



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 21 OF 2020

HAMISI BWENI DZILA.....CLAIMANT

- VERSUS -

KWALE COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

COUNTY ASSEMBLY OF KWALE.....2ND RESPONDENT

SAMMY NYAMAWI RUWA.....3RD RESPONDENT

OMAR KITENGELE.....4TH RESPONDENT

ANTONY YAMA.....5TH RESPONDENT

MWAKARIBU HAMISI.....6TH RESPONDENT

CELINE LUSWETI.....7TH RESPONDENT

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

RULING

The claimant filed a notice of motion on 31.03.2020 through Aboubakar, Mwanakitina & Company Advocates. The application was under rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016, section 12(3) of the Employment and Labour Relations Court Act, 2011 and all enabling provisions of the law. The claimant prayed for orders:

- 1) The honourable Court do certify the application as urgent and service thereof be dispensed with in the first instance.
- 2) The Honourable Court do grant an injunction against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them from suspending the claimant from his office as a clerk of the County Assembly of Kwale pending the hearing and determination of the claim herein.
- 3) The Honourable Court do grant an injunction against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them from proceeding with the notice to show cause why removal proceedings should not be commenced against the claimant pending the hearing and determination of the claim herein.
- 4) The Honourable Court do grant an injunction against the 2nd respondent restraining it from receiving, discussing, debating and or receiving any motion brought to it by the 1st, 3rd, 4th, 5th, 6th, and 7th respondents seeking the removal of the claimant from his office as a clerk of the County Assembly of Kwale pending the hearing and determination of the claim herein.
- 5) The Honourable Court do grant an order that the 1st and or 2nd respondents do immediately pay the claimant his outstanding salary from December 2019 to the date of filing this claim or the date of the judgment herein.
- 6) The honourable Court do grant prayers 2, 3, and 4 above on interim basis pending the hearing and determination of the application herein.
- 7) Costs of the application.

The application is based on the annexed claimant's affidavit, the claimant's further affidavit filed on 13.07.2020, and upon the following grounds:

1) The claimant filed suit on 17.12.2019, **Hamisi Bweni Dzila –Versus- County Assembly of Kwale and Kwale County Assembly Service Board, ELRC Cause 99 of 2019 at Mombasa.** The Court (Rika J.) delivered a ruling in that suit on 28.02.2020 and ordered:

- a) The claimant is reinstated with immediate effect to his position as the Clerk to the County Assembly of Kwale.
- b) He shall be paid his back salary from the date of termination, 11.12.2019, to-date.
- c) The respondents shall not interfere with the claimant's discharge of mandate as the Clerk, provided that any steps taken by the respondents to remove the claimant from office, in accordance with the law, shall not be deemed to amount to interference with discharge of mandate.
- d) No order on the costs.
- e) This ruling shall be adopted as the judgment of the Court within 30 days, and the file closed, unless the parties demonstrate to the Court there are triable issues pending.
- f) Mention on 31.03.2020.

2) The claimant reported to work on 02.03.2020 but was not allowed to enter the office as police had been deployed to prevent his entry. Prior to leaving the premises he was given a notice a notice of administrative suspension pending investigation dated 02.03.2020. The Board (1st respondent) had sat on Sunday 01.03.2020 and decided that the notice be issued. The notice set out 8 allegations against the claimant as allegedly amounting to gross misconduct, thus:

- a) Failed to exhaust internal disciplinary mechanism in handling allegations against an officer of the service and opted to explore external disciplinary mechanism without involving the Board.
- b) Have refused or failed to implement several decisions or resolutions of the Board.
- c) Have on various occasions undertaken programs without seeking the Board's approval.
- d) Have written to sources external to the service seeking advice without the knowledge or approval of the Board.
- e) Have authorised or approved payments from the Assembly's account without the approval of the Board and contrary to financial procedures and guidelines.
- f) Have misrepresented information to the Board and presented minutes that do not capture the true deliberations and decisions of the Board.
- g) Have been insubordinate to the Board.
- h) Have refused or failed to subject himself to the attendance control systems set by the Assembly to check time-keeping and attendance.

3) The notice stated that pursuant to section 22 of the County Assembly Service Act, 2017 the claimant was suspended effective immediately for a period of 60 days. It further stated that the suspension was not disciplinary but intended to pave way for thorough investigations and to determine appropriate action and if investigations were not completed within the 60 days, the 1st respondent reserved the right to extend the suspension as necessary. Further, during investigations the claimant would be provided with the details of the allegations and given an opportunity to respond to them. If the claimant failed to avail himself, the notice stated that the 1st respondent would proceed with the disciplinary procedure in the claimant's absence and make a determination based on the information available to the Board. It further stated that the claimant had a right to personal or legal representation when appearing before the 1st respondent if he was to leave town or not be available to appear before the Board, he had to make a written request and obtain approval from the 1st respondent's Chairman. Further, upon receipt of the notice he had to hand over to the Chairman all 2nd respondent's property in his possession.

4) The claimant received undated notice to show cause signed by one Hon. Sammy N. Ruwa, Chairman of the 1st respondent. The notice conveyed that investigations had been completed and the details of the allegations were set out in that notice. The notice concluded thus, **“Consequently, we write to you and give you a Seven (7) days’ notice (the Notice Period) from the date of your receipt of this letter to submit to the undersigned a written response to the issues raised in this letter. Thereafter, the Board shall proceed in accordance with Section 22 and 23 of the County Assembly Services Act, 2017.”**

5) The claimant replied by his Advocates' letter dated 23.03.2020 that the claimant was saddened and shocked by the content of the said notice to show cause. Further the allegations levelled against the claimant were motivated by malice, authoritarianism, abuse of office and disregard of the rule of law. The claimant replied to each of the allegations in detail.

6) The claimant is apprehensive that despite his response to the notice to show cause, the respondents have already made their decision to terminate his services as the Clerk of the 2nd respondent. The claimant's case is that the respondents are going through the process to appear to be complying with the legal procedure hence the claimant filed the claim herein and the present application. The basis of the apprehension is as follows:

a) The claimant was appointed Clerk of the 2nd respondent effective 01.08.2019 per section 12(4) of the County Government Act, 2012 and became Secretary for the 1st respondent but has never been allowed to take and sign minutes of the 1st respondent as per law required.

b) After appointment the office was not handed to him and no hand over report was submitted.

c) After appointment in August 2012 he started receiving cell phone calls that there was a dossier against him from his previous service and despite asking for the dossier it was not presented to him and he reported the matter to police per OB. No. 18/25/09/2019. The matter is pending investigation by the police.

d) The claimant believes he is antagonised by the 3rd respondent together with the 4th to 7th respondents because he advised them that he could not authorize or approve payments to a contractor of a project which was under investigation by the Ethics and Anti-Corruption Commission (EACC) without the Commission's authority to pay and his advise was supported by the Assembly's Legal Department and the EACC. In the process, the claimant states that the County Procurement Officer became angry and uttered threats to the claimant's secretary whom the claimant advised to report to the police and after reporting, the 3rd to 7th respondents were not happy and the 3rd respondent moved to terminate the claimant's employment on 11.12.2019 which the claimant successfully challenged in the earlier suit. Thus the suspension letter of 02.03.2020 issued together with the undated notice to show cause herein.

7) The alleged meeting of 01.03.2020 took place on a Sunday and the claimant says it was illegal as it breached clause 3 of the second schedule to the County Assembly Service Act, 2007 and which showed malice, lack of good faith, and abuse of office or power by the 3rd to 7th respondents as members of the 1st respondent.

8) The claimant was arrested in Mombasa on 11.03.2020 upon alleged giving of false information whereas his report to the police about work related complaints was still under investigation. He believes that his arrest was instigated by the 3rd to 7th respondents.

9) The 3rd to 7th respondents' actions herein are a violation of Article 236 of the Constitution of Kenya 2010 as they amount to victimization or discrimination against the claimant for having performed the functions of his office in accordance with the Constitution, the County Government Act, 2012, the County Assembly Service Act, 2017, and, the Public Finance Management Act, 2017.

The respondents opposed the application by filing on 11.05.2020 the replying affidavit of Sammy Nyamawi Ruwa, the Speaker of the County Assembly of Kwale. The respondents appointed Muturi Gakuo & Kibara Advocates to act in the suit. It was urged for the respondents as follows:

1) It was not disputed that claimant filed suit on 17.12.2019, **Hamisi Bweni Dzila –Versus- County Assembly of Kwale and Kwale County Assembly Service Board, ELRC Cause 99 of 2019 at Mombasa**. The respondents opposed that suit in which the claimant prayed for reinstatement to the position of Clerk to the County Assembly of Kwale. Ruling was delivered by the Court on 28.02.2020. The 1st respondent convened on Sunday 01.03.2020 to deliberate the ruling and it was resolved that the suspension letter of 02.03.2020 be issued against the claimant.

2) On 02.03.2020 the claimant did not report on duty as alleged but he reported on 03.03.2020 and it was not true, per claimant's averments, that he was prevented from accessing the office. After the adjournment of the County Assembly sitting on 03.03.2020, the Speaker summoned the claimant in presence of the Deputy Speaker and, the Speaker explained to the claimant the decision by the Board and handed to the claimant the suspension letter dated 02.03.2020.

3) The claimant has declined to subject himself the daily attendance biometric register put in place by the respondents and as per the register exhibited for the period 01.07.2019 to 06.03.2020.

4) The respondent did not instigate the arrest of the claimant as alleged by the claimant. It was the claimant who reported to the police that the 1st respondent's employee known as John Kalu had threatened the claimant's life but the police investigations failed to establish the alleged threats. Instead the police investigations discovered that there was a bad working relationship between the claimant and the staff of the County Assembly. The police recommended that the claimant and one Janet Mwanja be charged with the offence of giving false information to a person employed in public service contrary to section 129(a) of the Penal Code. The 1st respondent and the County Assembly were never involved in the arrest and subsequent charging of the claimant and the respondents became aware when the DCI wrote to the County Assembly the letter dated 17.03.2020 conveying that two of the Assembly's employees being the claimant and Janet Mulwa had been charged accordingly and the case had been fixed for mention on 02.04.2020 at Kwale law Courts for further directions and the Assembly was being notified to take appropriate administrative action.

5) The 1st respondent completed its investigations and per sections 22 and 23 of the County Assembly Services Act, 2017 framed charges against the claimant who was given 7 days' notice to respond to the charges as per the notice to show cause delivered on 17.03.2020. The claimant responded by his Advocates' letter dated 23.03.2020. Under section 23(d) of the County Assembly Service Act 24 of 2017, after the written response, the claimant is to be invited to appear before the 1st respondent either personally or with

Advocate to exculpate himself. However, due to Covid 19 situation restricting movement and gathering the 1st respondent had not convened awaiting lifting restrictions of inter-county movement.

6) On 27.04.2020 the Court (Ndolo J.) suspended disciplinary process against the claimant. Thus the 1st respondent resolved that it would not initiate any disciplinary hearing against the claimant until the issues in dispute pending before Court are determined. The 1st respondent extended the administrative suspension of the claimant for 60 days (as per letter dated 30.04.2020) with full pay in line with section 22, section 27(1) of the CASA Act and as read with Article 236(b) of the Constitution of Kenya, 2010.

7) The 1st respondent is impartial in carrying out its functions and maintains high standards of professionalism and per Article 232 and 236 of the Constitution of Kenya.

8) As Clerk to County Assembly and Secretary to 1st respondent and after appointment the claimant took 1st respondent's minutes which were signed by the 3rd respondent being the 1st respondent's Chairman. The claimant had reported to work on 01.08.2019 and took oath of office before the 1st respondent's members on 06.08.2019. On 19.08.2019 the 1st respondent withdrew the Deputy Clerk's duties of accounting officer and the claimant was designated as such per section 17(b) of the County Assembly Service Act, 2017. He was also facilitated to attend a two weeks' training or induction at the Centre for Parliamentary Studies and the Senate of Kenya to assist him settle smoothly in his new appointment. Nevertheless, the claimant continued to urge that there had been no proper hand over whenever issues of the County Assembly Complex Project came up for his action. The 1st respondent intervened and the claimant was given all information and documents now exhibited per paragraph 20 (a) to (f) of the replying affidavit.

9) Whenever the claimant was absent the Deputy Clerk performed the duty of recording the 1st respondent's minutes. Once appointed as Clerk, the claimant took over the duties as such. Whenever present, he attended Board meetings and took minutes and he enjoyed all his salary and benefits as Clerk. It is not true that he had been denied the chance to perform his work.

10) It was true that the 1st respondent held a meeting on Sunday 01.03.2020 but the same was not illegal because clause 1 and 2 of the 2nd schedule of the County Assembly Services Act, 2017 provides that meetings of the Board can be held on such date and time as the Chairperson shall determine and the Board may meet as often as necessary. The meeting of 01.03.2020 was not a special meeting as contemplated in clause 3 of the schedule. Clause 3 applied where the meeting had not been initiated by the Chairman or Vice – Chairman in absence of the Chairman but initiated by a member to discuss an issue where the Chairman had been reluctant to call the meeting. That was not the case for the meeting of 01.03.2020. Further, at a Board meeting held on 28.02.2020, the Board resolved to meet on 01.03.2020 to receive the Advocates' report on the ruling which the Board members knew would be delivered by the Court on 28.02.2020. The Chairman had convened the meeting of 01.03.2020 per his notice dated 28.02.2020 exhibit SNR-15.

11) The 1st respondent takes no objection to the claimant's or other officers' communicating with the EACC. The letter to show-cause does not allege that the claimant irregularly communicated with the EACC. The certificate No. 8 in issue as raised in the matter was handled with integrity and above board per paragraph 28 of the replying affidavit. The allegations against the claimant are that while executing official duty he sought advice and direction from external sources relating to his duties as a Clerk without the knowledge and approval of the Board per section 4(3) of the County Assembly Act, 2017.

12) The claimant severally denied before the 1st respondent of ever communicating with EACC and which contradicts the claimant's own evidence to the 1st respondent. The EACC only cautioned the Board not to pay the certificate if all documents had not been provided. In any event, the respondents' case is that the disciplinary case cannot be considered on merits at this stage as it is still pending.

13) By replying to the notice to show-cause the claimant thereby submitted himself to the disciplinary process. If he did not wish to submit to the disciplinary process, he ought to have declined to reply the notice to show-cause. Article 236 of the Constitution requires that no officer is dismissed without regard to due process of the law. The respondents have followed the due procedure under the County Assembly Act 24 of 2017 and the claimant should subject himself to the disciplinary proceedings.

14) The 1st respondent has resolved that the claimant's pending dues be paid and any delay in payment by the Human Resource Department is due to challenges related to the IPPD system. The April 2020 payroll had already captured the claimant as one of the beneficiaries.

15) Under section 42 of the County Assembly Service Act 24 of 2017, the members of the 1st respondent are not subject to any liability, action, claim, or demand if the same was done in good faith and their capacity as Board members so that, the 3rd to 7th respondents are improperly sued and the claim against them ought to be struck out with costs.

16) It is contrary to section 7 of the Civil Procedure Act Cap.21 for the claimant to file the present suit about the same issues and against the same parties, the issues having been determined in the said previous ELRC Cause No.99 of 2019 determined by the ruling delivered on 28.02.2020.

17) The application is frivolous, vexatious, and an abuse of Court process and should be dismissed with costs.

Written and oral submissions were made for the parties. The Court has considered the material on record for and against the application. The Court makes findings as follows.

To answer the **1st issue** for determination, whereas the 1st respondent is a corporate body and its members are immune to personal liability for acts done in good faith in the discharge of their duties, in the instant case the claimant has made specific allegations, claims and prayers against the 3rd to 7th respondents such as is done in paragraphs 21, 22, and 23 of the statement of claim filed on 31.03.2020. The claimant has also made specific prayers 1, 3, 4, and 5 against the 3rd to 7th respondents. In view of the pleadings in the statement of claim and the fact that no statement of response has so far been filed to oppose the claim, the Court returns that the 3rd to 7th respondents are proper parties to the suit. In any event, the Court considers that whether the 3rd to 7th respondents acted in good faith and therefore protected from liability by reason of statutory immunity is a matter to be determined after a full hearing of the suit. The Court reckons that in any event no formal or oral application has been made to strike out the 3rd to 7th respondents as parties to the suit. Thus, the Court will not strike out the 3rd to 7th respondents as named parties to the suit and as was urged and submitted for the respondents.

To answer the **2nd issue**, the Court returns that the present suit is not trapped by the doctrine of *res judicata* and the claimant is not re-litigating matters that were decided in the said ELRC Cause No.99 of 2019 determined by the ruling delivered on 28.02.2020. It is clear that the suit is based on a new cause of action flowing from the 1st respondent's resolution at its meeting of Sunday 01.03.2020 for the suspension letter dated 02.03.2020 to issue. The Court finds that the cause of action is fresh even if the parties are similar to the parties in the earlier suit.

To answer the **3rd issue** for determination, the Court returns that the principles governing the Court's intervention or interference in the employer's prerogative to perform human resource functions over its employees are now settled. In deciding whether to interfere in the employer's prerogative to undertake human resource functions, the Court has held that the jurisdiction to do so shall be exercised very sparingly. In **Rebecca Ann Maina and 2 Others –Versus- Kenyatta University of Agriculture and Technology [2014]eKLR** the Court held that it will only intervene in compelling and exceptional cases when the process is fundamentally flawed to occasion serious injustice or where the process was marred with irregularities. Further the intervention would not be to stop the disciplinary process but to right things. In **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** the Court held thus, **"The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

The **4th issue** for determination is whether the applicant has satisfied the principles to justify the Court's interference against the respondents continuing to undertake the disciplinary process as initiated by the letter of suspension dated 02.03.2020. The disciplinary process against the claimant is governed by the provisions of the County Assembly Service Act, 2017. Section 22 of the Act on suspension or removal of the Clerk provides that the County Assembly Service Board may suspend or remove from office, the Clerk for:

- a) inability to perform the functions of the office, whether arising from infirmity of body or mind;
- b) gross misconduct or misbehaviour;
- c) incompetence;
- d) bankruptcy;
- e) violation of the provisions of the Constitution, including Chapter Six of the Constitution; or
- f) violation of the provisions of the Act.

Section 23 of the Act provides for the procedure for removal of the Clerk as follows.

"Procedure for removal of the Clerk

(1) Where the Board considers it necessary to remove the Clerk under section 20, the Board shall

- (a) frame a charge or charges against the Clerk;**
- (b) forward the statement of the said charge or charges to the Clerk together with a brief statement of the allegations in support of the charges;**
- (c) invite the Clerk to respond to the allegations in writing setting out the grounds on which the Clerk relies to exculpate himself or herself; and**
- (d) invite the Clerk to appear before the Board, either personally or with an advocate as he or she may opt, on a day to be specified, to exculpate himself or herself.**

(2) If the Clerk does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Board

the Clerk fails to exculpate himself or herself, the Board shall submit a notice of a motion to the Speaker seeking that the county assembly revokes the appointment of the Clerk.

(3) A motion under subsection (1) shall specify—

(a) the grounds set out in section 21 in which the Clerk is in breach; and

(b) the facts constituting that ground.

(4) Upon notice of the motion under subsection (2), the Speaker shall refer the matter to a select committee of the assembly consisting of eleven members and established in accordance with the Standing Orders of the assembly to investigate the matter within ten days of receipt of the motion.

(5) The select committee shall, within ten days, report to the assembly whether it finds the allegations against the Clerk to be substantiated.

(6) The Clerk shall have the right to appear and be represented before the select committee during its investigations.

(7) The assembly shall consider the report of the select committee and resolve whether to approve the motion.

(8) If the assembly approves a motion filed under this section, the Clerk against whom the motion was filed shall be deemed to have been removed from office from the date the motion was approved.”

It is submitted for the respondents that for a suspension under section 22, the 1st respondent was making an administrative decision for which the claimant was not entitled to due process of a notice to show-cause and a hearing. The respondents rely on Denis Musyoka Mutui – Versus- Kwale County Assembly Service Board & Another [2018] eKLR where Rika J stated thus, “28. Suspension of an Employee is lawful, if it is founded of contractual authority, or is underpinned by statute, as held in Industrial Court [E&LRC] in *Shedd Dennies Simoto v Speaker Narok County Assembly 2015 [e-KLR]*. Section 22 of the County Assembly Services Act authorises the County Assembly Service Board, to suspend or remove the Clerk from Office. There is no requirement the Clerk is given a hearing before suspension. Hearing is only required, under section 23, once the process of removal is commenced. Suspension contemplated under Section 22, is not suspension in form of a penalty, after a disciplinary hearing; it is suspension in the form of an administrative measure. The Claimant is merely being asked to step aside, to enable investigations and the process of removal, to go on without his possible interference. He has not been adjudged guilty and suspended as punishment for any employment offence. There is no requirement that he is heard before being placed on administrative suspension.”

The respondent further cites Martin Nyaga Wambora & 4 Others –Versus- Speaker of the Senate & 6 Others [2014] eKLR where the High Court (Ongúdi J, Githua J and Olao J) held, “171. Where a suspension from the performance of a person’s duties is being considered pending further investigations, we find that the rules of natural justice need not be strictly adhered to since no final decision is expected to be made at that point and such proceedings only amount to a preliminary inquiry. We are supported in this reasoning by the Learned authors of *Halsbury’s Laws of England Fourth Edition Reissue Volume 1*, where when discussing the applicability of the rules of natural justice stated as follows at page 175 Paragraph 94; “The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or recommendation on which a subsequent decision may be founded.” Further, “173. In *Lewis V Heffer & Others (1978) 3 All ER 354*, it was held inter alia that where a suspension was made as a holding operation pending inquiries, the rules of natural justice did not apply because suspension was a matter of good administration. We agree with this finding because good administration requires that where investigations are about to be launched regarding suspected irregularities in the execution of duties assigned to a certain office, the occupant of such office should step aside to pave way for the intended investigations in order to avoid the possibility of any interference with the investigations and to safeguard the integrity of its outcome.”

For the claimant it was submitted that the claimant is entitled to due process of a hearing prior to the suspension decision because Article 236(b) of the Constitution provides that a public officer is not to be dismissed, removed from office, demoted to a rank, or otherwise subjected to disciplinary action without due process of the law.

The Court has carefully considered the authorities, the parties’ submissions and the statutory provisions providing for suspension of the Clerk to the County Assembly. **First**, section 23(1) of the Act refers to when the Board considers it necessary to remove the Clerk under “**section 20**” of the Act. Section 20 of the Act in fact deals with procedural functions of the Clerk and not removal of the Clerk. It is section 22 of the Act that deals with suspension or removal of the Clerk by the Board. Further, section 23(3) (a) refers to grounds set out in section 21 whereas the grounds are set out in section 22 and section 21 of the Act in fact relates to functions of Clerk during vacancy or inability. Accordingly, the Court will construe “**section 20**” in section 23 (1) of the Act to essentially read “**section 22**” and, “**section 21**” in section 23(1) to essentially read “**section 22**”. In view of the mix up, the claimant will serve this ruling upon the Attorney General to consider appropriate measures towards correcting the mix up in the apparent and obviously erroneous reference in section 23(1) of the Act to “**section 20**” instead of “**section 22**” thereof, and in section 23(3) (a) to “**section 21**” instead of “**section 22**”.

Second, the Court finds that the wording of section 22 is such that the Board is empowered to suspend the Clerk or remove the Clerk from office upon the stated grounds. As per the authorities cited for the respondents, a decision upon a preliminary inquiry would not necessarily require the hearing of the affected person prior to making such preliminary administrative decision that would later lead to a substantive consideration of the issues under which the affected person is accorded due process or natural justice. In the instant case, section 22 empowers the Board to suspend or remove the Clerk upon the stated grounds. The section does not provide that such suspension is preliminary and may be imposed as a temporary measure pending the removal process as per the procedure for removal of the Clerk in

section 23 of the Act. Thus, whereas the procedure for removal is prescribed in section 23, no procedure for suspension is provided for, and, with necessary safeguards such as how the suspension is to be initiated, the duration of the suspension, and the effect of the suspension on the contract of service such as on the Clerk's remuneration and other benefits. While the Board is required to make regulations as provided for in section 45 of the Act, the 1st respondent has not suggested that it has made such regulations and none were said to have been made or exhibited to the Court as governing the suspension of the claimant as contemplated in section 22 of the Act. In absence of the procedure to govern the power to suspend as conferred to the Board under section 22 of the Act, the Court considers that the suspension as imposed against the claimant and the disciplinary proceedings are being continued in a manner that is manifestly unfair. In any event and in absence of the statutory procedure and safeguards for exercising the power to suspend as conferred in section 22 of the Act, the Court returns that the claimant has established a serious ground for the Court to intervene in the ongoing disciplinary proceedings initiated by the respondents against the claimant. The Court further finds that in absence of due process prior to the suspension letter of 22.03.2020, and, looking at the wording of section 22 of the Act, the claimant is genuine to lament that by reason of the suspension, he is thereby deemed culpable as per any of the grounds for suspension listed in section 22 of the Act, or, that in view of such culpability flowing from the suspension letter, an outcome of any purported removal proceedings per section 23 of the Act have thereby been predetermined. While making that finding, the Court has observed the procedural hiccups the parties dispute about such as whether the Board would meet on Sunday 01.03.2020 and the unclear tenure of the suspension as manifested in the extensions by the 1st respondent. Thus, the exercise of the power to suspend in section 22 (in absence of any other statutory provisions and safeguards) in the opinion of the Court, amounts to potentially a power for summary removal of a Clerk from office whereby nothing therefore prevents suspension under the section from being indefinite or eternal or final and thereby rendering the removal procedure (in section 23 of the Act and involving the County Assembly) as mute. The Court observes that section 22 of the Act prescribes definitive grounds for suspension or removal and the Court is burdened to resolve how, without due process or natural justice prior to suspension, like in the instant case, any of the grounds in section 22 of the Act had been established prior to imposing the suspension against the claimant. It appears to the Court that the respondents' case is that the suspension was based upon allegations and which obviously would fall short of the definitive grounds for suspension or removal in section 22 of the Act. In that sense, it appears to the Court that suspension in section 22 of the Act is not preliminary but means removal and cannot be imposed except as a removal in accordance with section 23 of the Act – meaning that the 1st respondent has no power to impose “a preliminary suspension” pending the procedure in section 23 of the Act. Such is a state of things and considerations that encourage the Court to find that the scope and manner of the 1st respondent's exercise of the statutory power to suspend the Clerk, the claimant herein, is such a serious matter to be investigated at the full hearing of the suit. Further section 22 of the Act refers to “suspend or remove” upon the stated grounds and is open to interrogate whether “suspend” in the section essentially means “remove” so that the suspension thereunder is then potentially, in the statutory design, amenable to section 23 of the Act providing for procedure for removal of a Clerk –so that as urged for the claimant the suspension can only be imposed per procedure in section 23 –after due process or observance of the rules of natural justice.

The Court therefore further finds that the on-going disciplinary proceedings as flowing from the suspension decision are founded upon a likely ambiguous section 22 of the Act and therefore resulting in the manifest injustice per the claimant's lamentation herein. The Court considers that the emerging issue of interpretation of the applicable statutory provisions is such matter that amounts to a systemic defect that justifies a stay of the disciplinary process pending a complete scrutiny and investigation at the full hearing of the suit. The Court further considers that such apparent or likely systemic statutory defect or gap and the grievances raised for the claimant are matters that do not amount to a grievance that may be resolved through the parties' internal grievance management procedure. In any event, the parties have not suggested or shown that there exist internal mechanisms for managing the claimant's grievance herein or any part of the grievance, accordingly. The Court therefore returns that the claimant has established that the disciplinary procedure is continuing in a manner that is manifestly unfair and there exists no or conceivable internal grievance management procedures that are available, in the circumstances of the case. Thus, the Court finds that the claimant has established a *prima facie* case with a high probability of success, thereby, justifying the Court's intervention at this interlocutory stage.

To answer the 5th issue, while parties raised issues of fact and submitted extensively on the merits of the grounds for the suspension, the Court returns that such are matters not to be delved into at this interlocutory stage and in circumstances that in absence of a reasonable bar as may be established in Court, the respondents in discharging the prerogative power of an employer to exercise disciplinary control over the claimant may eventually have to consider the merits of the allegations and decide one way or the other. Further, it was urged and submitted for the claimant that the members of the 1st respondent were biased and therefore not impartial to fairly and objectively consider the disciplinary case against the claimant – and it was submitted and suggested for the claimant that the Court should therefore take up the administrative disciplinary case and decide it by itself in place of the 1st respondent. The Court returns that, while already cautioned that it is not for the Court to take up the employer's legitimate prerogative power to undertake human resource functions over an employee, such issue of bias on the part of the 1st respondent's members can only be determined after the full hearing of the suit - and cannot be determined at this interlocutory stage for want of necessary evidence and elaborate submissions establishing the alleged bias, and, the best next steps in the pending administrative disciplinary proceedings as may be necessary.

The 7th issue for determination is whether the claimant is entitled to the prayers in the notice of motion. The Court returns that the claimant has established that the suspension and therefore the administrative disciplinary proceedings are continuing in a manner that is manifestly unfair, and, the grievances are not conceivably amenable to an internal grievance management procedure, or, such procedure has not been suggested to have existed or not exhausted. Thus, the Court returns that since the suspension letter of 22.03.2020 was already issued, prayer 2 will issue to the extent that the continuation of the disciplinary proceedings as flowing from the suspension letter is amenable to a stay. The Court considers that the finding effectively covers prayers 3 and 4 relating to the notice to show cause and the deliberations flowing from the show-cause letter. While the show-cause letter flows from the suspension, the Court considers that suspension is elective to removal or means removal as per the wording of section 22 of the Act – and the administrative disciplinary proceedings ought to be stayed pending hearing of the main suit at which the effect, scope and meaning of the applicable statutory provisions will be completely resolved. The respondents urged and submitted that the 1st respondent had already resolved that the claimant is entitled to remuneration and other benefits pending the determination of the disciplinary proceedings and the Court will order accordingly.

In conclusion, the application filed and dated for the claimant on 31.03.2020 is hereby determined with orders:

- 1) Pending the hearing and determination of the main suit herein, there be stay of the suspension and the administrative disciplinary proceedings initiated by the 1st, 3rd, 4th, 5th, 6th and 7th respondents against the claimant as flowing from the letter of administrative suspension pending investigation Ref. No. KWL/CA/BD/VOL.1(53) dated 02.03.2020.

2) Pending the hearing and determination of the main suit herein, the 1st and 2nd respondent to pay the claimant outstanding salary from December 2019 to date and to continue paying him accordingly.

3) Pending the hearing and determination of the main suit herein, the claimant to serve upon the Attorney General this ruling in 7 days for consideration of appropriate measures towards correcting the apparent mix up in section 23(1) of the County Assembly Service Act No.24 of 2017 referring to “**section 20**” instead of “**section 22**” thereof, and in section 23(3) (a) to “**section 21**” instead of “**section 22**” thereof.

4) Pending the hearing and determination of the main suit herein, the parties are at liberty and are encouraged to negotiate a compromise towards amicable resolution of the dispute herein and taking into account the findings in this ruling - and with a view of recording a consent in Court as may be appropriate.

5) Parties to take steps towards the expeditious hearing and determination of the suit, or, compromise of the dispute.

6) Costs of the application in the cause.

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

BYRAM ONGAYA

JUDGE