



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 15 OF 2019

COUNTY ASSEMBLY OF MIGORI.....1st APPELLANT

COUNTY ASSEMBLY SERVICE BOARD, MIGORI.....2nd APPELLANT

VERSUS

GEORGE OKINYI OMAMBA.....RESPONDENT

(Being an Appeal from the Ruling and Order delivered on 26/06/2019 by Honourable R. Odenyo,

Senior Principal Magistrate in Migori Senior Principal Magistrates Court

Employment & Labour Relations Cause No. 1 of 2019)

JUDGMENT

1. George Okinyi Omamba (the Respondent) was at all material times the Deputy Speaker of the County Assembly of Migori.
2. On or around 10 May 2019, the Respondent sued the County Assembly and the County Assembly Service Board, Migori (the Appellants), alleging that a Motion lodged with the Assembly for his removal from office of Deputy Speaker was unconstitutional, illegal and arbitrary.
3. The Statement of Claim was accompanied by a Motion seeking temporary injunctive orders barring the County Assembly from debating the Motion.
4. When the application was placed before the Magistrates Court on 8 May 2019, he granted an order in the following terms:
 - (1) ...
 - (2) A temporary order of injunction is hereby granted restraining the County Assembly of Migori the 1st Respondent herein from debating a motion presented to the Assembly on 7th May 2019 intending to remove the Claimant/applicant from the office of Deputy Speaker of the County Assembly of Migori pending the hearing and determination of this application.
5. The Motion was fixed for an *inter-partes* hearing on 22 May 2019.
6. On or around 14 May 2019, the Respondent moved the Court through another Motion seeking leave to commence contempt proceedings allegedly on the ground that the Appellants had disobeyed the orders of 8 May 2019 to reinstate him.
7. This Court has looked at the proceedings of 14 May 2019, and they show that the Court had declined to issue any *ex-parte* orders reinstating the Respondent but had rather directed that the Motion be served for *inter-partes* hearing on 22 May 2019.
8. When this latter motion was served, the Respondents filed Grounds of Opposition dated 21 May 2019, contending that the Magistrates Court had no jurisdiction and that Motion was irredeemably defective and presented before the wrong forum.
9. The contempt application was canvassed through submissions, and in a Ruling delivered on 26 June 2019, the Court held that it had jurisdiction and granted leave to commence contempt proceedings.

10. The Appellants were aggrieved, and on 15 July 2019 filed a Memorandum of Appeal with this Court contending that:

(1) The Honourable Magistrate erred in law and fact when he held that he had jurisdiction to hear and determine the Claim, contrary to the directions in the Kenya Gazette Volume CXX – No. 74 of 22/06/2018, Gazette Notice No. 6024.

(2) The Honourable Magistrate erred in law and fact when he considered but failed to appreciate that the position of a substantive County Deputy Speaker is constitutionally non-existent to warrant the Respondent's reinstatement, locus standi and issuance of leave to commence contempt of court proceedings against the Appellants.

(3) The Honourable Magistrate erred in law when he concurred with the Appellants' position that the Contempt of Court Act Cap 46 Laws of Kenya was declared unconstitutional and null and void, for lack of public participation but failed to declare the application grossly incompetent for being predicated upon a non-existent law.

(4) The Honourable Magistrate erred in law and fact when he failed to consider material issues in the Appellants' submissions and supporting case law thereof, which, if put into perspective, could have only led to the dismissal of the application dated 14/05/2019.

11. On 21 September 2020, the Appellants filed a Motion seeking stay of execution of the orders issued on 26 June 2019.

12. The Court declined to certify the Motion urgent and directed that it be served ahead of directions on 21 October 2020.

13. For unexplained reasons, the Appellants filed another Motion on 22 September 2020, seeking similar orders to the Motion filed on 21 September 2020.

14. Perhaps, unknown to the Court that it had dealt with a similar application only the previous day, the Court, on 23 September 2020, granted an order staying the Magistrates Court order of 26 June 2019.

15. The Court also directed the filing and exchange of affidavits and submissions on this latter application ahead of highlighting on 14 October 2020.

16. The Respondent must have become alarmed, for on 2 October 2020, he filed a Motion seeking an order staying the stay orders granted on 23 September 2020.

17. When the Respondents application was placed before the Court on 5 October 2020, it directed that it be mentioned on 14 October 2020.

18. On 13 September 2020, the Appellants filed a Notice of Withdrawal in respect to the Motion filed on 21 September 2020.

19. On 14 October 2020, the parties appeared before this Court, and it directed that the Motions filed on 22 September 2020 and 2 October 2020 be taken together.

20. The Court directed the parties to file and exchange responses and submissions ahead of *the inter-partes* hearing on 18 November 2020. The interim orders of stay were extended.

21. On 18 November 2020, the Court issued an order staying the Magistrates Court order of 26 June 2020 and further directed that a Record of Appeal be filed and served ahead of further directions on 26 January 2021.

22. The Record of Appeal was filed on 28 April 2021, and on 3 May 2021, the Court directed the parties to file and exchange submissions.

23. The Appellant filed his submissions on 1 July 2021, while the Respondents submissions were not on record by the agreed timeline.

24. The Court has considered the material placed at its disposal.

Role of Court on the first appeal

25. The Court of Appeal pronounced itself on the role of a first appellate Court in ***Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212*** thus:

On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

26. In the instant appeal, the Court had not reached the stage of leading evidence, but it relied on the record and arguments.

27. This Court will therefore evaluate the record and applicable case and statutory law.

Magistrate's Court jurisdiction under Gazette Notice No. 6024

28. The Chief Justice delegated to the Magistrates Court jurisdiction over certain disputes arising from contracts of employment.
29. One of the primary deciding factors was that the employee's gross monthly pay does not exceed Kshs 80,000/-.
30. The question of the gross monthly pay is one of fact and must be proved as such.
31. The Court has looked at the Statement of Claim.
32. The Respondent's gross monthly salary was not pleaded therein.
33. Similarly, there was no disclosure of the Respondent's gross monthly salary in the verifying affidavit, the Motion and supporting affidavit dated 8 May 2019.
34. In the replying affidavit filed in opposition to the Motion, the Appellants asserted that the Court did not have jurisdiction, but the particulars for the assertion were not disclosed.
35. The Appellants did not raise the question of jurisdiction based on the gross monthly salary in the Response to the Statement of Claim.
36. In the Grounds of Opposition to the contempt application, the Appellant raised the question of jurisdiction on the ground of it being anchored on non-existent legislation.
37. In the submissions filed in opposition to the contempt application, the Appellants again raised the issue of jurisdiction.
38. In dealing with this aspect of jurisdiction, the Magistrates Court stated:

I have looked at the various issues pointed out by the respondents and find anything that would oust the jurisdiction of this Court. The major issue raised is that income of the Claimant earns. An article is not proof of income.. In short, I do not find anything challenging the jurisdiction of this Court.

39. A Magistrates Court exercises delegated jurisdiction in employment disputes. The jurisdiction is, however, circumscribed by two primary considerations.
40. The considerations are that the action arises out of a contract of employment and that the gross monthly salary does not exceed Kshs 80,000/-.
41. With the circumscription, it is incumbent upon the Magistrates Court at the first instance to satisfy itself that the considerations have been met before it assumes jurisdiction.
42. If the pleadings are not clear on the two considerations, as was the case before the Magistrate herein, it was incumbent upon the Court to seek clarifications from the parties.
43. By assuming jurisdiction, when the Appellants had raised the question in the submissions, this Court finds that the Magistrate fell into an error both of law and fact.

Existence of office of Deputy Speaker

44. The constitutionality and or lawfulness of the office of the Deputy Speaker of County Assemblies have been the subject of decisions by the High Court.
45. In *Douglas Bundi Kirimi v Joseph Kaberia Arimba, Speaker County Assembly of Meru & Ors* (2018) eKLR and *Nathaniel Nganga Ruben v Speaker, Machakos County Assembly & Ar* (2016) eKLR, the High Court (differently constituted held that the office of Deputy Speaker of a County Assembly did not exist within the Constitutionally ordained framework.
46. However, in *Amos Muthui Muchiri v Speaker, County Assembly of Nyeri & 3 Ors* (2019) eKLR, the High Court differently constituted after examining the 2 decisions referred to in the previous paragraph came to the conclusion that the office of the Deputy Speaker was contemplated within the Constitutional and legal architecture of this country.
47. The Magistrates Court herein was faced with conflicting decisions from the High Court, and he opted to go with one rather than the other, and he gave a reason:

On the constitutionality of the post of Deputy Speaker, I have read the cited authorities from the High Court. Indeed, as pointed out by counsel for the applicant, Hon in his judgment dismissed at length the judgments of And and came to a finding that the post of Deputy Speaker was not unconstitutional. He referred to Article 178, which contemplate that position.

48. The Magistrates Court was faced with inconsistent decisions on the legal existence of the office of Deputy Speaker, and this Court cannot fault him or find an error of law for him endorsing one conclusion as against the other(s).

49. With the conclusion on the jurisdiction question, this Court is of the view that it need not examine the ground of appeal anchored on the invalidity of the Contempt of Court Act.

Conclusion and Orders

50. From the foregoing, the Court will allow the Appeal on the ground of error of law on the conclusion on jurisdiction.

51. The order which commends itself to the Court is to remit back to the Magistrates Court the question of *delegated jurisdiction* for fresh hearing as it requires an assessment and determination of facts which were not placed before it or this Court.

52. Each party to bear its own costs of the Appeal.

53. The Court regrets the judgment could not be delivered on 27 October 2021, due to other official engagements.

Delivered through Microsoft teams, dated and signed in Kisumu on this 25th day of November 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellants Nelson Jura & Co. Advocates

For Respondent Olel, Onyango, Ingutiah Advocates LLP

Court Assistant Chrispo Aura