



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MALINDI**

**PETITION NO E001 OF 2020**

**IN THE MATTER OF ARTICLES 1,2,3(1),4,10,19,20,21,23,27,33,35,47,48,**

**50,73,165 AND 232 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ARTICLE 35 OF THE CONSTITUTION ON THE  
PROTECTION OF FUNDAMENTAL RIGHTS OF ACCESS TO INFORMATION**

**IN THE MATTER OF ARTICLE 10 OF THE CONSTITUTION OF  
KENYA 2010 ON NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE**

**IN THE MATTER OF SECTION 66, 68 AND 78 OF THE COUNTY**

**GOVERNMENT ACT**

**IN THE MATTER OF ARTICLE 75(1) A OF THE CONSTITUTION  
ON CONFLICT OF INTEREST BY PUBLIC OR STATE OFFICERS**

**HOLDING TWO DIFFERENT POSITIONS SIMULTANEOUSLY**

**IN THE MATTER OF THE PUBLIC RIGHT TO INFORMATION**

**AND ADHERENCE TO DUE PROCESS ON APPOINTMENT**

**OF COUNTY ATTORNEY, KILIFI COUNTY GOVERNMENT**

**BETWEEN**

**COMMISSION FOR HUMAN RIGHTS AND JUSTICE.....PETITIONER**

**VERSUS**

**MICHELLE BIBI FONDO.....1<sup>ST</sup> RESPONDENT**

**H.E GOVERNOR, KILIFI COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE BOARD, KILIFI COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**RULING**

**a) Introduction**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have filed the application dated 16<sup>th</sup> August 2021 seeking stay and or suspension of a section of this court's judgment (differently constituted) delivered on 12<sup>th</sup> March 2021. The contested section of the decision relates to the tenure of the 1<sup>st</sup> Respondent as County Attorney, Kilifi County. The two Respondents want the portion of the judgment aforesaid stayed and or suspended

pending the hearing and determination of the appeal now pending before the Court of Appeal.

2. The application is opposed by the Petitioner who has filed a replying affidavit. The 3<sup>rd</sup> Respondent filed no response in respect of the application.

#### **b) The Issues as they appear from the Pleadings and Submissions**

3. The main dispute before the learned Judge was whether the 1<sup>st</sup> Respondent was, in view of the provisions of the Office of the County Attorney Act, 2020 (OCAA), lawfully in office as the County Attorney of the County Government of Kilifi. The 1<sup>st</sup> Respondent had been appointed by the 3<sup>rd</sup> Respondent into that position sometime in 2018. This was after the 3<sup>rd</sup> Respondent established the office of County Attorney for the County Government of Kilifi. The appointment was validated by the County Assembly of the County Government of Kilifi as was required by law.

4. Around 13<sup>th</sup> July 2020, the OCAA was enacted by Parliament. It came into force on 27<sup>th</sup> July 2020. As appears from the Act, the holders of the office of County Attorney were henceforth to be appointed by the Governors of the respective Counties. However, those who were already serving as County Attorneys on the effective date were to transition to the County Attorney's office as established under the new Act.

5. It would appear that the Petitioner held the view that upon the coming into force of the OCAA, the position of County Attorney was to be advertised a fresh and competitive recruitment of the occupant of the office done by the 3<sup>rd</sup> Respondent. As the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not undertake this process in respect of the 1<sup>st</sup> Respondent, the Petitioner moved to court to challenge the continued stay in office by the 1<sup>st</sup> Respondent as unlawful.

#### **c) The Impugned Order**

6. In his judgment delivered on 12<sup>th</sup> March 2021, the learned trial Judge found the Petition as substantially lacking in merit. He therefore dismissed it. In the learned Judge's view, the 1<sup>st</sup> Respondent was validly in office pursuant to the operation of section 31 of the OCAA which provided for transition of officers who were already in office when the Act came into force.

7. However, the court issued a declaration in respect of the 1<sup>st</sup> Respondent's tenure in the following terms:-

*“ That in view of the prayers in the Petition and the findings by the court, a declaration is hereby issued that the letter ref. no. CG/KLF/OG/VOL. 1 dated 14.10.2020 is amenable to correction in clause 1 to effectively reflect thus, “You will continue in service as County Attorney, Kilifi County, for a term commensurate to the term of the current Governor or until lapsing of six years from 27.07.2020 whichever comes first.”*

#### **d) Submissions by the Parties**

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that by this declaration the trial Judge was simply stating that in computing the balance of the term of the 1<sup>st</sup> Respondent, the County Government has to consider only the balance of the term of the 1<sup>st</sup> Respondent before transition as this is what was protected by the transition provision. This according to the 1<sup>st</sup> Respondent would mean that she has to exit office in August 2022 when the current Governor's term lapses. Yet, she holds the view that she is entitled to serve as County Attorney for 6 years as from 14<sup>th</sup> October 2020, the date she was given the letter of appointment under the OCAA. This, as the 1<sup>st</sup> Respondent argues, is hinged on section 6 of the OCAA which entitles County Attorneys to hold office for six years from the date of their appointment.

9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that the question of the term of the 1<sup>st</sup> Respondent was neither raised in the pleadings filed in court nor the submissions by the parties. Therefore, the parties had no opportunity to canvass the matter before the trial Judge rendered his decision on it. Yet, the pronouncement has the grave consequence of clawing back the duration the 1<sup>st</sup> Respondent was to remain in office from approximately 6 years to less than 2 years.

10. On its part, the Petitioner argues that there is no valid appeal pending before the Court of Appeal. According to the Petitioner, the Notice of Appeal instituting the alleged appeal has never been served on it. Further, the period within which to file the appeal has long run out without the 1<sup>st</sup> and 2<sup>nd</sup> Respondent lodging the Memorandum of Appeal. Therefore, the application is misconceived.

#### **e) Analysis by the Court**

11. I have looked at the Petition filed and the replies by the Respondents. Indeed, it appears that the issue of tenure of the 1<sup>st</sup> Respondent was not raised, at least directly. However, it features indirectly in the submissions by the parties (both oral and written). It also appears to me that though not raised, the issue was incidental to the matter that the trial court was invited to consider and decide on.

12. However, whether it was correct for the trial court to have considered the matter when it had not been raised directly in the cause is not an issue that I have jurisdiction to address. This is a matter that only the appellate court has jurisdiction to address. At this point, all I can say is that the Respondents appear to raise a material question of law that deserves a second opinion by the appellate court.

13. I am at the same time convinced that the 1<sup>st</sup> Respondent is likely to suffer substantial loss if the impugned order is implemented only for her appeal to succeed. She would have lost her job which is, in law, time bound.

14. I have considered the objection to the application as raised by the Petitioner. All I would say in reaction to the position taken by the Petitioner is that the issues raised by the Petitioner in its replying affidavit appear to have been satisfactorily countermanded by the 1<sup>st</sup> Respondent in her supplementary affidavit dated 14<sup>th</sup> October 2021.

**f) Determination**

15. I am therefore inclined to grant (which I hereby do) an order suspending the part of the order set out in paragraph 3 of the application dated 16<sup>th</sup> August 2021 pending the determination of the appeal. For the avoidance of doubt the order referred to is as set out in paragraph 7 of this ruling.

16. The 1<sup>st</sup> Respondent has offered to provide security for making good any loss that may be suffered by the County Government of Kilifi should she lose the appeal. To my mind, the loss anticipated in the cause would be the emoluments paid to the 1<sup>st</sup> Respondent by the County Government of Kilifi from the date her contract would have lapsed in terms of the decision of the trial Judge. I will therefore require that the 1<sup>st</sup> Respondent issues the Petitioner an irrevocable undertaking to pay back to the County Government of Kilifi all the emoluments she would have drawn from the said County in the event the appeal is lost by her. This undertaking should be issued within 30 days of this ruling. The terms of the undertaking may be settled by the Deputy Registrar of the court should the parties fail to agree on them.

17. The Applicants shall pay the Petitioner the costs of this application.

**DATED, SIGNED AND DELIVERED ON THE 16<sup>TH</sup> DAY OF NOVEMBER, 2021**

**B O M MANANI**

**JUDGE**

In the presence of:

.....for the Petitioner

.....for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

..... for the 3<sup>rd</sup> Respondent

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B O M MANANI**