



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT BUNGOMA**

**JUDICIAL REVIEW NO. 20 OF 2021**

**IN THE MATTER OF : ARTICLE 10,27,41,47,232 OF THE**

**CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT**

**CHAPTER 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 4, 8 & 9 OF THE FAIR ADMINISTRATIVE**

**ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE BUSIA COUNTY ASSEMBLY**

**STANDING ORDERS**

**AND**

**IN THE MATTER OF THE SUPERVISORY JURISDICTION OF THE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AND**

**IN THE MATTER OF NOMINATION & VETTING FOR APPOINTMENT**

**OF MIRIAM WAKAYA OBURA AND SYLVIA OSIBA OLUK MEMBERS**

**OF BUSIA COUNTY PUBLIC SERVICE BOARD**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY**

**FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION**

**AND MANDAMUS**

**BETWEEN**

MIRIAM WAKAYA OBURA.....1<sup>ST</sup> APPLICANT

SYLVIA OLUK OSIBA.....2<sup>ND</sup> APPLICANT

AND

THE SPEAKER, COUNTY ASSEMBLY OF BUSIA.....1<sup>ST</sup> RESPONDENT

COUNTY ASSEMBLY OF BUSIA.....2<sup>ND</sup> RESPONDENT

THE GOVERNOR, COUNTY GOVERNMENT

OF BUSIA.....3<sup>RD</sup> RESPONDENT

### RULING

1. The Applicants approached the court by way of Chamber Summons dated 6<sup>th</sup> December 2021 for leave to be granted to apply for judicial review orders and further under Order No. 3 for “leave so granted does operate as stay of the decision and ruling of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein in the County Assembly sitting No. 129 of the Fifth Session made on the December, 1, 2021 rejecting the Applicants’ nominations for the position of members of the Busia County Public Service Board and barring the re-submission of their names for the said positions.

2. The Respondents opposed the application for the leave granted to operate as stay as prayed.

3. The court directed the parties to file written submissions on the question of stay and their counsel highlighted their submissions before the court on the 20<sup>th</sup> December, 2021.

#### **The Applicants case for stay.**

4. The process leading to the rejection of the nominees is not disputed save for that the allegation by the Applicants that the Assembly did not debate on the report of the Committee but voted leading to rejection of the Applicants who had passed all other stages.

5. The Applicants submit that the County Assembly acted unconsciously, impartially and in blatant disregard of the customs procedures and traditions of other legislature oversight jurisdiction, in the breach of legitimate expectations of the Applicants and in breach of the rules of natural justice and in violation of the dictates of Article 47 of the Constitution and in breach of principles of service enshrined in Articles 10 and 232 of the Constitution of Kenya, 2010.

6. The Applicant submits that the court under Articles 22, 23, 262 and 165 of the Constitution has supervisory jurisdiction over public bodies exercising quasi-judicial or administrative powers as read together with Article 165 (6) & 7 of the Constitution of Kenya, 2010 clothing the court with jurisdiction to supervise any person, body or authority exercising quasi factual junction . Section 9 of the Fair Administrative Action Act provides for Judicial Review of Administrative action and requires such a review to be determined within 90 days of the Application of review.

7. That Section 12 (3) of the Employment and Labour Relations Act No. 20 of 2011 empowers the court to issue Judicial Review Orders of Certiorari, prohibiting orders, mandamus and declarations. The Applicant further relies on order 53 (1) of the Civil Procedure Rules 2010 to extent that grant of leave shall operate as state of the proceedings in question until determination of the application if the Judge so directs.

8. The Respondent in opposition submit that the decision whether or not to grant a stay pursuant to Section 53 (Rule 1 (4) of the Civil Procedure Rules is an exercise of judicial discretion and that the jurisdiction must be exercised judiciously and relies on the holding of Judge Nyamweya HC in *Judicial Review Application No. 16 of 2019 -Republic -vs – National Hospital Insurance Fund Management Board Exparte – Patanisho maternity & Nursing Home (2019) eKLR* where the court held, “*in addition even if this court has jurisdiction and the discretion to suspend the Respondent decision, a number of factors mitigate against the exercise of that discretion. First as noted above this discretion should be exercised sparingly. Where a decision has been fully implemented, secondly there is a public interest element involved*”.

9. The Respondent further cites in *R (H) –vs- Ash Worth Special Hospital Authority (2003) 1 WLR* where it was held that a stay halts the proceedings or suspends proceedings that are challenged by a claim of Judicial review and that the purpose of a stay is to preserve the status quo pending the final determination of the claim for Judicial Review.

10. What is sought to be stayed?

The Applicant in order No. 4 under the application seeks to stay the decision and ruling of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein in the County Assembly sitting No. 129 of the Fifth Session made on the December 1<sup>st</sup> 2021 rejecting the Applicants’ nominations for the positions of members of the Busia County Public Service Board and barring the re-submission to the Assembly of their names for the said positions by the Governor.

### DETERMINATION

11. Does the court have jurisdiction to grant the order of stay?

The Applicant states the court has jurisdiction under Articles 22, 23, 262 and 165 of the Constitution being supervisory jurisdiction over public bodies exercising quasi-judicial and Administrative powers. I wish to point out Article 262 is on transitional and consequential provisions and could not relate it to court jurisdiction. The Applicant also relies on section 53 rule 1 of the Civil Procedure Rules cited earlier in this ruling to extent that orders of leave can operate as stay of the impugned proceedings if the court so directs.

12. The Applicant on doctrine of separation of powers submits that the Constitution is supreme. The Applicant relies on the Advisory opinion of the Supreme Court in *Speaker of the National Assembly -vs- the Attorney General & 3 others (2013) eKLR* where they cite part of the decision as follows:- “Parliament must operate under the Constitution which is the supreme law of the land where the Constitution decrees a specific procedure be followed in enactment of legislation both houses are bound to follow the procedure. That if Parliament violates the procedural requirements of the supreme law of the land it is for the courts to assert the authority and supremacy of the Constitution”. The Supreme Court in the same decision further states the court would be averse to questioning parliamentary procedures that are formulated by the houses to regulate their internal workings as long as the same do not breach the Constitution.

13. The Applicant has demonstrated that where there is a breach or violation of Constitution by the County Assembly then the court can intervene. The Applicant submits they were denied the right to be heard at the Assembly/House plenary hence violation of their rights.

14. This court cautions itself that the Supreme Court in a later decision in *Julius Karuiki Mate & Another -vs- Martin Nyaga Wambora & Another (2019) eKLR* cautioned courts against rushing to issue conservatory orders against other arms of government for exercising their constitutional and statutory roles. The Supreme Court guided the courts to be restrained in ongoing process in the National & County Assemblies and only review final outcome if seized of the matter.

15. The court believes it is properly seized of the matter and proceeds to consider if on prima facie basis it should exercise its discretion to grant stay of the decision of the Assembly and ruling of the 1<sup>st</sup> & 2<sup>nd</sup> Respondent in rejecting the Applicants nominations as members to the Busia County Public Service Board. In doing so the court is aware of the County Assemblies Powers and Privileges Act No. 6 of 2017. Section 10 which provides as follows:- “No proceedings or decision of a County Assembly or Committee of Powers and Privileges acting in accordance with the Act shall be questioned in court”. The court is also aware it cannot force the Assembly to appoint the Applicants. However, the court can still question the decision of Assembly if it offends the Constitution of Kenya as the Supreme law of the Land.

16. Is there anything to stay? The Applicant submits that the process of sourcing for members of the Busia county Public Service Board has not been completed and /or has not been implemented. That the communication is dated 2<sup>nd</sup> December, 2021 ( page 187 of Applicants bundles reads in part) “ pursuant to Section 58 (a) 10 of the County Government amendments Act 2020. I notify your office of the said decision of your further action”.

17. What is the further Action?. To notify the Governor to re-submit fresh names to the assembly. The Speaker in his letter of 2<sup>nd</sup> December, 2021 notified the Governor of the rejection of the names of the 3 candidates nominated to serve as the Secretary and members of the County Public Service Board namely Mr Philip Mark Busumu , Ms Sylvia Oluk Osiba (2<sup>nd</sup> Applicant), Ms Miriam Wakaya Obura(1<sup>st</sup> Applicant) . The applicants challenge process on the Assembly. The court has already cautioned itself of the Assembly Privileges and oust of jurisdiction of the court on its proceedings . Out of the 3, the two nominees Miriam Wakaya Obura & Sylvia Oluk Osiba have challenged the decision and ruling of Speaker on fresh nominees.

18. The Court cautions itself that at this stage it should only look as to whether the application on *prima facie* basis has merit for grant of order of stay. At page 149 of Applicants bundle, being the Hansard of the Assembly, it is recorded that Hon. Luyemba said that the 2 Applicants are indicated at page 29 of Committee Report to have admitted they are Public Officers. Hon. Okaale at page 158 of the Applicants bundle, the Hon Okale further underscored the fact of the 2 Applicants being public officers. It is recorded that the Deputy Speaker for the Committee sought for extension of time to address issues raised in the debate meaning there was a debate on the qualification of the nominees. The Deputy Speaker motion for extension was rejected under the house rules by the members. At page 159 of the Applicants bundle, the Hansard records that the 2 applicants needed to resign as Public Officers. After the deliberation on the report the speaker at page 160 of the Applicants bundle then asked if members wanted to debate or to vote. The members unanimously said they wanted to vote. It is apparent from the Hansards before the court produced by the Applicant that the members of the house discussed the report by the Assembly Committee on Appointments and raised issue of the Applicants being Public Officers as reported in the committee report. I will not delve in the merits of the case further. Section 58 (13) (b) of County government Act 2012 provides that a person shall be qualified to be appointed as a member under subsection (1) of County Public Service Board if that person is not a state or Public Officer”. It is apparent that the qualifications of the 2 Applicants were tainted by the fact of them being public officers. On *prima facie* basis the court finds that the Applicants having appeared and the record indicating they were heard by the Assembly Committee on Appointments which represents the Assembly and their report having been considered by the Assembly, the decision of the Assembly to reject their appointments, them being found to be Public officers on admission as per report of the Committee, and the decision making process having been complete when the Speaker communicated the Assembly decision to the Governor the order of stay then would not be efficacious. The Applicants relied on Busia County Assembly standing orders number 65. The court looked into the same and finds the provision not relevant or applicable to the instant case. The standing order no. 65 cited concerns petitions for removal of persons from office and their right to be heard by the assembly. The instant concerns rejection of the Applicants’ nominations to be appointed hence the standing order is not relevant to the instant case.

19. On the ruling of the Speaker that the names of the applicants cannot be resubmitted and fresh names be submitted , the court finds the decision is supported by the law. Under Section 58 (A) (10) of the County Government( Amendment ) Act No. 11 of 2020 it is stated, “where the County Assembly rejects any nominee, the Speaker shall within five days communicate the decision of the County Assembly to the Governor and request the Governor to submit fresh Nominations from amongst the persons shortlisted and forwarded by the section panel under sub section (6)”.

20. The court finds on *prima facie* basis that the Respondents discharged their mandate legally and there no violation of the Constitution in

the process. The court further finds that although the appointment to the vacancies are not yet done, in the meantime the 1st and 2<sup>nd</sup> Respondents have completed their decisions. When fresh names are submitted the process will begin a fresh. There is no decision thus to stay and if I am wrong I also found there is no basis to exercise my discretion to stay the decision rejecting the nominees (Applicants ) and the ruling of the 2<sup>nd</sup> Respondent ( speaker) that the Governor (3<sup>rd</sup>) Respondent ) should submit fresh names .

21. I found the decisions and ruling of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively are supported by law. Consequently I disallow the application for leave granted to the Applicants on the 8<sup>th</sup> December, 2021 to operate as stay of the decision and ruling of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents rejecting the Applicant's nominations to the Busia County Public Service Board and barring the applicants names from being resubmitted. Costs in the cause.

It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 21<sup>ST</sup> DECEMBER, 2021 AT BUNGOMA**

**J. W. KELI**

**JUDGE**

The court appreciates the diligence of the counsel for both parties which assisted the court in making this decision .

**In the Presence of**

Court Assistant : Brenda Wesonga

The Applicants: Mr. Omboko

The Respondents: Baraka holding brief for Juma.