



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. E001 OF 2021**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 165(3)(a),(b) AND (4) OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF ARTICLES 2, 3, 10(2)(a) & (c), 27(1) & (2), 28, 41(1), 47, 50, 73 AND 232 OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA IN SO FAR AS THE CONSTITUTION HAS BEEN AND STANDS TO BE VIOLATED**

**AND**

**IN THE MATTER OF A CONSTITUTIONAL PETITION BY**

**HON DAVID ONDIMU KOMBO**

**PETITIONER**

**v**

**COUNTY ASSEMBLY OF KISII**

**1<sup>st</sup> RESPONDENT**

**COUNTY ASSEMBLY SERVICE BOARD, KISII**

**2<sup>nd</sup> RESPONDENT**

**HON SAMUEL ANGASA ONUKOH**

**3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

1. Hon David Ondimu Kombo (the Petitioner) was elected as the Speaker of the County Assembly of Kisii on 7 September 2017.
2. On 18 November 2020, a member of the County Assembly gave the Clerk of the Assembly a notice of Motion for the Petitioner's removal.
3. The Clerk notified the Petitioner of the Motion through a letter dated 20 November 2020 and invited him to respond in writing. The Petitioner responded on 23 November 2020, and on 24 November 2020, he vacated the seat of Speaker to enable the Assembly to discuss the Motion.
4. The Motion was moved on 1 December 2020, and the Petitioner was accorded an opportunity to respond to the allegations.
5. The Motion was put to the vote, but chaos ensued during the process. The acting Speaker adjourned the Assembly to 3 December 2020.
6. However, the Petitioner convened the Assembly in the afternoon of 1 December 2020, and declared that the Motion had been lost.
7. On 4 January 2021, the Petitioner moved the Court alleging that the Respondents and more particularly Hon Samuel Angasa Onukoh (the 3<sup>rd</sup> Respondent), who had been elected acting Speaker on 18 November 2020, had continued to present himself as acting Speaker and frustrated him from carrying on the duties of his office as Speaker thus violating his rights as well as breaching the provisions of the Constitution and the Standing Orders of the Assembly.

8. The Petitioner sought orders:

(i) An order of injunction and prohibition do issue against the Respondents restraining its members and/or any persons acting under their behest from entertaining and/or debating any motion to remove the Petitioner through a process in violation of fair administrative action, the Constitution, the County Governments Act, the Standing Orders of the 1<sup>st</sup> Respondent and without due process accorded to the Petitioner and in violation of a right to a fair hearing accorded to the Petitioner.

(ii) An order of injunction and prohibition do issue against the Respondents restraining its members and/or any person acting under their behest from interfering, meddling in the office, functions and duties of the Petitioner as the Speaker of County Assembly of Kisii.

(iii) A declaration that the resolution contained in the Hansard report of 3<sup>rd</sup> December 2020 electing or extending the mandate of the 3<sup>rd</sup> Respondent as acting Speaker is without basis in law being contrary to the Constitution, section 11 of the County Governments Act and the Standing Orders of the Respondent.

(iv) A declaration do issue that the purported resolution and decision of the Respondents appointing or electing the 3<sup>rd</sup> Respondent as acting Speaker after the Motion dated 18<sup>th</sup> November 2020 to impeach the Petitioner had been defeated on the floor of the House is a clear violation of the law and constitutes a violation of the Petitioner's rights under Articles 27(1),(2) & (3), 41 and 47(1) of the Constitution of Kenya.

(v) A declaration that any proceedings taken by the Respondents in the Assembly chambers without the County mace and after the 1<sup>st</sup> December 2020 are null and void being contrary to the calendar of the House for 2020 and having been presided over by a person not recognised under the Constitution and the law.

(vi) An order of judicial review in the nature of prohibition do issue forthwith to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either by themselves, agents, servants and/or employees carrying out a process to remove the Petitioner without complying with the law, the Constitution, due process, according the Petitioner a fair hearing and without following to the letter the 1<sup>st</sup> Respondents Standing Orders.

(vii) An order of judicial review in the nature of certiorari to forthwith bring to this Court the decision of the 2<sup>nd</sup> Respondent contained in the Hansard report of electing and/or appointing the 3<sup>rd</sup> Respondent as acting Speaker, County Assembly of Kisii and the same be quashed forthwith.

(viii) An order of damages/compensation for breach of the Petitioner's fundamental rights.

(ix) An order do issue directing the OCS Kisii Police Station to provide security to the Petitioner owing to the threats of violence both inside and outside the chambers.

(x) The Respondents jointly and severally do pay the costs of the Petition.

9. Simultaneous with the Petition, the Petitioner filed a motion under a certificate of urgency seeking conservatory orders. The Court granted the conservatory order on 5 January 2021.

10. On 15 January 2021, Momanyi Manyoni & Co Advocates filed a Notice of Appointment to act for the County Assembly and the 3<sup>rd</sup> Respondent. The firm also caused to be filed on the same day a replying affidavit sworn by the 3<sup>rd</sup> Respondent and Grounds of Opposition.

11. Despite the Notice of Appointment, Albert Onchwati, an Advocate in the employ of the County Assembly, filed a Notice of Appointment to act for the County Assembly and the County Assembly Service Board on 19 January 2021.

12. When the Petition was mentioned on 26 January 2021, Mr Onchwati, Advocate, from the County Assembly department of Legal Affairs and Legislative Services, informed the Court that the County Assembly and the County Assembly Service Board had not instructed the firm of Momanyi Manyoni & Co. Advocates to act.

13. Mr Momanyi conceded, and the Court ordered that he would only act for the 3<sup>rd</sup> Respondent.

14. At the same session, the Court gave comprehensive directions and reserved judgment to 28 April 2021 (the Court declined to allow the joinder of the members of the County Assembly as Interested Parties).

15. On 3 February 2021, the firm of Bwondika & Co. Advocates purported to file a Notice of Appointment to act for some 36 listed members of the County Assembly. Also filed were Grounds of Opposition and a replying affidavit sworn by a member of the County Assembly and a schedule signed by 36 members of the County Assembly authorising one James Anunda to plead and sign affidavits on their behalf.

16. The 36 members of the County Assembly were not parties to the Petition. They did not secure leave to participate in the proceedings, and the Court, therefore, expunges from the record all the documents filed on their behalf on 3 February 2021.

17. The County Assembly and the County Assembly Service Board caused to be filed a replying affidavit sworn by the Deputy Clerk on 12

February 2021.

18. Pursuant to leave granted by the Court, the Petitioner filed a further affidavit on 19 February 2021.

19. The Petitioner filed his submissions on 3 March 2021, the 3<sup>rd</sup> Respondent on 17 March 2021, while the County Assembly and the County Assembly Service Board filed their submissions on 7 April 2021.

20. The Court has considered the Petition, affidavits and submissions.

### **Whether removal of Petitioner was lawful?**

21. The removal of a County Assembly Speaker is guided by section 11 of the County Governments Act and the Standing Orders enacted by the particular County Assembly. In the case of the Petitioner, Standing Order no. 58 was applicable.

22. Section 11 of the County Governments Act is in the following terms:

#### 11. Removal of Speaker from office

(1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy-five per cent of all the members of the county assembly.

(2) A notice of the intention to move a motion for a resolution to remove the Speaker shall be given in writing to the Clerk of the county assembly, signed by at least one-third of all the members of the county assembly stating the grounds for removal.

(3) A motion for a resolution to remove the Speaker shall be presided over by a member of the county assembly elected under section 9(4).

(4) Before the debate and voting on a motion under subsection (3), the Speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.

23. The parties did not dispute that the relevant provision of the Standing Orders mirrored the provisions of section 11 of the County Governments Act.

24. To advance his case that his removal was unlawful, the Petitioner contended that there was no resolution by the County Assembly on the Motion for his removal, that by the time of disruption of the vote-counting, 26 members had voted no, so it was impossible to achieve the 75% threshold, that the Motion had to be concluded within 14 days, which was not the case and therefore the Motion automatically lapsed, and that the 3<sup>rd</sup> Respondent's mandate was limited to presiding over the removal debate and therefore terminated on the 14<sup>th</sup> day after the debate was moved, and consequently he could not lawfully continue carrying out the duties of acting Speaker.

25. The Respondents countered the case presented by asserting that the voting for the Petitioner's removal was disrupted when chaos ensued during the voting process forcing the Assembly to adjourn at 1447 hours before declaration of the vote.

26. According to the Respondents, it was therefore unlawful for the Petitioner to convene the Assembly at 1646 hours and declare that the vote had been lost when the responsibility of declaring the vote was reserved to the acting Speaker.

27. It is not in dispute that a member of the County Assembly gave notice of Motion for the Petitioner's removal from the office of Speaker on 18 November 2020. The Clerk notified the Petitioner of the Motion through a letter dated 20 November 2020, and the Petitioner made a written response on 23 November 2020.

28. The Motion for the Petitioner's removal was moved in the Assembly on 24 November 2020, and the Petitioner vacated the chair to enable the Motion to be debated.

29. The County Assembly then elected the 3<sup>rd</sup> Respondent to act as Speaker for purposes of debating the Motion, and the Motion came up for debate on 1 December 2020. The Petitioner was given an opportunity to defend himself.

30. At the close of the debate, the members voted through a secret ballot.

31. The Hansard for the day shows that during the counting of the votes, some members of the Assembly disrupted the counting, and commotion ensued, forcing the 3<sup>rd</sup> Respondent to adjourn.

32. Despite the decision of the 3<sup>rd</sup> Respondent, the Petitioner convened the Assembly in the afternoon and declared the results of the vote.

33. It is clear from the Hansard that the voting and counting process had not been concluded.

34. There was no disclosure where, when, how and by whom the vote counting was concluded. The vote counting had to be conducted on the floor of the Assembly with members present.

35. It is not clear where the Petitioner got the results he declared as the Hansard does not indicate that vote counting resumed during the afternoon session.

36. It was therefore not within the province of the Petitioner to assume control of the process in the afternoon and declare that the Motion had been lost as he was outrightly barred by section 11(6) of the County Governments (Amendment) Act, 2020.

37. Therefore, the declaration that the Motion had been lost was not only premature, unlawful but of no legal consequence.

**Did County Assembly consider the removal motion within 14 days?**

38. Section 11(8) of the County Governments (Amendment) Act 2020 outlines the steps in the removal proceedings of a Speaker of a County Assembly.

39. It provides:

Vacation of Office of Speaker

11. (1) The office of Speaker shall become vacant—

(a) when a new county assembly first meets after an election;

(b) if the officeholder is disqualified from being elected as a member of a county assembly on grounds specified under Article 193(2) of the Constitution;

(c) if the county assembly so resolves by a resolution supported by at least two-thirds of all the members of the county assembly;

(d) if the office holder resigns from office in a letter addressed to the county assembly; or

(e) if the officeholder dies.

(2) The Speaker may be removed pursuant to subsection (1) (c) on any of the following grounds —

(a) gross violation of the Constitution or any other law;

(b) incompetence;

(c) gross misconduct;

(d) if convicted of an offence punishable by imprisonment for at least six months; or

(e) inability to perform the functions of the office of Speaker arising from mental or physical incapacity.

(3) A notice of the intention to move a motion for a resolution to remove the Speaker under subsection (1)(c) shall —

(a) be given in writing to the Clerk of the county assembly;

(b) be signed by at least one-third of all the members of the county assembly; and

(c) state the grounds for removal as specified in subsection (2).

(4) A motion for the removal of the Speaker shall specify —

(a) the grounds for removal as specified in subsection (2) in which the Speaker is in breach; and

(b) the facts constituting those grounds.

(5) Upon notice of the Motion being given under subsection (2)—

(a) the Clerk of the county assembly shall within five days—

(b) notify the Speaker; and

(c) invite the Speaker to respond, within seven days, in writing setting out the grounds of opposition;

(6) The Speaker shall not perform any of the functions of the office of the Speaker pending the resolution of the county assembly.

(7) The Speaker shall have the right to appear and be represented before the county assembly during its investigations.

(8) The county assembly shall consider the Motion within fourteen days and resolve whether to approve the Motion.

40. The parties differed on when time started to run for computing the 14 days. The Petitioner asserted that time started running on 18 November 2020 when the notice of the Motion was given to the Clerk.

41. The Respondents took the position that time started running on 1 December 2020 when the County Assembly became seized of the Motion.

42. When notice of the Motion was given to the Clerk, it was not yet properly before the County Assembly as the Clerk and the Speaker by themselves do not constitute the County Assembly as envisaged under Article 177 of the Constitution.

43. In the Petition at hand, when the Motion came up on 24 November 2020, it moved on smoothly until the stage for vote counting started and was disrupted. The acting Speaker adjourned the Assembly.

44. In this Court's view, time started running when the County Assembly became seized of the Motion through a communication from the Chair on the floor of the Assembly on 24 November 2020.

45. The 14 days lapsed on or around 7 December 2020.

46. The Petitioner assumed his duties as Speaker before the County Assembly had made a decision to remove him from office. The 14-day window granted to the Assembly had not lapsed.

47. The Petitioner's conduct contributed significantly to the actions he is now challenging, otherwise, the County Assembly would have concluded the vote counting on or before 7 December 2020.

48. It is, therefore, up to the Assembly to go back to its Standing Orders to confirm whether it has reserved residual power to conclude debate on the removal process or not.

#### **Conclusion and Orders**

49. In the circumstances, the Court declines to grant any of the remedies sought by the Petitioner.

50. The Petition is dismissed with no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 28TH DAY OF APRIL 2021.**

**RADIDO STEPHEN, MCIArb**

**JUDGE**

#### **Appearances**

For Petitioner Mr Kerongo instructed by Mokaya Onyambu Advocates

For 1<sup>st</sup> and 2<sup>nd</sup> Respondents Mr Albert Onchwagi, Advocate, Department of Legal Affairs and Legislative Services

For 3<sup>rd</sup> Respondent Mr Momanyi instructed by Momanyi Manyoni & Co. Advocates

Court Assistant Chrispo Aura