



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 42 OF 2019

DANIEL OMONDI OGADA

COLLINS ODHIAMBO AGUTU

TOBIAS ODUNDO (*Members of the HOMABAY*

COUNTY PUBLIC SERVICE BOARD),..... **PETITIONERS/APPLICANTS**

VERSUS

COUNTY ASSEMBLY OF HOMABAY,.....**1ST RESPONDENT**

COUNTY GOVERNMENT OF HOMABAY,.....**2ND RESPONDENT**

THE GOVERNOR OF HOMABAY COUNTY,.....**3RD RESPONDENT**

RULING

1. The application dated 28/4/2020 prays for an Order in the following terms: -

(a) Spent

(b) Spent

(c) An order of committal to be made against Cyprian Otieno Awiti, the 3rd Respondent herein for such period as this Honourable Court may deem fit and just.

(d) Costs of the application.

5. The application is premised on grounds set out on the notice of motion marked (a) to (f) the nub of which is that the Court on 2/12/2019 issued interim Orders restraining the Respondents from removing the Petitioners from office or interfering with their duties.

6. That the said orders were extracted and served upon the Respondents together with a Penal Notice.

7. The 3rd respondent despite knowledge of the Court orders proceeded on 22/4/2020 to appoint one Elijah Kodo as Chairman of Homa Bay County Public Service Board despite the existence of the order conserving the position of the 1st petitioner, Daniel Omondi Ogada as the Chairman of the Homa Bay County Public Service Board issued on 2/12/2019.

8. The application is further supported by a statement by Bruce Odeny, Counsel for the Petitioner, and the supporting affidavit of the Petitioner restating the facts set out in the Notice of Motion.

9. The respondents filed a replying affidavit sworn to by Isiah Ogwe, the County Secretary and Head of Public Service of the 2nd respondent who deposes that the deposition by the 1st Petitioner is riddled with falsehoods and deceit in that the Court amended and varied the Order being relied upon by the applicants by consent of the parties on 20/12/2019 and allowed the recruitment of other County Public Service Board members whose terms had expired and the process had started as per the law.

10. The Court Order dated 20/12/2019 is annexed to the affidavit and marked "10-1."

11. That the process of recruitment of other County Public Service Board members had been undertaken as per the law and approved by the Homa Bay County Assembly.
12. That the 3rd respondent was mandated by law to have the appointed persons take oath and take up their duties. The appointed persons Lawrence Ayoo Oteng (Dr); Sarah N. Waswa (Mrs) and Elija Odondi Koloh were then gazetted and took oath of office as members and one took oath as Chairman of the County Public Service Board as alleged by the applicants.
13. That the application is based on falsehoods to mislead the Court and it be dismissed with costs.
14. The parties filed their respective submissions.
15. At the outset the Court notes that the application dated 28/4/2020 was granted at ex parte stage in terms of prayers 1 and 2. These prayers have been spent therefore and may not be extended.
16. That only leaves the Court with prayer 3 which seeks to have the 3rd respondent to be committed for contempt of Court for disobeying the Order of the Court issued on 2/12/2019 and restated and varied on 20/12/2019.
17. The respondents do not deny service or knowledge of the order but state that they have not disobeyed at all the order issued on 2/12/2019 but have instead acted in terms of the order varied by Consent of the parties on 20/12/2019.
18. In terms of the variation, the Court allowed recruitment of members of the HomaBay County Public Service Board to proceed provided the positions of the petitioners were not affected by any advertisement and or recruitment process pending hearing and determination of the suit.
19. In this respect, the County Secretary deponed at paragraph 7, 8, 9, 10, 11 and 12 of the replying affidavit that the recruitment of the Board members was done in strict compliance with the law and in conformity with the reviewed Order of the Court dated 20/12/2019 in that the respondents only recruited three more members of the Board namely Lawrence Ayoo Oteng (Dr.) Sarah N. Waswa (Mrs) and Elija Odondi Koloh as per gazette notice No. 3108 of 17/4/2020. That the respondent have not removed and/or replaced the petitioners as members of the Board nor have they appointed or gazetted a replacement of the 1st petitioner as the Chairman of the Board.
20. The Court has perused the Gazette Notice and has confirmed as true the deposition by the Secretary in the replying affidavit.
21. The applicant however states in the supplementary affidavit dated 20/5/2019 that the respondents have updated the official facebook page and website of the 2nd respondent with information that Elijah Kodo had been appointed by the 3rd Respondent as the Chairman of the Homa Bay County Public Service Board. No documentation has been attached to the affidavit to illustrate this assertion.
22. It is the Court's considered finding that there is no tangible evidence before Court to show that the 1st applicant has been removed and replaced as the Chairman of the Homa Bay County Public Service Board.
23. Nothing in law prevents a member of a Board from acting as Chairman of the Board and or chairing sub-committee of the Board for any identified purpose including recruitment of staff.
24. Contempt of Court is a serious offence and the burden of proof that another has committed the offence of contempt of Court is on he who alleges. The standard of proof is beyond reasonable doubt, since contempt of Court is a criminal offence.
25. The importance of obeying Court orders has been restated over a long period of time including by Lord Justice Denning in **Hadkinson – vs- Hadkinson (1952) 2 ALL ER 567, 573; Mutitika –vs- Baharini Limited (1985) KLR (CA) and in Econet Wireless Kenya Ltd. –vs- Minister of Information Communication of Kenya and Another (2005) eKLR.**
26. In the latter case it was said: -

“It is a fundamental principle of the Rule of Law that Court orders must be obeyed. The importance of this principle has been stated in many decisions in our courts, and in particular the Court of Appeal.
27. The applicant has in this particular case failed to prove that the 3rd respondent and for that matter any of the respondents was in willful disregard of the varied Court Order issued on 20/12/2019 to the required standard of proof.
28. Accordingly, the application lacks merit and is dismissed with costs in the cause.
28. The parties have filed submissions on the petition itself and the matter should be placed before the Employment and Labour Relations Court judge at Kisumu for hearing and determination of the petition.

Dated and delivered at Nairobi this 11th day of March, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

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

MATHEWS N. NDUMA

JUDGE

Appearances

Bruce Odeny for Applicant

Otieno Yogo Ojwang & Co. Advocates for the Respondents

Chrispo: Court Clerk