



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E003 OF 2020

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 19, 20, 23, 27, 28, 48, 55, 56 AND 258 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 31

OF THE OFFICE OF THE COUNTY ATTORNEY ACT

BETWEEN

EVANS MUSWAHILI LADTEMA.....PETITIONER

VERSUS

GOVERNOR, COUNTY OF VIHIGA.....RESPONDENT

AND

COUNTY ASSEMBLY OF VHIGA.....1ST INTERESTED PARTY

COUNCIL OF GOVERNORS.....2ND INTERESTED PARTY

AGGREY B.L. MUSIEGA.....3RD INTERESTED PARTY

RULING

1. In a judgment delivered on 24 February 2021, the Court found that:

i. A declaration be and is hereby issued that the nomination and appointment of Aggrey B. L. Musiega to the position of County Attorney Vihiga County is illegal and invalid.

ii. An order of certiorari be and is hereby issued quashing the nomination, appointment and/or purported appointment of one Aggrey B. L. Musiega to the office of County Attorney Vihiga County.

2. The Respondent was aggrieved, and on 3 March 2021, he filed a Motion seeking orders:

i. ...

ii. ...

iii. ...

iv. ...

v. The orders of stay, once granted to remain in force until the determination of the Appeal at the Court of Appeal, which has been commenced by the Notice of Appeal dated 1 March 2021 and filed herewith.

vi. Costs of this application to abide the outcome of the appeal.

3. The 3rd Interested Party filed an affidavit in support of the Motion on 10 March 2021.

4. When the parties appeared in Court on 11 March 2021 for directions, the Court directed the Petitioner to file a response to the Motion before 31 March 2021. The response was not on record by the aforesaid date or by this morning.

5. The Respondent did not file any submissions as directed.

Respondent's assertions on the Motion

6. In seeking a stay of execution pending appeal, the Respondent contended that he had commenced an appeal and that he stood to suffer substantial loss if the order of stay was not granted.

7. According to the Respondent, the substantial loss was likely because the County Public Service Board had already started the recruitment process for the position of County Attorney, and there was a possibility that a person without a disability would be appointed.

8. The Respondent further asserted that the Court had not been properly addressed the requirement for affirmative action in the public service when quashing the appointment of the 3rd Interested Party, and the issue raised was polycentric (affected other counties not party to the litigation).

3rd Interested Party's take

9. The 3rd Interested Party, whose appointment as the County Attorney had been quashed while admitting that his appointment was not preceded by advertisement, stated that he was supporting the application because the intended appeal raised questions that required the interpretation of the Court of Appeal.

Evaluation

10. The Court has considered the material on record.

11. The first remedy given by the Court was a declaration that did not direct any of the parties to take any positive action or refrain from taking any action. Therefore it is not capable of being stayed.

12. The second remedy was an order of certiorari quashing the appointment of the 3rd Interested Party as the County Attorney, Vihiga.

13. The order of certiorari was contingent on the declaration that the appointment of the 3rd Interested Party was invalid and therefore is inextricably linked to the declaration.

14. Considering the close link and the fact that the 3rd Interested Party was under a contract of employment albeit, in a public office which was quashed and that alternative remedies such as damages or compensation would be adequate if the contract was breached, the Court is of the view that this is not a suitable case to grant a stay of execution pending appeal.

15. The Motion is dismissed.

16. The Petitioner did not file a response within agreed timelines. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF JULY 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Mr Malenya instructed by Chimei & Co. Advocates

For Respondent Ms Andisi, Principal Legal Officer, Office of the County Attorney

For 1st Interested Party Francis Rakewa, Principal Legal Counsel

For 3rd Interested Party In person

Court Assistant Chrispo Aura