BETWEEN-

COMMISSION FOR HUMAN RIGHTS AND JUSTICE..... PETITIONER

- VERSUS -

MICHELLE BIBI FONDO.....1ST RESPONDENT

H.E. GOVERNOR, KILIFI COUNTY.....2ND RESPONDENT

PUBLIC SERVICE BOARD, KILIFI COUNTY GOVERNMENT.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th March, 2021)

JUDGMENT

The petition was filed on 23.10.2020 through M/S Obara & Obara Advocate. The petitioner prayed for judgment for:

- 1) A declaration that the appointment, swearing in and assumption of office by the 1st respondent was unprocedural, illegal and null and void *ab initio*.
- 2) A declaration that the 3rd respondents violated the provision of Article 10, 35, 73 and 232 of the Constitution and presided over illegality and the 1st respondent is un-procedurally, irregularly and illegally in office and do cease forthwith from discharging and occupying the position of county attorney of Kilifi County.

The petition was based on the verifying affidavit of Julius Ogogoh, the Executive Director of the petitioner.

The petitioner’s case is that it has come to its knowledge sometimes on 22.09.2020, that, on 21.09.2020 the 2nd respondent had presided over or witnessed the swearing of the 1st respondent to assume the office of Kilifi County Attorney. The 2nd respondent had issued on social media a public congratulatory message to the 1st respondent upon assumption of office. The petitioner’s case is that the appointment and

swearing in office of the 1st respondent by the 2nd respondent was unlawful and wrongful because of the following reasons:

- a) There was no declaration of vacancy of the office of the County Attorney and no advertisement calling for applications as envisaged by section 66 of the County Government Act.
- b) There were no interviews conducted and minutes recorded per section 67 of the County Government Act.
- c) The provisions of section 68 of the County Government Act were not adhered to.
- d) That the 1st respondent was not vetted as envisaged by the provisions of section 5 of the Office the County Attorney Act, 2020.
- e) The provisions of the Constitution on appointment of public officers were disregarded entirely and procedures for such appointment was not followed at all.
- f) The 1st respondent was not therefore entitled to and was not supposed to assume the office of County Attorney for Kilifi County as the appointment was a product of illegality and utter violation of the Constitution and applicable legislation.
- g) The only known step in the appointment process was an internal memo sent by the County Secretary and Head of Public Service of Kilifi County to the Executive Committee Members informing them of the swearing ceremony and no other steps in the procedure of employing and appointing such officers was followed. After the appointment the 1st respondent has continued to hold another office in the government of Kilifi County without relinquishing such previous appointment. She holds the previous position on permanent and pensionable terms and the current position on a term contract of 6 years amounting to violation of the Constitution and law, conflict of interest and pilferage of public funds.
- h) On 7th and 8th October 2020 a motion was filed in the County Assembly of Kilifi by Hon. Saumu Sidi Julius moving the Assembly through the County Executive Committee Members in Charge of Devolution, Public Service and Disaster Management to operationalize the Office of Attorney Act, 2020. The petitioner says that the motion aimed at initiating the process of appointing the County Attorney as stipulated under section 66 and section 78 of the County Government Act and the provisions of section 31 of the County Attorney Act, 2020.
- i) The 2nd respondent initiated on 19.10.2020 the process of swearing in of the 1st respondent and the 1st respondent was sworn in office on 21.10.2020. The petitioner's case is that the swearing in violated Article 10 and 232 as there was no public advertisement of vacancy and no interviews per section 66 of the County Governments Act because the 3rd respondent did not interview candidates; the County Assembly vetted no candidate per section 5 of the County Attorney Act, 2020 and the County government withheld information surrounding the appointment contrary to Article 35 of the Constitution.
- j) The petitioner is aggrieved by the 1st respondent's swearing into the office of the County Attorney of Kilifi County because it amounted to violation of Articles 10 on values and principles of national government, Article 35 on access to information held by the County Government, Article 47 on fair administrative action, and 232 on values and principles of public service. Further by reason of the swearing into office of the 1st respondent by the 2nd respondent, the 2nd and 3rd respondents have failed the integrity test in Article 73 of the Constitution and are unfit to supervise and superintend the interview and appointment of the 1st respondent as the County Attorney.

The 1st and 2nd respondents opposed the petition by filing on 11.12.2020 the 1st respondent's replying affidavit through Munyao, Muthama & Kashindi Advocates. Their grounds of opposition were stated and urged as follows:

- a) The 1st respondent is serving as the County Attorney of the Kilifi County Government.
- b) The petitioner is not a natural or juristic person and cannot bring the petition in its own name as currently done. The petitioner has described itself as a registered non-profit making, non-governmental organisation based in Mombasa and committed to promotion of human rights and justice but has exhibited no evidence of such registration to show its legal personality status, as alleged. Thus the petitioner lacks *locus standi* to file the petition and which should be struck out.
- c) The Petitioner laments lack of declaration of vacancy in the office of County Attorney and swearing in of the 1st respondent without advertisement, competitive interviews by the 3rd respondent, and prays that the appointment should be quashed as illegal, null and void. However, the petitioner's case is misconceived, in bad faith and tainted by ulterior motive. In fact, the 1st respondent assumed the office of County Attorney per Office of the County Attorney Act No.14 of 2020, the County Governments Act 17 of 2012, and the Constitution of Kenya, 2010.
- d) The 1st respondent is an Advocate of the High Court of Kenya with an experience of over 11 years of post-admission to the bar, is an active member of the Law Society of Kenya, and is duly qualified in law to hold the office of County Attorney.
- e) The 3rd respondent established and declared a vacancy in the office of Head of Legal Services (Job Group R) in the County Government of Kilifi as per the 3rd respondent's mandate under Article 235 of the Constitution and provisions of the County Governments Act, 2012. The 1st respondent was one of the applicants. The 1st respondent was subsequently recruited competitively and appointed to the position by the letter of appointment dated 19.05.2014.

f) While in service as Head of Legal Services, the 3rd respondent established and declared a vacancy in the office of County Attorney. Open advertisement was published in the print media and the 1st respondent applied for the position. By the letter dated 01.04.2018 the 1st respondent was appointed to be the County Attorney, County Government of Kilifi. On the tenure of service, the letter stated, **“You will be engaged on contract for a term commensurate to the term of the Governor, commencing 2nd April, 2018.”**

g) The Parliament of Kenya enacted the Office of the County Attorney Act, 2020 which was dated at Nairobi on 13.07.2020 (and there appears to be no dispute that the commencement date of the Act was on 27.07.2020 – so that the Act having been published on 13.07.2020, the 14 days leading its commencement lapsed on 27.07.2020, the date of its coming into force per Article 116(2) of the Constitution). In the long title, it is an Act of Parliament to establish the Office of the County Attorney; provide for the functions and powers of the County Attorney; provide for the discharge of duties and the exercise of powers of the County Attorney; and for connected purposes. Section 4 of the Act establishes in each county the Office of the County Attorney as an office in the county public service. The Office of the County Attorney consists of the County Attorney; the County Solicitor; and, such other number of County Legal Counsel as the County Attorney may, in consultation with the county public service board, consider necessary. Section 5 (1) of the Act provides that the County Attorney shall be appointed by the Governor with the approval of the county assembly. Section 5(2) of the Act provides that a person qualifies for appointment as County Attorney if such person is an Advocate of the High Court of Kenya of at least five years standing; and, meets the requirements of Chapter Six of the Constitution. Section 6 of the Act provides that the County Attorney shall hold office for a term of six years and shall have the status and rank of a member of the county executive committee.

h) Section 31 of the Office of the County Attorney Act, 2020 provides for transition. Section 31(1) provides, inter alia, that upon the coming into effect of the Act, members of staff employed by the county executive to perform the functions of the Office of the County Attorney under the Act shall, be deemed to be members of staff of the Office in their respective capacities; retain any rights accrued or accruing to them as such staff or contributors; be at liberty to continue to contribute to any superannuation scheme to which they were contributors; be entitled to receive any deferred or extended leave as if they have continued to be such staff of the Office during their service with the county executive; be entitled to receive any payment, pension, or gratuity as if they have continued to be such staff of the Office during their service with the county executive; and be deemed to be employees of the Office for purposes of any law under which those rights accrued or were accruing, under which they continue to contribute or by which that entitlement is conferred.

i) Section 31(2) thereof states that despite the provisions of subsection (1) of the Act, a person employed by the county public service board to perform the functions of the County Attorney, County Solicitor or County Legal Counsel at the commencement of this Act shall continue to hold their respective positions in the Office after the coming into effect of the Act only if they meet the qualifications specified in the Act. Section 31(3) provides that the county public service board shall, where a person employed by the county executive to perform the functions of the County Attorney, County Solicitor or County Legal Counsel does not meet the qualifications specified in the Act, redeploy such person to the highest position that is vacant and to which such person qualifies for appointment.

j) The 1st respondent states that by reason of the cited provisions of the Office of the County Attorney Act, 2020 she was qualified to hold the office of the County Attorney as established under the Act and she was entitled to transit as such. Thus, by the letter dated 14.10.2020 titled **“CORRIGENDUM – APPOINTMENT TO THE OFFICE OF THE COUNTY ATTORNEY”** the 2nd respondent conveyed to the 1st respondent that pursuant to his letter dated 01.04.2018 and the Office of the County Attorney Act, 2020, No. 14 of 2020, section 31 as read together with sections 5 and 6 the terms of service attached to her appointment were amended thus, on duration and terms of service the 1st respondent will be engaged on contract for a six year term with effect from 27.07.2020; remuneration at Job Group AY8 with a consolidated gross monthly remuneration package of Kshs.350,000.00 subject to normal statutory taxes; other benefits to be entitlement to the benefits attributed to that of an Executive Committee Member; and all other terms of the initial letter of appointment remain the same. The 1st respondent signed on 21.10.2020 in acceptance of the terms of the letter for corrigendum appointment.

k) The allegation by the petitioner that the 1st respondent holds two offices and leading to conflict of interest is unfounded because the 1st respondent holds only one office of the County Attorney as per the transitional provisions of the Office of the County Attorney Act, 2020.

The respondents' further case is that the Attorney General of the National Government has offered his considered advisory opinion to the Council of Governors by the letter dated 10.11.2020 on the implementation of the office of the County Attorney Act, 2020. The advisory signed by Hon. P. Kihara Kariuki, Attorney General, advised as follows:

a) Where the incumbent holder of the office discharging the duties of the County Attorney at the date of the commencement of the Office of the County Attorney Act, 2020 (that is on 27.07.2020) qualifies for the position, that is, he or she is an Advocate of the High Court of Kenya and meets the requirements of Chapter Six of the Constitution, such person shall continue to hold his or her respective position for the unexpired portion of his or her current contract, subject to the statutory term, without the need of the position being declared vacant and advertised.

b) Subject to provisions of the Act, the persons shall assume and perform all the functions of the County Attorney as provided under the Act for the unexpired term of their contract.

c) The foregoing (a and b above) applies only to persons who had been employed in their current positions by the County Public Service Board.

The 3rd respondent filed on 26.11.2020 a notice of preliminary objection and grounds of opposition to the entire petition through Njoroje

Mwangi & Company Advocates. The notice stated as follows:

- a) That the appointment of the County Attorney is not amongst the functions vested on the 3rd respondent and that functions of appointing the County Attorney inheres on the powers granted to the Governor, County Government of Kilifi by section 5(1) of the Office of the County Attorney Act, 2020.
- b) By dint of section 17 of the Office of the County Attorney Act, 2020 only the County Solicitor ought to be competitively recruited and appointed by the 3rd respondent and by dint of section 18 of the Act, County Legal Counsel, but with the consultation with the County Attorney. As such the office of the County Attorney is not an office that is statutorily required to be filled with substantive input from the 3rd respondent.
- c) The petition does not allege that the County Solicitor or County Legal Counsel have been unlawfully recruited or appointed by the 3rd respondent.
- d) That the 3rd respondent is maliciously enjoined in the petition, is unsuited and the entire petition should be dismissed with costs to the 3rd respondent.

The 3rd respondent also filed the replying affidavit of Gideon C. Mumba, the 3rd respondent's Deputy Director, Administration Services. The affidavit confirms that prior to the coming into effect of the Office of the County Attorney Act, the 3rd respondent had established the office of the County Attorney and to which the 1st respondent was competitively recruited by the 3rd respondent and appointed to hold as per the letter dated 01.04.2018 signed by the 2nd respondent. Thus by operation of section 31(2) of the Act, the 2nd respondent was entitled to retain the 1st respondent in the position of the County Attorney. The affidavit further states that the 1st respondent was not handpicked to fill the office as established under the Act but was lawfully allowed to continue holding the office by operation of the transitional provisions. Further, the 1st respondent draws salary only in one capacity as the County Attorney and not any other office as alleged for the petitioner.

The parties filed their respective submissions and made oral submissions. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination, the Court returns that there is no material on record to justify a finding that the petitioner does not exist as urged for the 1st and 2nd respondents. Julius Ogot has filed affidavits in the suit as the petitioner's Executive Director and the petitioner has stated that it is a non-profit making, non-governmental organisation based in Mombasa committed to promotion of basic human rights and justice and, is suing on its own behalf and in the greater public interest. As submitted for the 1st and 2nd respondent, it is true that the petitioner has failed to exhibit its certificate of registration as a non-governmental organisation. However, the 1st and 2nd respondents have made no attempt to carry out an official search and exhibit evidence that indeed the petitioner is not registered as a non-governmental organisation and as was alleged for the respondents. Looking at the material before Court, the Court finds that there is no reason to discount that petitioner's case that it is a non-governmental organisation whose Executive Director is Julius Ogot. On a balance of probability, the Court returns that the petitioner is a non-governmental organisation and therefore a person under Article 260 of the Constitution which defines "person" includes a company, association or other body of persons whether incorporated or unincorporated. While making that finding the Court considers that there was no dispute between the parties that in any event a non-governmental organisation is a body corporate under the applicable statutory provisions and therefore entitled to sue in its own name. Thus the Court returns that the petitioner was entitled to sue and file the petition as per Article 22 and 258 of the Constitution.

To answer the **2nd issue** for determination the Court returns that the 3rd interested party was a necessary party to the petition to enable the Court to facilitate the just, expeditious and proportionate resolution of the dispute and as envisaged in section 3 of the Employment and Labour Relations Court Act, 2011. The evidence is that prior to the coming into effect of the Office of the County Attorney Act, 2020, it is the 3rd respondent who had openly and competitively recruited the 1st respondent for appointed to the position of Head of Legal Services and subsequently created the office of the County Attorney, advertised the vacancy and competitively recruited the 1st respondent for appointment by the 2nd respondent as the County Attorney. The previous details on the creation and recruitment relating to the position of the County Attorney was crucial in the present dispute. While the Court agrees with the 3rd respondent's case that under the Office of the County Attorney Act, 2020 the County Attorney shall be appointed by the Governor with the approval of the county assembly, the 3rd respondent's previous involvement in the creation of the office of the County Attorney and appointment of the 3rd respondent amounted to making the 3rd respondent a proper party towards complete, efficient, proportionate and just determination of the dispute. Accordingly, the 3rd respondent's preliminary objection in that regard will fail.

To answer the **3rd issue** for determination the Court returns that under the design of section 5(1), the 3rd respondent is not involved in the recruitment, approval and appointment of the County Attorney. The Court further considers that by section 5(1) providing that the County Attorney shall be appointed by the Governor with approval of the county assembly, the constitutional ethos of transparency, accountability, competitiveness, suitability and merit are not thereby defeated. It is the Court's considered view that in undertaking the nomination of the County Attorney for appointment with approval of the county assembly, the Governor must exercise the discretion in accordance with the constitutional values and principles of public and state appointments. The Court further considers that towards achieving such constitutional values and principles, the Governor may invoke his or her own procedures or delegate to appropriate authority such as the 3rd respondent or act in accordance with such applicable legislation (by the National or County Government) or such lawful policies and practices, for the time being in place. Thus the Court finds that it was misconceived for the petitioner to urge that for an appointment under section 5(1) of the Office of the County Attorney Act, 2020, the 3rd respondent had to be necessarily involved within the mandate as vested in the 3rd respondent under the County Governments Act, 2012 to create offices; declare and publicly advertise vacancies; and, to undertake competitive recruitment (interviews) and selection of the successful candidate. In any event the Court hold that the County Attorney's office is already expressly established by the Act and nothing more was needed to create the office or position.

The Court further considers that the county assembly, in undertaking the approval under section 5(1) of the Office of the County Attorney Act, 2020, is as well, bound within its internal procedures of vetting the Governor's nominee for appointment, to invoke the relevant Constitutional values and principles such as participation.

As submitted for the petitioner Article 10 provides for values and principles such as patriotism, national unity, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, human rights, non-discrimination and protection of the marginalised; and good governance, integrity, transparency and accountability. Further Article 73(2) provides for principles of leadership and integrity to include, *inter alia*, selection on the basis of personal integrity, competence and suitability or election in free and fair elections; and objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, other improper motives or corruption practices. Further Article 232 on values and principles of public service provides for, *inter alia*, high standards of professional ethics; efficient, effective and economic use of resources; accountability for administrative acts; transparency and provision to the public of timely, accurate information; fair competition and merit as the basis of appointments and promotions; representation of Kenya's diverse communities; and, affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women, the members of all ethnic groups, and persons with disabilities. The Court holds that such are the constitutional values and principles that apply to making of decisions for appointment to hold or act in a public or state office.

The Court further holds that the Governor in exercising an appoint of the County Attorney and the county assembly in exercising the approval of appointment under section 5(1) of the Act, the Governor and the assembly must take care and document procedures invoked towards compliance with the cited constitutional values and principles of recruitment, selection and appointment to public or state office. Thus in event of a dispute in an appointment of a County Attorney under the section and it is alleged that the constitutional values and principles have not been complied with, it will be for the Governor and the county assembly to demonstrate such compliance as may be appropriate and failing which, the appointment and approval under the section may be brought to question one way or the other. In other words, the Court holds that in exercising the appointment and approval under the section, the exercise of the discretion by the Governor and the county assembly is accordingly chained by the constitutional values and principles governing making of decisions of appointment to a public or state office. In an appropriate case, the Court considers that failure to demonstrate compliance with the constitutional values and principles in making an approval for appointment and appointment under the section may render the appointment to be impugned.

To answer the **4th issue** for determination, the Court returns that the 1st respondent's continued service as the County Attorney for the County Government of Kilifi was governed by and based upon the provisions of section 31 of the Office of the County Attorney Act, 2020. The evidence is that the 3rd respondent had competitively recruited the 1st respondent and as at the time the Act came into operation on 27.07.2020, the 1st respondent held the office of the County Attorney. As per the advisory of the Attorney General, the Court returns that the 1st respondent would continue to work as the County Attorney provided she held the qualifications in section 5(2) of the Act (that is, an Advocate of the High Court of Kenya of at least five years standing; and meets the requirements of Chapter Six of the Constitution), and, that she had been employed by the 3rd respondent. The material on record shows that the 1st respondent satisfied all the qualifications and was employed following the competitive recruitment and selection by the 3rd respondent. The Court finds that the 1st respondent was therefore entitled to continue in service as her accrued rights to hold the office of County Attorney had been protected in section 31 of the Act which deemed her to be a member of staff of the Office of the County Attorney for the County of Kilifi; retained any rights accrued or accruing to her as such staff; and she met the requirements of the Act. The Court therefore finds that it was misconceived for the petitioner to urge and submit that the 1st respondent had been appointed to the office of the County Attorney without due procedure of constitutional values and principles and pursuant to section 5(1) of the Act.

The Court further considers that it was inconsistent with the transitional section 31 of the Act when Hon. Saumu Sidi Julius appears to have signed a motion on 07.10.2020 purportedly seeking the County Assembly of Kilifi to urge the County Secretary to operationalise the County Attorney Act, 2020 through the appointment of the County Attorney and forwarding the name to the Assembly for vetting and, secondly, undertake a competitive recruitment process for the positions of the County Solicitor and County Legal Counsel as per the Act. However, while making that finding, the Court finds that the 1st respondent should expeditiously consult the 3rd respondent in terms of sections 4(2)(c) and 8(2) (a) of the Act towards establishing appropriate organisational structure and the relevant administrative units and offices for the effective discharge of the functions of the Office of the County Attorney. Such units, in the opinion of the Court, should take into account the functions of the County Attorney in section 7 of the Act and may include administrative and functional units like Administration and Support Services; Legal Representation and Litigation; Legislative Policy and Drafting; and, Negotiations and Agreements. The Court further considers that in terms of sections 17 and 18 of the Act and as per the provisions of the County Governments Act, 2012 (on the procedures, powers and functions of a county public service board to appoint), the 3rd respondent should make the appropriate competitive recruitment and appointments to operationalise the organisational structure and offices to be established for the Office of the County Attorney. Further, the Court returns that such appointments will be subject to the full implementation of the provisions of the transitional section 31 of the Office of the County Attorney Act, 2020.

Thus the Court returns that for avoidance of doubt, the 1st respondent continued in service as a County Attorney per transitional section 31 of the Act and there having been no appointment and approval pursuant to section 5(1) of the Act, the issue of compliance by the Governor and the county assembly with the constitutional values and principles for recruitment, selection and appointment of a person to hold or act in a state or public office (as already extensively set out earlier in this judgment) do not begin to emerge for consideration in the instant petition.

The **5th issue** is the determination of the effective tenure of a County Attorney who continues to serve as a County Attorney as per the provisions of the transitional section 31 of the Office of the County Attorney Act, 2020. By the letter dated 14.10.2020 the 2nd respondent conveyed to the 1st respondent the alignment, of her continuing service as County Attorney, to the provisions of the Office of the County Attorney Act, 2020. In so doing it was, *inter alia*, conveyed that the tenure of the service was an engagement on contract for six-year term effective 27.07.2020 (the effective date of the Act).

The Court has considered the transitional section 31 of the Act and returns that as per the advisory by the Attorney General, the provision protected accrued rights in same capacity held prior to the commencement of the Act, and, provided the affected officer held prescribed qualifications and had been employed by the 3rd respondent prior to commencement of the Act. On tenure of the County Attorney, section

6(1) of the Act declares that the County Attorney shall hold office for a term of six years. The Court holds that at the end of the six years, section 5(1) of the Act comes into play for a fresh or another appointment to be made by the Governor with approval of the county assembly. Section 6(1) of the Act is silent on, if the holder of the office upon ending of the 6 years, can be considered for another term under section 5(1) or not be so considered. In view of the silence, the Court holds that there is no established bar for a person whose term is ending to be considered for appointment per section 5 (1) of the Act but, upon lapsing of six years, the office holder must leave office. Thus section 6(1) of the Act only sets the mandatory tenure of six years but does not bar candidature of the person whose tenure has so ended, from, so to say, another or fresh appointment per section 5(1).

What is the effect of sections 6(1) and therefore section 5 of the Act to the tenure of the person, like the 1st respondent, who by transitional provisions, continued to serve as a County Attorney? The Court has already held that per section 31 of the Act the transitional protection is for accrued rights. Thus, the Court holds that the statutory tenure being six years, the accrued contractual tenure lapses per the prevailing contractual tenure prior to the commencement of Act if such pending contractual tenure was less than six years as at the commencement date of the Act (27.07.2020); and, if the protected tenure as at commencement date of the Act was over six years, it lapses six years running from the commencement date, 27.07.2020. Thus, in aligning the continuing service to the provisions of the Act (of a person continuing to serve as a County Attorney), the person cannot be given a tenure beyond the protected contractual tenure and where the protected contractual tenure as at the commencement of the Act was beyond six years, such a person is entitled to only six years of service effective 27.07.2020 and per the maximum statutory tenure under section 6(1) of the Act.

While making the finding the Court holds that claims to hold an office are subject to terms establishing an office (such as tenure and other terms attached to the office). Further, the right to hold an office is subject to the decision of abolition of office so that where an office is abolished, the holder of an abolished office cannot validly continue to claim continued service in the abolished office. The Court considers that consequential to the abolition of office, the holder may make claims based on the contract of service thereby ended by the abolition of the office held, but, has no claims to continue in service. The Court considers that the effect of the Office of the County Attorney Act, 2020 was to abolish the office of the County Attorney as may have been established by the county public service board under the County Governments Act, 2012. But for the transitional provisions in section 31 thereof, the holder of the office of the County Attorney would have left service on account of abolition of office. The tenure of the office as established in the Act is six years and the Court holds that a person who continues in office as County Attorney by reason of the transitional provision can only claim the pending contractual tenure where it is less than six years and nothing more. Thus, the office of the County Attorney as established by the Act is walled within a tenure of six years and a person continuing to serve in the office under the transitional section 31 of the Act is obstructed by the walls of the tenure. Thus, the Court holds that the transitional provisions only protected the accrued contractual tenure subject to the statutory walls of the tenure of the new office of County Attorney as established in the Act. The Court returns that the maximum tenure of the office as established and protected under the transitional section 31 (for a County Attorney continuing in service under a contract of service providing for more than six pending years of service or tenure as at commencement date being 27.07.2020) is therefore six years running from 27.07.2020.

In the instant case, by the letter dated 01.04.2018, the 1st respondent was employed as County Attorney, County of Kilifi on a contract “... **for a term commensurate to the term of the Governor, commencing 2nd April, 2018**”. The Court therefore finds that the 1st respondent’s tenure protected by the transitional section 31 of the Act is a continuing tenure to the end of the tenure of the current Governor of the County of Kilifi, or, until lapsing of six years from 27.07.2020, whichever comes first. The effect is therefore that if the tenure of the current Governor ends prior to lapsing of six years from 27.07.2020, the contractual tenure protected by the transitional provisions will thereby come to an end and the 1st respondent will vacate office- for the vacancy to be filled in accordance with section 5(1) of the Act and the Court has already found that it is open for the 1st respondent to be considered in the appointment and approval if such a situation arises.

To that extent, the Court returns that the letter dated 14.10.2020 is liable to correction so that clause 1 on duration and terms of service reflects thus, “**You will continue in service as County Attorney, County of Kilifi, for a term commensurate to the term of the current Governor, or, until lapsing of six years from 27.07.2020, whichever comes first.**” Thus, the Court considers that the respondents will take appropriate steps accordingly.

To answer the 6th issue for determination, the Court returns that in view of the earlier findings in this judgment, the Court finds that the petitioner has failed to establish the alleged violations of the constitutional provisions and the remedies as prayed for will collapse, except that, the letter dated 14.10.2020 is amenable to correction as already found so that the petitioner partially succeeds to that extent –that failing such correction, the declarations as prayed for by the petitioner may fall due with respect to the 1st respondent’s continued tenure as may flow from clause 1 in the letter dated 14.10.2020 and which may not have been protected by the transitional section 31 of the Act. The Court has found that the letter addressed to the 1st respondent by the 2nd respondent Ref.No.CG/KLF/OG/VOL.1 dated 14.10.2020 is amenable to the cited correction. The Court has further considered the growing jurisprudence in the nascent devolved system of government established in the Constitution of Kenya, 2010. To balance justice for the parties, each will bear own costs of the petition.

The Court has considered the advisory opinion the Council of Governors had sought and obtained from the Attorney General and that the matters in dispute relate to and affect all the 47 Counties, one way or the other, towards the sound implementation of the Office of the County Attorney Act, 2020. Accordingly, the Court directs that the petitioner will serve this judgment upon the Chief Executive Officer of the Council of Governors with a view of bringing the judgment to the attention of all the 47 county governments.

In conclusion, the petition dated 22.10.2020 and filed on 23.10.2020 is hereby determined with orders:

1) The declaration that in view of the prayers in the petition and the findings by the Court, a declaration is hereby issued that the letter Ref. No. CG/KLF/OG/VOL.1 dated 14.10.2020 is amenable to correction in clause 1 to effectively reflect thus, “**You will continue in service as County Attorney, County of Kilifi, for a term commensurate to the term of the current Governor, or, until lapsing of six years from 27.07.2020, whichever comes first.**”

2) The petitioner to serve the judgment upon the Chief Executive Officer of the Council of Governors within 7 days from the date of this judgement with a view of bringing the judgment to the attention of all the 47 county governments.

3) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 12TH MARCH, 2021.

BYRAM ONGAYA

JUDGE