



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 66 OF 2018

(Originally Kisumu High Court Petition No. 8 of 2018)

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 56, 73, 124, 127, 159, 165, 179, 196, 197, 232 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 12(1) & (3), 1(A), (B) & (C), 1(2),(7), 30(2) & (3) AND SECTION 35 OF THE COUNTY GOVERNMENTS ACT, 2012 (ACT NO. 17 OF 2012)

AND

SECTIONS 4, 5 AND 10 OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT OF 2015

AND

SECTIONS 8, 10 AND 11 OF THE PUBLIC APPOINTMENT (COUNTY ASSEMBLY APPROVAL) ACT NO. 5 OF 2017

AND

SECTION 7 OF THE NATIONAL COHESION ACT NO. 12 OF 2008

AND

SECTION 9 AND 11 OF THE COUNTY ASSEMBLY SERVICES ACT NO. 24 OF 2017

AND

VIHIGA COUNTY ASSEMBLY SERVICE ACT, 2013

AND

VIHIGA COUNTY ASSEMBLY STANDING ORDERS

AND

HUMAN RESOURCE MANUAL AND PUBLIC SERVICE REGULATIONS

BETWEEN

DR TOM SHAVISA.....1st PETITIONER

MARY KAZIRA LIHANDA.....2nd PETITIONER

VERSUS

HON HAZINA MUDEIZI, SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....1st RESPONDENT

COUNTY ASSEMBLY OF VIHIGA.....2nd RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD.....3rd RESPONDENT

COUNTY GOVERNMENT OF VIHIGA.....4th RESPONDENT

JUDGMENT

1. Sometime in 2017, the County Assembly Service Board, Vihiga (the Board), issued an advertisement for *the board's external members*.
2. Dr Tom Shavisa and Mary Lihanda (the Petitioners) were among those who applied and were shortlisted.
3. The Board conducted interviews, and amongst those interviewed were the Petitioners.
4. The Petitioners were successful, and the Board presented a report to the County Assembly recommending that they be approved as members of the Board under section 12(3)(d) of the County Governments Act.
5. The County Assembly, in a plenary sitting held on 22 February 2018, debated the report and resolved to amend the recommendations of the Board by replacing the Petitioners with Mr Onzere B. Mudangale and Mrs Dorothy Ayuma Owiro.
6. Mr Onzere and Mrs Owiro were sworn or took an oath of office on 4 April 2018.
7. The Petitioners felt short-changed, and on 21 June 2018, they filed a Petition before the Kisumu High Court alleging that the decision of the County Assembly to replace them as members of the Board violated Articles 1, 2, 3, 10, 23, 56, 73, 124, 127, 159, 165, 179, 196, 197, 232 and 259 of the Constitution as well as section 59 of the County Governments Act.
8. The reliefs sought by the Petitioners were:
 - (i) A declaration that the Respondents actions of accepting, approving, receiving, gazetting, appointing, absorbing, working with, remunerating, paying, allocating duties and/or in any way accepting the names of Mr Onzere B. Mudangale and Mrs Dorothy Ayuma as external members of the County Assembly Service Board, Vihiga County is a violation of Articles 2, 3, 10 and 201 of the Constitution and section 59 of the County Government Act and the same is illegal, null and void.
 - (ii) A declaration that the actions of the Respondents if replacing, removing the names of the Petitioners from the report presented by the County Assembly Service Board, Vihiga without the express consent, notice, knowledge and consent of the Petitioners amounts to illegal usurpation of the rights of the Petitioners as protected under the Constitution of Kenya and the County Governments Act.
 - (iii) Exemplary damages.
 - (iv) Costs and interest incidental thereto.
9. At the same time, the Petitioners filed a Motion under a certificate of urgency seeking interim conservatory orders.
10. On 17 July 2018, the High Court directed the parties to file and exchange affidavits/responses ahead of giving further directions on 20 September 2018.
11. The Respondents filed a replying affidavit sworn by the Speaker of the County Assembly on 7 August 2018.
12. When the parties appeared before the High Court on 20 September 2018, the Respondents sought an adjournment.
13. The parties next appeared before the High Court on 30 October 2018 when the High Court transferred the Petition to this Court.
14. When the parties appeared before this Court on 19 February 2019, the Court directed that the Petition be heard instead of the Motion.
15. The Court also directed the parties to file and exchange submissions within prescribed timelines.
16. The parties did not comply with the directions, and on 19 March 2019, when the Court was supposed to schedule a judgment date, the parties informed the Court that they were negotiating.
17. The Court scheduled several mentions during which the parties indicated that they were still negotiating, and on 20 January 2021, the parties informed the Court that they had reached a settlement.
18. The Court directed that written consent be filed, and one was filed on 23 February 2021.
19. The Court was not convinced that the consent was within the confines of the pleadings, and it directed the parties to file and exchange

submissions on whether the consent should be adopted.

20. Instead of filing submissions confined to the adoption of the consent, the parties filed submissions on the Petition, hence this judgment.

21. The Petitioners filed their submissions on 19 March 2021, while the Respondents filed their submissions on 21 April 2021.

22. The Court has considered the Petition, affidavits, consent and submissions.

Jurisdiction

23. The Respondents challenged the Court's jurisdiction on the ground that there was no employer/employee relationship between the Petitioners and the Respondents.

24. It was further submitted that the Petitioners were employees of the Teachers Service Commission (no evidence of this contention was produced in Court).

25. In support of the assertion that the Court had no jurisdiction, the Respondents cited *Philip Wanyonyi Wekesa & 2 Ors v Clerk, County Assembly of Bungoma & 4 Ors* (2018) eKLR and *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Ar* (2014) eKLR.

26. The Petitioners, in addressing the question of jurisdiction, drew the attention of the Court to a decision of the High Court in *Daniel Chitwa Chegenye v Vihiga Clerk County Assembly* (2016) eKLR wherein the High Court declined jurisdiction in a suit between the Speaker of County Assembly of Vihiga and the County Assembly.

27. In the said decision, the High Court, relying on *the County Assembly of Kisumu & 2 Ors v Kisumu County Assembly Board & 6 Ors* (2015) eKLR, had held that the Speaker of a County Assembly was an employee of the County Assembly.

28. The jurisdiction question has intrigued the Court. The High Court declined jurisdiction and transferred the Petition to this Court.

29. The Respondents did not appeal against the order of the High Court declining jurisdiction. They did not seek a review of the order from the High Court. At the same time, the Respondents did not disclose as between the High Court and this Court, or any other tribunal, which had jurisdiction.

30. The Petitioners applied for the position of members of the Board.

31. The Board held interviews and made recommendations for the appointment of the Petitioners. Upon approval, the Petitioners were going to serve defined contractual terms with set terms and conditions of service, which include entitlements under the Employment Act, 2007 such as housing or house allowance, salaries and eligibility to annual leave.

32. Although the appointment process had not been concluded, the Court finds that it has jurisdiction.

Constitutional threshold

33. The Respondents further challenged the competency of the Petition on the ground that the Petitioners had not set out the specific rights allegedly violated as contemplated in *Anarita Karimi Njeru v Republic* (No 1) (1979) KLR 154.

34. The Petitioners were challenging the function of the County Assembly in carrying out a constitutionally ordained role in the approval process of members of a county assembly service board, and in that role, it is enjoined to respect, uphold and promote the values and principles of the Constitution.

35. The Board had recommended the Petitioners for approval. The County Assembly replaced the Petitioners with some other persons.

36. The Petitioners were contending that the resolution of the County Assembly to replace them was in violation of stated provisions of the Constitution and statutory provisions.

37. In the instant Petition, the Respondents have not suggested that they did not understand the case advanced by the Petitioners or that they were prejudiced by the nature of the pleadings.

38. In the Court's view, the Petition met the requisite threshold, and even if it did not, and in light of the *epistolary jurisdiction* envisaged under Article 22(3)(b) of the Constitution, it should not be rejected because of failure to precisely set out Petitioners case.

Whether a County Assembly can substitute persons nominated for membership of a County Assembly Service Board?

39. The recruitment process for a member of a county assembly service board is supposed to be carried out within a certain legal framework. The framework is informed by the County Governments Act, the Public Appointments (County Assemblies Approval) Act, 2017, amongst others.

40. Under section 7 of the Public Appointments (County Assemblies Approval) Act, 2017, the County Assembly should conduct an approval

hearing for persons recommended for appointment as Board members.

41. During the approval hearing, public participation is required.

42. The nominee(s) is also entitled to be heard during the hearings.

43. Where the County Assembly resolves to reject a nominee, section 10 of the Act contemplates that the nominating authority would submit fresh names to the County Assembly.

44. The County Assembly herein appears to have rejected to approve the nomination of the Petitioners. Such a resolution was perfectly within its legal remit.

45. However, it was not open to the County Assembly to substitute and proceed to approve names of persons not expressly recommended by the Board.

46. The County Assembly should have requested the Board to submit new names.

47. There is nothing on record to show that upon rejecting to approve the Petitioners nomination, the Board submitted the names of Mr Onzere and Mrs Owiro as envisaged under section 10 of the Act.

48. Equally, there is no evidence that Mr Onzere and Mrs Owiro were taken through public participation and the approval hearings contemplated by section 7 of the Public Appointments (County Assemblies Approval) Act, 2017.

49. The Court finds that the decision or resolution by the County Assembly to substitute and approve Mr Onzere and Mrs Owiro as members of the County Assembly Service Board, Vihiga was invalid and *ultra vires*.

50. It was not anchored in any law.

Fait accompli

51. The Respondents contended that since Mr Onzere and Mrs Owiro had taken oaths of office, the Petition had been overtaken by events.

52. In the Court's view, a decision that is *ultra vires* cannot be overtaken by events. It remains an illegality.

Exemplary damages and the consent

53. Before concluding, the Court wishes to address the remedy of exemplary damages, which was one of the remedies sought by the Petitioners.

54. Exemplary damages are meant to punish a Respondent for malicious, oppressive or willful misconduct.

55. The County Assembly had the option of rejecting or declining to approve the nomination of the Petitioners under section 10 of the Public Appointments (County Assemblies Approval) Act, 2017.

56. Since the law contemplated such a course of action and the Petitioners did not prove any malice or ill-will on the part of the County Assembly, the Court is of the considered view that exemplary damages would not be available to the Petitioners.

57. On this ground, the Court declines to adopt the consent by the Parties that the Petitioners be paid Kshs 2,500,000/- as damages.

Conclusion and Orders

58. From the foregoing, the Court is satisfied that the Petition should be allowed.

59. The Court orders:

- (i) A declaration be and is hereby issued that the Respondents actions of accepting, approving, receiving, gazetting, appointing, absorbing, working with, remunerating, paying, allocating duties and/or in any way accepting the names of Mr Onzere B. Mudangale and Mrs Dorothy Ayuma as external members of the County Assembly Service Board, Vihiga County is a violation of Articles 2, 3, 10 and 201 of the Constitution and section 59 of the County Governments Act and the same is illegal, null and void.

60. Petitioners to have costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 2nd day of June 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioners Ben Aduol Nyanga & Co. Advocates

For Respondents Rakewa Otieno, Principal Legal Counsel, County Assembly of Vihiga

Court Assistant Chrispo Aura