



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. E033 OF 2021**

**IN THE MATTER OF ALLEGED THREAT AND CONTRAVENTION OF ARTICLES**

**27(1) & (2), 30, 41, 47(1) & (2) 50(1) AND 23(1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF SECTIONS 3, 4 AND 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF CONSTITUTIONALISM, RULE OF LAW, NATURAL JUSTICE AND GOVERNANCE**

**BETWEEN**

**PROF RICHARD OTIENO MUGA.....PETITIONER**

**v**

**COUNTY ASSEMBLY OF HOMA BAY.....RESPONDENT**

**AND**

**GOVERNOR, COUNTY GOVERNMENT OF HOMA BAY.....INTERESTED PARTY**

**JUDGMENT**

1. Prof Richard Otieno Muga (the Petitioner) was appointed as a County Executive Committee member in charge of Health by the Governor, County of Homa Bay, on a date which was not disclosed.
2. On 6 April 2021, a member of the County Assembly of Homa Bay (the County Assembly) raised a motion on the state of Homa Bay County Teaching and Referral Hospital, and the County Assembly debated the motion and referred the motion to the Health Services Committee for investigations.
3. As a result, on 8 April 2021, the Clerk of the County Assembly invited the Petitioner to appear before the Health Services Committee on 14 April 2021.
4. The Petitioner appeared before the Committee on the said date.
5. The Committee completed its investigations, and it published a Report on 26 April 2021.
6. Amongst the recommendations of the Committee were that the Petitioner be removed from office on the grounds of incompetence, abuse of office and gross violation of the Constitution of Kenya (as contemplated by section 40 of the County Governments Act).

7. The County Assembly adopted the Report of the Committee on 27 April 2021.
8. On 10 May 2021, a member of the County Assembly moved a Motion to remove the Petitioner from office, and the County Assembly resolved to establish a Select Committee to investigate the matter and report back to the County Assembly within 10 days.
9. The Clerk of the County Assembly invited the Petitioner through a letter dated 5 May 2021 to appear before the Select Committee on 7 May 2021, to defend himself against allegations outlined on the face of the letter.
10. On 10 May 2021, the Petitioner lodged a Petition with the Court alleging that the decision to remove him contravened his constitutional rights.
11. Filed with the Petition was a Motion under a certificate of urgency, which the Court directed the Petitioner to serve and that further directions be given on 17 May 2021.
12. On 12 May 2021, the Select Committee laid its Report before the County Assembly.
13. When the Motion came up for directions on 17 May 2021, the Petitioner sought leave to file both an Amended Motion and Amended Petition. The Respondent was represented by a Mr Orieyo.
14. The Court granted leave to the Petitioner to file and serve an Amended Motion and Amended Petition and also directed the filing and exchange of affidavits and submissions ahead of judgment on 27 October 2021.
15. During the same session, the Respondent indicated that it would not oppose the grant of conservatory orders, staying the Petitioner's removal pending judgment, and the Court granted a conservatory order.
16. The Petitioner filed an Amended Motion and Amended Petition on 28 May 2021, and in the Amended Petition, he sought the following remedies:
  - (a) A declaration that your Petitioner is a public officer protected under Article 236 of the Constitution.
  - (b) A declaration that the resolutions passed by the Respondent on 14 May 2021 and intended removal of the Petitioner from his position of Executive Committee member for Health offends the law and violates the Petitioner's constitutional rights under Articles 27(1) and (2), 30, 41, 47(1) and (2), 50(1) and 23(1) of the Constitution, is unconstitutional and thus null and void for all purposes.
  - (c) An order of certiorari to issue and bring into the Court for purposes of quashing the decision of the Respondent report (sic) and the resolution passed by the Respondent made pursuant to the sittings of 14<sup>th</sup> April 2021 and 14<sup>th</sup> May 2021 for having been made without due process and in complete violation of the Constitution and the law.
  - (d) An order directing that the Respondent and or anybody or agent acting under its direction not to interfere with the Petitioner's position as Executive Committee member for Health.
  - (e) An order directed at the Interested Party not to implement, act on or put into action any directive resulting from the Respondent's action herein for having been made without adherence to the law and Constitution.
  - (f) That costs of the Petition be borne by the Respondent.
17. The Respondent caused a replying affidavit sworn by its acting Clerk to be filed on 5 July 2021.
18. The Court has considered the Amended Motion and Petition, the affidavits and submissions.

#### **Petitioner's case**

19. The Petitioner's challenge to the removal process can be summarised.
20. These are that the members of the County Assembly who sat in the Health Services Committee are the same ones that moved the Motion recommending his removal in the Select Committee.
21. The Petitioner also contended that no charges were preferred against him, nor was he afforded an opportunity to respond to the charges before the removal motion was debated and passed.
22. The Petitioner further challenged the resolution to remove him on the ground that when it was made on 17 May 2021, these legal proceedings were pending and, therefore, it was meant to defeat the Court proceedings.

#### **The case for the County Assembly**

23. The County Assembly defended the legality of the removal of the Petitioner by asserting that after the Health Services Committee placed

its Report before it, it was debated and adopted on 28 April 2021 and that the resolution was then forwarded to the Governor.

24. According to the County Assembly, the Petitioner was supplied with the charges and evidence against him, and that he was afforded an opportunity to be heard.

25. The County Assembly further contended that it had complied with its Standing Orders and that the Petition had been overtaken by events.

### **Evaluation**

26. The removal of a County Executive Committee member is primarily guided by section 40 of the County Governments Act.

27. The first step is a member of a County Assembly proposing a Motion.

28. In the Petitioner's case, a member of the County Assembly proposed the Motion on 4 May 2021, and the proposal was supported by 40 members of the County Assembly.

29. The next step in the process is the adoption of the proposed Motion and the establishment of a Select Committee.

30. The County Assembly adopted the proposed Motion for the removal of the Petitioner, and on 4 May 2021, it established a Select Committee of 5 Members to conduct hearings.

31. On 5 May 2021, the Clerk of the County Assembly invited the Petitioner to appear before the Committee, and he did appear and made representations.

32. The Select Committee found the allegations against the Petitioner substantiated, and, therefore, the third step was for the County Assembly to vote and approve the recommendations.

33. The County Assembly approved the recommendation for the removal of the Petitioner on 17 May 2021.

34. Under Standing Order No. 69(9) of the County Assembly of Homa Bay Standing Orders, the County Assembly was required to afford the Petitioner (another) opportunity to defend himself before the plenary of the County Assembly.

35. The County Assembly did not disclose whether the Petitioner was invited to make use of the further opportunity before it voted to approve the recommendation for removal by the Select Committee.

36. By failing to invite the Petitioner to appear before the plenary, the County Assembly was in a fundamental breach of a procedural step in the removal process, and the Court so finds.

37. The last question for the Court's consideration is the one of conflict of interest or whether it was against the rules of natural justice for the same members to propose the removal Motion and sit in the Select Committee.

38. The Motion to remove the Petitioner was proposed by Hon Morice Ogwang. The said Hon Ogwang was also a member of the Select Committee.

39. The rules of natural justice and the right to fair administrative justice are sacrosanct in our jurisdiction, and the test for establishing bias and/or impartiality is that of the fair-minded and informed observer and whether the proceedings were seen to be fair (see *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge* (1995-1998) 1 EA 134).

40. The Petitioner attended the proceedings before the Select Committee but did not complain about the composition of the Committee at the outset.

41. In the circumstances, the Court is of the view that the apparent bias on the part of the Select Committee should not be decisive in the determination of the Petition.

42. The Petitioner also lamented that the County Assembly debated and approved the removal recommendation when these legal proceedings were pending.

43. When the County Assembly was approving the recommendation to remove the Petitioner, there was no Court orders staying the process.

### **Conclusion and Orders**

44. In light of the foregoing, the Court finds that the County Assembly was in breach of a fundamental procedural step in the removal process and orders:

- (i) A declaration is hereby issued that the resolutions passed by the Respondent on 17 May 2021 to remove the Petitioner from his position of Executive Committee member for Health offended the Respondent's Standing Orders and violated the Petitioner's constitutional rights under Articles 41, 47(1) and (2), and 236 of the Constitution hence unconstitutional and thus null and void for

all purposes.

(ii) An order of certiorari is hereby issued to bring into the Court for purposes of quashing the resolution of the Respondent passed during the sitting of 17 May 2021 to have the Petitioner removed from office.

45. Due to the ongoing relationship between the parties, the Court orders that each party bears its own costs.

46. The Court regrets it could not deliver the Judgment on 27 October 2021, due to other official engagements.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Petitioner Ibrahim & Isaac & Co. Advocates

For Respondent Otieno, Yogo, Ojuro & Co. Advocates

Court Assistant Chrispo Aura