



**REPUBLIC OF KENYA**

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

**PETITION NO. E010 OF 2021**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 73, 174, 175, 232 AND 235 OF THE  
CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 56, 59 AND 75 OF THE COUNTY GOVERNMENTS  
ACT, 2012**

**AND**

**IN THE MATTER OF PUBLIC APPOINTMENTS (COUNTY ASSEMBLY APPROVAL) ACT, 2017**

**BETWEEN**

**EVANS MUSWAHILI LADTEMA.....PETITIONER**

**v**

**VIHIGA COUNTY PUBLIC SERVICE BOARD.....1<sup>st</sup> RESPONDENT**

**AMBASSADOR FRANKLIN ESIPILA.....2<sup>nd</sup> RESPONDENT**

**AND**

**AGAVA MAKHUMBIRI.....1<sup>st</sup> INTERESTED PARTY**

**ABISAI AMATALO.....2<sup>nd</sup> INTERESTED PARTY**

**RICHARD KEMBOI.....3<sup>rd</sup> INTERESTED PARTY**

**CHRISTOPHER ETALE TUNYA.....4<sup>th</sup> INTERESTED PARTY**

**ARNOLD NAMADI.....5<sup>th</sup> INTERESTED PARTY**

**CLEMENT MANYULU.....6<sup>th</sup> INTERESTED PARTY**

**PAMELA BUSUNGU.....7<sup>th</sup> INTERESTED PARTY**

**MARY ANYIENDA.....8<sup>th</sup> INTERESTED PARTY**

**PHILIP GAVUNA.....9<sup>th</sup> INTERESTED PARTY**

LUCY IJAI.....10<sup>th</sup> INTERESTED PARTY

GILBERT VIDIJA.....11<sup>th</sup> INTERESTED PARTY

LIVINGSTON IMBAYI.....12<sup>th</sup> INTERESTED PARTY

### JUDGMENT

1. Evans Muswahili Ladtema (the Petitioner) lodged a Petition with the Court on 1 February 2021 alleging that the decision of the County Public Service Board, Vihiga (the Board) and its Chairperson (the 2<sup>nd</sup> Respondent) to set the terms and conditions of service of the Interested Parties after an order by the Court on 11 December 2020 within 30-days was null and void because the advice of the Salaries and Remuneration Commission had not been sought or given.

2. The Petitioner contended that the decision violated sections 56, 59 and 75 of the County Governments Act as well as Articles 10, 73 and 232 of the Constitution.

3. The Petitioner sought the following remedies:

(i) A declaration that the Respondents decision to set the terms of office of the Interested Parties as contained in the instrument described as *Terms and Conditions for Vihiga County Chief Officers dated 30<sup>th</sup> December 2020* is unconstitutional, null and void.

(ii) A declaration that the Respondents instrument described as *Terms and Conditions for Vihiga Count Chief Officers, 2020* dated 30<sup>th</sup> December 2020 is unconstitutional, null and void.

(iii) A declaration that the Interested Parties being in office as Chief Officers without the term of office being set by the 1<sup>st</sup> Respondent with the advice of the Salaries and Remuneration Commission is unconstitutional, null and void.

(iv) A declaration that any decision taken by the Interested Parties as County Chief Officers (not clear).

4. Filed with the Petition was a Motion under a certificate of urgency.

5. When the Motion came up for directions on 23 February 2021, the Court directed that it would be taken together with the Petition.

6. The Court also directed the parties to file and exchange responses and submissions within agreed timelines.

7. The Board filed a Notice of Preliminary Objection and Replying Affidavit sworn by its Chairperson, the 2<sup>nd</sup> Respondent an on 22 March 2021.

8. The Respondents contended in the Notice of Preliminary Objection that:

(i) The application and Petition dated 23<sup>rd</sup> February 2021 are frivolous, vexatious and gross abuse of the court process.

(ii) The Petition and the Notice of Motion are (in the context of Petition No. 34 of 2019 before the Honourable Court) *subjudice*.

(iii) The Petition and the Notice of Motion are *res judicata*.

(iv) The Honourable Court is bereft of the requisite jurisdiction to entertain the Petition or grant the remedies sought, which in effect is an appeal against this Honourable Court's Judgment in Petition No. 34 of 2019.

9. The Petitioner's submissions which were supposed to be filed and served by 23 April 2021, were not on record by the time of preparation of this judgment, and logically, the Respondents submissions were not on record.

10. Nonetheless, the Court has considered the Motion, Petition, Objection and affidavits on record.

#### **Failure to file and serve submissions**

11. A Petition is ordinarily determined on the basis of the record and submissions to be filed, served and highlighted.

12. The Respondents proposed, and the Court directed that the parties file and exchange submissions within set timelines.

13. The Petitioner did not file his submissions within the set timelines. He has not tendered any explanation to the Court either through the Deputy Registrar or through an oral application which he could have easily made by requesting the Deputy Registrar to place the file before the Court.

14. The effect of failing to file and serve the submissions is that the Petitioner has failed to prosecute the Petition.
15. Closely related to the above is that the Court made peremptory orders on the filing and exchange of the submissions.
16. The Petitioner who was supposed to file and serve his submissions at the first instance did not comply with the order. He was thus in disobedience of a Court order whilst seeking the exercise of the Court's discretion.
17. Lastly, failure to file and serve submissions, or for that matter, any process not only interferes with the administration of justice but also leads to interference with the Court's docket, thus leading to case backlog. Parties are enjoined to assist the Court to achieve the principal objective of the just, expeditious and proportionate resolution of cases in terms of section 3 of the Employment and Labour Relations Court Act.
18. Backlog of cases is one of the most endemic challenges facing the judiciary and has even led to perceptions of corruption.

#### **Merits**

19. The Court would have dismissed the Petition on the merits.
20. The Court is of that view because it is within the public knowledge and information that the Salaries and Remuneration Commission had issued a Circular setting out the terms and conditions of service (including remuneration and benefits) of Chief Officers across the country.
21. The various County Public Service Boards responsibility was to adopt and/or incorporate the same in the individual contracts or through a policy and procedures manual.
22. Secondly, the Petitioner should have exhausted the appellate process envisaged under Article 234(2)(i) as read with section 77 of the County Governments Act and sections 85 and 87 of the Public Service Commission Act, 2017.
23. For the above reasons, the Court dismisses the Petition with costs to the Respondents and Interested Parties.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF JUNE 2021.**

**RADIDO STEPHEN, MCIArb**

**JUDGE**

#### **Appearances**

For Petitioner Mr Malenya instructed by Chimei & Co. Advocates

For Respondents/Interested Parties Ms Andisi instructed by the Office of the County Attorney, Vihiga

Court Assistant Chrispo Aura