



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 16 OF 2019

IN THE MATTER OF THE DECISION BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD ON 28/2/2019 TO SUSPEND THE PETITIONER FOR THREE (3) MONTHS WITH EFFECT FROM 1/3/2019 AS THE CLERK OF THE COUNTY ASSEMBLY NOF SIAYA

AND

IN THE MATTER OF THE SIAYA COUNTY ASSEMBLY SERVICE BOARD DISCIPLINARY COMMITTEE SITTING ON 20/5/2019

AND

IN THE MATTER OF THE DECISION BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD ON 25/5/2019 TO EXTEND THE SUSPENSION OF THE PETITIONER FOR A FURTHER THREE (3) MONTHS WITH EFFECT FROM 1/6/2019

AND

IN THE MATTER OF THE DECISION BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD ON 3/6/2019 TO RECOMMEND TO THE COUNTY ASSEMBLY OF SIAYA TO REVOKE THE APPOINTMENT OF THE PETITIONER AS THE CLERK OF THE COUNTY ASSEMBLY OF SIAYA

AND

IN THE MATTER OF THE NOTICE OF MOTION PRESENTED TO THE COUNTY ASSEMBLY OF SIAYA ON 4/6/2019 BY THE SIAYA COUNTY ASSEMBLY SERVICE BOARD RECOMMENDING THE REVOCATION OF THE APPOINTMENT OF THE PETITIONER AS THE CLERK OF THE COUNTY ASSEMBLY OF SIAYA

BETWEEN

ISAAC FELIX OLWERO.....PETITIONER

VERSUS

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

SPEAKER, COUNTY ASSEMBLY OF SIAYA..... 2ND RESPONDENT

COUNTY ASSEMBLY OF SIAYA3RD RESPONDENT

JUDGMENT

1. Isaac Felix Olwero (the Petitioner) was offered the position of County Assembly Clerk through a letter dated 30 July 2014 by the County Assembly Service Board of Siaya (the Board).
2. Sometime in 2019, the Board caused an audit to be carried out on the County Assembly of Siaya Car Loan and Mortgage Fund.
3. As a result of the audit, the Board suspended the Petitioner through a letter dated 1 March 2019 for 3-months. The letter also requested the

Petitioner to respond within 21-days. He was also advised that he would appear before a Disciplinary Committee.

4. The Petitioner responded to the suspension letter/show-cause on 11 March 2019, and on 25 March 2019, he appealed to the Chairperson of the Board to be furnished with certain records in order to prepare for any disciplinary hearing.

5. On 16 May 2019, the Board invited the Petitioner to attend a disciplinary hearing scheduled for 20 May 2019. The Petitioner attended the hearing, and on 23 May 2019, the suspension was extended for a further 3-months.

6. Within days of the hearing, the Board decided to embark on the removal process of the Petitioner from the office of the Clerk.

7. On 10 June 2019, the Petitioner lodged a Petition with the Court alleging that his suspension and a recommendation by the Board to the County Assembly to revoke his appointment was illegal and violated his fundamental rights and freedoms.

8. Filed with the Petition was a Motion under a certificate of urgency. The Court certified the Motion urgent but declined to issue any *ex-parte* conservatory orders.

9. On 12 June 2019, the Petitioner, upon receiving a WhatsApp invitation, appeared before a Select Committee of the County Assembly, which had been set up to inquire into the allegations for his removal.

10. The County Assembly debated and passed the Select Committee report recommending the Petitioner's removal on 13 June 2019.

11. When the parties appeared for an *inter-partes* hearing on 13 June 2019, the Respondents informed the Court that the Petitioner was appearing before the Select Committee that day, and they sought more time to file their response.

12. The Court allowed them more time and further ordered that the *status quo* be maintained pending hearing before the Court in Kisumu on 10 July 2019.

13. On 10 July 2019, the Court directed the Petitioner to file and serve a further affidavit and submissions with liberty given to the Respondents to file and serve submissions within 14 days of service by the Petitioner.

14. The Court fixed mention on 23 October 2019 to confirm compliance.

15. On 23 October 2019, the Court indicated that it would deliver a Ruling on 5 March 2020. The interim orders of *status quo* were extended till then.

16. The Ruling was delivered as scheduled, and the Court found the Motion without merit. It was dismissed.

17. Pursuant to leave granted by the Court, the Petitioner filed an Amended Petition on 25 January 2021, in which he sought orders:

i. spent.

ii. ..

iii. ...

iv.

v. A declaratory order that all the actions and/or proceedings undertaken by the Respondents with a view to revoking the appointment of the Petitioner as the Clerk of the 3rd Respondent including but not limited to initiating and acting on the special audit report dated 25/2/2019, suspension of the Petitioner with effect from 1/3/2019, disciplinary committee hearing on 20/5/2019, extension of his suspension with effect from 1/6/2019, presentation of the notice of Motion to the 3rd Respondent on 4/6/2019 seeking the revocation of the appointment of the Petitioner as the Clerk of the 3rd Respondent and tabling, debate and adoption by the 3rd Respondent of its Select Committees report on 13/6/2019 were illegal and/or violated the Petitioner's fundamental rights and freedoms and are consequently null and void, and that the Petitioner is still the bonafide and/or legal Clerk of the 3rd Respondent.

vi. An order of certiorari bringing into this Honourable Court for the purpose of being quashed all the actions and/or proceedings undertaken by the Respondents with a view to revoking the appointment of the Petitioner as the Clerk of the 3rd Respondent, including but not limited to initiating and acting on the special audit report dated 25/2/2019, the suspension of the Petitioner with effect from 1/3/2019, disciplinary committee hearing on 20/5/2019, extension of his suspension with effect from 1/6/2019, presentation of the notice of Motion to the 3rd Respondent on 4/6/2019 seeking the revocation of the appointment of the Petitioner as the Clerk of the 3rd Respondent and tabling, debate and adoption by the 3rd Respondent of its Select Committees report on 13/6/2019.

vii. General damages for violation of the Petitioner's fundamental rights and freedoms, and interest thereon from the date of judgment until payment in full.

viii. Costs of this Petition and interest thereon at court rates until payment in full.

18. Despite the grant of leave, the Respondents did not file any further responses in reaction to the Amended Petition.

19. The Petitioner filed his submissions on 22 March 2021 in which he identified the Issues in Dispute as:

i. Whether the procedure for the suspension and removal of the Petitioner from office was lawful and/or irregular and/or fair and/or respected the Petitioner's fundamental rights and freedoms?

ii. Whether the grounds for the suspension and removal of the Petitioner from office were substantively valid?

iii. Whether the Petitioner is entitled to the prayers sought in the Amended Petition?

20. The Respondents had filed their submissions on 19 March 2021, and according to them, the Issues were:

i. Whether the deponent of the Respondents' replying affidavit sworn on 21 June, 2019 possessed the requisite authority to swear the relying affidavit?

ii. Does the Petition meet the threshold of a constitutional Petition?

iii. Whether the Petition discloses any reasonable cause of action against the Respondents so as to warrant the granting of the orders sought by the Petitioner herein?

21. The Court has considered the Petition, affidavits and submissions, including the case law, cited even if no direct reference to the cases has been made in this judgment.

Constitutional threshold

22. The Respondents objected to the competency of the Petition on the ground that it did not meet the standard envisaged in *Annarita Karimi Njeru v R* (1976-1980) 1 KLR 1272.

23. The Petitioner is a public officer and is entitled to the protections assured all public officers by Article 236 of the Constitution.

24. Specific statutory provisions also underpin his removal as a Clerk of the County Assembly.

25. The Court is, therefore, of the view and finds the objection should not be determinative of the Petition.

Defective replying affidavit

26. The Petitioner did not take up in his submissions the assertions that the Respondents' replying affidavit sworn on 21 June 2019 was defective. The Court will consider the objection as having been abandoned.

Unlawful suspension

27. The power to suspend and/or remove a Clerk of a County Assembly is vested in the Board by section 22 of the County Assembly Services Act.

28. The section sets out 6 grounds upon which the Clerk may be suspended from office. The Petitioner was suspended through a letter dated 1 March 2019.

29. The Board gave the ground for the suspension as gross misconduct. The particulars of the misconduct were stated to be *unclear circumstances under which cheque number 000041 amounting to Kshs 2,977,281 was withdrawn from Cooperative Bank of Kenya, Siaya branch on 1 September 2015 without requisite transfer letters.*

30. The Court has looked at the minutes of the Board meetings held on 19 February 2019 and 28 February 2019.

31. The meeting of 19 February 2019 resolved that the Senior Internal Auditor prepare a comprehensive report on the Car loan and mortgage account (among others) and submit the same to the Board latest by 28 February 2019.

32. On 28 February 2019, the Board considered the audit report and resolved to suspend the Petitioner for 3-months pending further investigations.

33. The Court is satisfied that the decision by the Board to suspend the Petitioner was properly anchored in fact and law.

34. The Petitioner made extensive reference to the case of *Bryan Mandila Khaemba v Chief Justice & President of the Supreme Court of Kenya & Ar* (2019) eKLR. The decision turned on the peculiar circumstances of the Judicial Service Act. The Court also notes that the Court

of Appeal granted a stay of execution of the judgment pending Appeal.

Whether the Disciplinary Committee proceedings were fair?

35. Sections 22 and 23 of the County Assembly Services Act govern the process for the removal of a Clerk of a County Assembly.

36. The process commences with the framing of charges against the Clerk and forwarding of the charges with a brief statement of the allegations in support of the charges.

37. The letter suspending the Petitioner set out in general terms the accusations against the Petitioner but also indicated that further investigations would be undertaken.

38. On 11 March 2019, the Petitioner responded to the suspension letter and requested to be furnished with a copy of the audit report which had prompted the suspension and copies of the Board minutes which sanctioned the suspension. The Petitioner followed with another request for records on 25 March 2019.

39. The Board had, in the meantime, tasked Audit Subcommittee to carry out further investigations, and it prepared a report dated 7 May 2019.

40. On 9 May 2019, the Board invited the Petitioner to attend a disciplinary hearing on 20 May 2019. The Petitioner attended the hearing and raised concerns about the failure to furnish him with copies of documents he had requested to prepare for the hearing.

41. The minutes of the hearing indicates that the charge against the Petitioner was *misappropriation of public funds*. Several particulars of the charge were also outlined.

42. Under section 23(1)(b) of the County Assembly Services Act, the Board should have forwarded a copy of the framed charge(s) together with a brief statement of the allegations to the Petitioner before his appearance before the Board.

43. The Respondents did not provide any evidence that the charge(s) and the brief statement were served upon the Petitioner on or before 20 May 2019.

44. The Court would have expected that precise charges against the Petitioner would have been framed after the investigation by the Audit Subcommittee. No such charges were framed, and the charge(s) in the suspension letter does not meet the charge as envisaged by section 23(1)(a) of the County Assembly Services Act.

45. The Court finds that the Board did not comply with the requirements of section 23(1)(b) of the County Assembly Services Act.

46. Apart from furnishing the Petitioner with a copy of the charge together with a brief statement to support the charges, the Board/Disciplinary Committee should have at the first instance invited the Petitioner to make a written response before the oral hearing in terms of section 23(1)(c) of the Act.

47. The Court again finds that Board failed to comply with this further measure of procedural protection assured the Petitioner.

48. In the Court's view, the missteps by the Board were procedurally substantial and could not be cured by the fact that the Petitioner attended the oral hearing.

Whether the proceedings before the Select Committee were fair?

49. On 3 June 2019, the Board met and resolved that a motion for the removal of the Petitioner be prepared and submitted to the County Assembly.

50. The Motion was prepared, and the Notice of Motion was given on 4 June 2019. The County Assembly debated the Motion the same day and appointed a Select Committee.

51. On 7 June 2019, the acting Clerk of the County Assembly extended an invitation to the Petitioner to appear before the Select Committee on 12 June 2019, but the Petitioner requested for certain records before he could appear before the Select Committee. He indicated that he would seek adjournment if the documents were not furnished in good time.

52. The Petitioner appeared before the Select Committee, and on 13 June 2019, the Select Committee resolved to adopt the Motion for the removal of the Petitioner.

53. The Court finds no procedural infringements on the part of the Select Committee.

Whether the proceedings before the County Assembly were fair?

54. The County Assembly debated the report by the Select Committee on 13 June 2019 and approved it.

55. However, on 18 June 2019, the Speaker issued a communication to the County Assembly that he had been alerted on 13 June 2019 about the existence of a Court order requiring that the *status quo* be maintained in the case of the removal proceedings, and therefore he would withhold issuing a dismissal letter to the Petitioner.

56. The Speaker also indicated that he would defer to the findings of the Court.

57. The Court at this juncture notes and recognises the decision of the Speaker to defer to the Court orders served on the Respondents albeit late. It is one of the rare occasions the Court has come across such fidelity to the law on the part of such state official.

58. Proceedings before a County Assembly are guided by Standing Orders. The County Assembly appointed a Select Committee, which made recommendations to it, and it discussed the same.

59. The proceedings before the County Assembly were not legislative in nature but were quasi-judicial. The proceedings did not breach any of the Petitioner's rights.

Conclusion and Orders

60. From the foregoing, the Court issues the following orders:

i. A declaration be and is hereby issued that the proceedings before the County Assembly Service Board with a view to revoking the appointment of the Petitioner as the Clerk of the County Assembly of Siaya did not comply with the requirements of section 23(1) (a), (b) and (c) of the County Assembly Services Act.

ii. An order of certiorari be and is hereby issued to bring into this Court to quash the recommendations of the County Assembly Service Board of Siaya to the County Assembly of Siaya to revoke the appointment of the Petitioner as Clerk of the County Assembly of Siaya.

61. The Petitioner did not demonstrate an entitlement to an award of general damages. He is also in an ongoing contractual relationship with the Board, and the relief is declined.

62. Considering the ongoing and anticipated contractual relationship between the parties, the Court orders each party to bear their own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 14TH DAY OF APRIL 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner ROW Advocates LLP

For Respondents Gordon Ogola, Kipkoech & Co. Advocates

Court Assistant Chrispo Aura