



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E027 OF 2021

IN THE MATTER OF

THE ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2)(a),

258(1) AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND

FREEDOMS IN ARTICLES 25, 27, 28, 33, 35, 41, 47, 48 AND 50 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

ALLEGED VIOLATION AND INFRINGEMENT OF THE COUNTY

ASSEMBLY SERVICES ACT NO. 24 OF 2017

AND

IN THE MATTER OF

ALLEGED VIOLATION AND INFRINGEMENT OF THE COUNTY

GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF

ALLEGED VIOLATION AND INFRINGEMENT OF THE FAIR

ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF

THE EMPLOYMENT ACT, NO. 11 OF 2007

HON MICHAEL NYANGI1st PETITIONER

HON PETER JUMA OWUOR 2nd PETITIONER

v

HOMA BAY COUNTY ASSEMBLY SERVICE

BOARD..... 1st RESPONDENT

HOMA BAY COUNTY ASSEMBLY2nd RESPONDENT

HON RICHARD OGINDO 3rd RESPONDENT

HON JEFF ONGORO.....4th RESPONDENT

JUDGMENT

1. Hon Michael Nyangi and Hon Peter Juma Owuor (the Petitioners sued the 4 Respondents on 26 April 2021, alleging that the County Assembly Service Board (the Board) was unlawfully constituted and that it lacked the jurisdiction to revoke their nomination as members of the Board because they were nominated members of the Board and further that the nomination of the Hon Richard Ogindo and Hon Jeff Ongoro as members of the Board to replace them was unlawful as the same were contrary to subsisting Court orders at the material time.
2. At the same time, the Petitioners filed a Motion under a certificate of urgency.
3. On 27 April 2021, the Court directed that the Motion and Petition be taken together.
4. The 3rd and 4th Respondents filed Grounds of Opposition on 20 May 2021, and the Clerk of the Assembly filed a replying affidavit on 24 May 2021.
5. The Board filed a supplementary affidavit on 4 June 2021.
6. Submissions on behalf of the Petitioners were also filed on the same day.
7. The Board and the County Assembly filed joint submissions on 30 June 2021, while the 3rd and 4th Respondents filed their submissions on 28 June 2021.
8. The Court will first examine a jurisdictional plea raised by the Board and the County Assembly.

Res judicata

9. The Board and the County Assembly raised a plea of *res judicata* on the ground that the Petitioners had previously filed Kisumu Judicial Review No. 5 of 2020, *R v Clerk, County Assembly of Homa Bay & 2 Ors, Julius Nyambok & Ar* (Interested Parties) *ex parte Michael Nyangi & Ar* (2020) eKLR.
10. The Court has looked at the record of the proceedings in the aforesaid Judicial Review.
11. The Petitioners herein were challenging the revocation of their appointments as members of the Board and their replacement by and/or the appointment of Julius Nyambok and Richard Ogindo as members of the Board (a Motion had been placed before the County Assembly on 12 March 2020 to this effect).
12. In the instant Petition, the Petitioners pleaded at paragraph 17 thus:

On 12th March 2020, without any authority and/or communication from the ODM party, the 2nd Respondent purported to remove the Petitioners as members of the 1st Respondent and purported to replace them with the 3rd Respondent and a one Hon Julius Nyambok.
13. The averment is repeated in paragraph 9 of the supporting affidavit.
14. In paragraph 17 of the supporting affidavit, it was deposed:

THAT on 25th September 2020, the 2nd Respondent purported again to install the 3rd and 4th Respondents as members of the 1st Respondent. At this time, there were two valid orders in place, one by Hon Justice Matthews N. Nduma in Kisumu ELRC Petition No. 21 of 2020 issued on 27th May 2020 restraining the 1st and 2nd Respondents from replacing us as members of the 1st Respondent with the 3rd and 4th Respondents and Nairobi PPDT No. 7 of 2020 issued on 10th June 2020 nullifying the nomination of the 3rd Respondent as a Board member of the 1st Respondent.

15. The Court's judgment in Kisumu Judicial Review, No 5 of 2020, was delivered on 11 December 2020.
16. The dispute revolved around the resolution by the County Assembly on 12 March 2020 to have the Petitioners replaced as members of the Board.
17. All the facts asserted by the Petitioners herein as lending credence to the unlawfulness of the decision by the County Assembly were within their knowledge up to the date that the judgment was delivered in the Judicial Review proceedings.
18. The Petitioners have not brought forward any new facts that could have emerged after the judgment was delivered.
19. In the view of the Court, the dispute and facts presented by the Petitioners in the Petition herein were the subject of adjudication in Kisumu Judicial Review No. 5 of 2020 and, therefore, the plea of *res judicata* applies.
20. The action herein is also an abuse of the court process as the Petitioners should have placed all the facts obtaining at the time of the judicial review and pleaded a full case instead of pleading in instalments.
21. The Petition is dismissed with costs to the Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF DECEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners Mutua, Nyongesa & Muthoka Advocates

For 1st and 2nd Respondents Otieno, Yogo, Ojuro & Co. Advocates

For 3rd and 4th Respondents N.E. Mogusu & Associates

Court Assistant Chrispo Aura