



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E018 OF 2021

IN THE MATTER OF

ARTICLES 1, 2(1), 10(2), 22(1), 23(3), 27(1) & (2), 28, 35, 41, 47, 48, 50(1),

159(2), 162(2), 232 AND 258 OF

THE CONSTITUTION, 2010

AND

IN THE MATTER OF

THE VIOLATION OF AND/OR THREATENED VIOLATION OF

THE CONSTITUTION, 2010

AND

IN THE MATTER OF

THE COUNTY ASSEMBLY SERVICES ACT, 2017

AND

IN THE MATTER OF

THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF

THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF

COMPULSORY LEAVE ISSUED BY THE SPEAKER, KISII COUNTY ASSEMBLY

AND

IN THE MATTER OF

KISII COUNTY ASSEMBLY

AND

IN THE MATTER OF
THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JAMES OMARIBA NYAOGA.....PETITIONER

v

CHAIRMAN, COUNTY ASSEMBLY SERVICE BOARD...1st RESPONDENT

SPEAKER, KISHI COUNTY ASSEMBLY.....2nd RESPONDENT

AND

COUNTY ASSEMBLY SERVICE BOARD.....INTERESTED PARTY

JUDGMENT

1. James Omariba Nyaoga (the Petitioner) was appointed as the Clerk of the County Assembly in 2013.
2. On 5 March 2021, the Chairman of the County Assembly Service Board (1st Respondent) wrote to the Petitioner notifying him that he was being sent on *compulsory leave*.
3. The Petitioner was aggrieved, and he moved the Court on 17 March 2021, contending that the decision violated the provisions of sections 22 and 23 of the County Assembly Services Act, 2017, section 76(6) of the County Governments Act and Articles 2(2), 10(2), 27(1) & (2), 41, 47, 50(1) and 232 of the Constitution.
4. On the same day, the Petitioner filed a Motion under a certificate of urgency seeking interim interdicts to preserve his status as Clerk of the Assembly.
5. When the Motion was placed before the Court, it directed the Petitioner to serve it together with the Petition ahead of the giving of further directions on 24 March 2021.
6. The Court also granted interim injunctive orders preserving the Petitioner's status/position.
7. The Respondents filed Grounds of Opposition to the Petition and a Cross Petition on 23 March 2021.
8. On the same day, the Respondents filed a Notice of Preliminary Objection and Motion under a certificate of urgency seeking the discharge of the interim orders which had been granted.
9. On 24 March 2021, the Court directed the Respondents Notice of Preliminary Objection and Motion would be taken together with the Petitioner's Motion.
10. The Court delivered a Ruling on 11 May 2021 and confirmed the interim injunctive orders pending the hearing and determination of the Petition.
11. Pursuant to further Court orders, the Petitioner filed a further affidavit and submissions on 23 June 2021 (should have been filed and served before 11 June 2021).
12. The Petitioner identified the Issues for adjudication as:
 - (i) Whether the Respondents herein are seized and/or possessed of the mandate to send the Petitioner on compulsory leave, whatsoever and/or howsoever?
 - (ii) Whether the provisions of section 76(6) of the County Governments Act, 2012, which was invoked by the Respondents, applies to employees of the County Assembly Service Board or otherwise?
 - (iii) Whether compulsory leave is legally provided for and/or otherwise lawful in the absence of statutory provisions to ground the same?

(iv) Whether compulsory leave can issue and/or be issued against the Petitioner in the face of the explicit provisions of sections 22 and 23 of the County Assembly Services Act, 2017?

(v) Whether the actions by the Respondents herein have breached and/or violated the fundamental rights of the Petitioner and, in particular, the right to fair labour practice in terms of Article 41 of the Constitution, 2010 and if so, whether the Petitioner is entitled to the reliefs sought?

(vi) Whether the Cross-Petition by the Respondents raises and/or discloses any reasonable cause of action?

13. The Court has considered the Petition, Cross-Petition, affidavits and submissions on record and come to the view that only one broad issue arises for its determination, the question of whether the decision to send the Petitioner on compulsory leave was sound in law or contract.

The lawfulness of the decision

Contract

14. The Respondents did not place before the Court any contractual provision, either in terms of a contract or Human Resources Policies which mandated the sending of the Petitioner on compulsory leave and from that viewpoint, the decision was tainted.

Legal framework

15. The Petitioner contended in brief that the decision to send him on *compulsory leave* was not a collective decision of the County Assembly Service Board, a corporate body, but a unilateral decision by the Chairperson.

16. In this respect, the Petitioner also asserted that the decision was not approved by the Board.

17. In the Cross-Petition, it was contended that the Petitioner as state officer held a position of trust and was enjoined by the provisions of section 8 of the Leadership and Integrity Act, 2012 to act in the interest of the people.

18. The Respondents also supported the decision to send the Petitioner on *compulsory leave* by invoking sections 22 and 23 of the County Assembly Services Act.

19. The Respondents further averred that they had received complaints from members of the public that the Petitioner had abused the trust, and therefore it decided on *compulsory leave* as an interim measure to enable the conduct of investigations.

20. The decision, it was prayed, should be found lawful.

21. In this Court's view, as a corporate entity, the County Assembly Service Board members should have met and resolved that the Petitioner be sent on *compulsory leave* (if that option was provided for).

22. The Respondents did not place before the Court any minutes or notes where the County Assembly Service Board sat and resolved to send the Petitioner on *compulsory leave*.

23. The Respondents had also contended that the decision to send the Petitioner on *compulsory leave* was anchored on sections 22 and 23 of the County Assembly Services Act.

24. The Respondents also called to their aid section 76(6) of the County Governments Act and case law being *Thomson Kerongo & Ar v James Omariba Nyaoga & Ors* (2017) eKLR.

25. In the cited decision, this Court differently constituted stated:

Section 76(6) of the County Governments Act upon which the Speaker's action was predicated provides as follows –

(6) Nothing in subsection (5) shall be interpreted as prohibiting or restricting the power of the County Government or the concerned county chief officer or other lawful authority to interdict or suspend or take any interlocutory decision against the public officer.

My understanding of the section is that an authorised officer acting lawful authority can take interlocutory action against an officer working under his supervision before substantive action is taken at a formal meeting to deliberate on the matter.... The Interested Parties have argued that there is no law providing for compulsory leave, and it is therefore illegal. I do not agree with them. My considered opinion in respect thereto would be that there is no law prohibiting an employer from sending an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure... an action is only illegal if it is prohibited by law....

For these reasons, I find the Speaker, as Chairman of the County Assembly Service Board, had the authority to send the 1st Respondent on compulsory leave pending the convening of a formal meeting of the Board to deliberate on appropriate action.

26. This Court has relooked at section 76 of the County Governments Act.

27. In the Court's view, it is open to debate whether the Public Service Commission, an organ of the executive, is competent to hear and determine appeals from employees of a county assembly service board (employees within the legislative arm).

28. The section is under Part VII of the Act, which provides for the County Public Service. Under the Part, the Public Service Commission is given an appellate oversight over decisions of the County Public Service Boards.

29. Given the role of the Public Service Commission, it is apparent to this Court that section 76 and indeed the provisions of Part VII of the County Governments Act apply to the executive branch of government, and therefore the same cannot be superimposed over the legislative branch of government.

30. With respect to section 22 of the County Assembly Services Act, it provides for suspension and removal of a County Assembly Clerk and not *compulsory leave*.

31. In this jurisdiction, the statutes which provide for interdiction and suspension have always treated the two as separate (see section 32 of the Judicial Service Act as read with the Third Schedule and sections 70 and 71 of the Public Service Commission and the regulations made thereunder).

32. In this Court's humble view, *compulsory leave*, suspension, and interdiction do not mean the same thing, and therefore they cannot be used interchangeably.

Conclusion and Orders

33. Flowing from the preceding, the Court finds merit in the Petition and orders:

(i) A declaration is hereby issued that the decision to send the Petitioner on *compulsory leave* through the letter dated 5 March 2021 was unilateral and without requisite jurisdiction.

(ii) A declaration is hereby issued that section 76(6) of the County Governments Act, 2012 does not apply to the Petitioner and/or employees of the County Assembly Services Board.

(iii) An order is hereby issued quashing the decision through the letter dated 5 March 2021, sending the Petitioner on *compulsory leave*.

34. The Cross-Petition is dismissed.

35. Considering that the Petitioner is still an employee of the County Assembly Service Board, each party is directed to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.

RADIDO STEPHEN,

MCIARB JUDGE

Appearances

For Petitioner Oguttu, Ochwal & Partners Advocates

For Respondents Aboki Begi & Co. Associates

Court Assistant Chrispo Aura