



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 21 OF 2020

VICTOR OMONDI RAKWACH.....CLAIMANT

VERSUS

THE SPEAKER, HOMA BAY COUNTY ASSEMBLY

CLERK, HOMA BAY COUNTY ASSEMBLY

COUNTY ASSEMBLY SERVICE BOARD OF HOMABAY

HOMA BAY COUNTY ASSEMBLY.....RESPONDENTS

RULING

1. The application dated 13/5/2020 was in the first instance granted *ex parte* in terms of prayers 1, 2, and 3 which are now spent.

2. The pending prayers in the application are:

i. **THAT** pending the hearing and determination of the petition herein, this Court be pleased to grant an Injunction restraining the Respondents either by themselves, agents, servants and/or employees, from admitting the two members of the assembly to the payroll of the Homa Bay County Assembly and/or making any payments to and/or in favour of the said appointments, either on account of remuneration, allowance and/or salaries.

ii. **THAT** an Order be issued directing the Respondents and the Clerk, Homa Bay County Assembly, to reinstate the two members of the County Assembly Service Board to their position as the members of the County Assembly Service Board and to stop any interference with their terms and conditions of service as the Members of the Homa Bay County Assembly Service Board, pending hearing and determination of the Petition.

iii. **THAT** an Order be issued restraining the Respondents and the Clerk, Homa Bay County Assembly by themselves or any persons acting on their behalf from interfering with the two members of the County Assembly Service Board's execution of their duties as members of the County Assembly Service Board, Homa Bay County pending hearing and determination of the Petition.

iv. **THAT** the Sergeant at Arms of the Homa Bay County Assembly to be enjoined to ensure the orders of the Court are observed to the letter.

v. **THAT** an Order restraining the Respondents from appointing any other person as Members of the Homa Bay County Assembly Service Board to replace the two members of the County Assembly Service Board removed and any such appointment in defiance of the orders of the Court, to be null and void *ab initio* pending the hearing and determination of the petition.

vi. **THAT** costs be in the cause.

3. The application is grounded on grounds 1 to 9 set out on the face of the Notice of Motion and the supporting affidavit of the Petitioner/Applicant, the nub of which is that the respondents unlawfully and unprocedurally removed, from office two members of the County Assembly Service Board in that the Respondents violated County Assembly Service Act No. 24 and in particular Section 12(5) (a) thereof.

4. There is no Supporting Affidavit attached to the application. However the Court has considered the supporting affidavit of the applicant attached to the petition in which the applicant reiterates that the process of appointment of the two members of County Assembly was not fair and contravened the Constitution and Section 12(5) (a) of the County Assembly Service Act No. 24.

5. The alleged appointed members of the County Assembly are not parties to the suit nor have they been named at all in the Notice of Motion and in the supporting affidavit of the applicant, not attached to the application but to the petition itself.
6. This being the case, the application lacks the substratum upon which a fair and just adjudication and determination of an application at the interim stage may be made. This fact had escaped the Court at the *ex parte* stage hence the grant of interim Orders *ex parte* in the absence of bare minimum averments and deposition in support of the application.
7. In fact, there being no affidavit directly supporting the Notice of Motion, there are no attachments to the application that may be relied upon by the Court to substantiate the issues raised by the applicant in this Notice of Motion application.
8. The respondent filed grounds of opposition to the petition and the application dated 22/10/2020 in which the respondents state that the petitioner/applicant has not demonstrated how his rights have been violated to warrant filing of this application and the petition. That the Petitioner lacks *Locus standi* to file the petition and the application therefore.
9. The Court has considered the opposition by the respondents and the apparent deficiencies in the Notice of Motion dated 13/5/2020 and has found that the Notice of Motion is devoid of any substratum upon which conservatory orders sought may be granted pending the hearing and determination of the petition.
10. Accordingly, the Application lacks merit and is an abuse of the Court process and is dismissed with costs in the cause.

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 rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

N.E. Mogusu & Co. Advocates for the Respondent

H. Obach & Partners Advocate for the Petitioner.

Chrispo: Cour clerk.