



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E037 OF 2021

IN THE MATTER OF ARTICLES 22(1) & (2)(c), 50(1)

AND 258(1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE

NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN

ARTICLES 1(1), 2(1) & (3), 3(1), 10(2), 73(1)(b), 232(1)(d),(e) & (f) AND

259(1) & (3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL

FREEDOMS UNDER ARTICLES 24, 27, 40, 43, 46, 47, 201, 202(a), 204

AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT AS READ WITH THE COUNTY GOVERNMENTS ACT, 2012**

AND

**IN THE MATTER OF CONSTITUTIONAL AND LEGAL VALIDITY OF TRANSACTING THE
BUSINESS OF THE COUNTY ASSEMBLY SERVICE BOARD, MIGORI WITH CORRUPTION**

CHARGES AT THE ETHICS AND ANTI-CORRUPTION COURT IN KISUMU

WITHOUT STEPPING ASIDE

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION,

DELEGATUS DELEGARE NON POTEST AND VOID AB INITIO

BETWEEN

MICHAEL KOJO OTIENO.....1st PETITIONER

EVANCE OTIENO OLOO GOR.....2nd PETITIONER

VERSUS

COUNTY ASSEMBLY OF MIGORI.....1st RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD OF MIGORI.....2nd RESPONDENT

BOAZ OWITI OKOTH.....3rd RESPONDENT

CHACHA MATHEWS DAVID.....4th RESPONDENT

NICHOLAS NGABIYA RIOBA.....5th RESPONDENT

BRIAN ODHIAMBO OSODO.....6th RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....7th RESPONDENT

RULING

1. Boaz Otieno Okoth, Chacha Mathews David, Nicholas Ngabiya Rioba and Brian Odhiambo Osodo (members of the County Assembly Service Board of Migori) were charged before the Chief Magistrates Court in Kisumu in MCAC/E002 of 2020, with various offences under the Anti-Corruption and Economic Crimes Act.

2. On 24 May 2021, the Petitioners lodged a Petition with the Court alleging that despite the corruption charges, the 3rd to 6th Respondents had continued to discharge the functions of their offices contrary to the provisions of section 62 of the Anti-Corruption and Economic Crimes Act, which provides that:

A public officer or state officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge until the conclusion of the case.

3. The continued exercise of official functions, the Petitioners alleged, were in violation of constitutional values and principles as enshrined in Articles 3, 10, 27 and chapter 6 of the Constitution.

4. The Petitioners sought the following reliefs:

(i) A declaration that the Respondents have threatened and violated the Constitution of Kenya, 2010, County Governments Act, the Fair Administrative Actions Act, 2015, the Public Finance Management Act, 2015, the Leadership and Integrity Act, as well as section 62 of the Anti-Corruption and Economic Crimes Act.

(ii) An order:

(a) declaring that the 1st to 6th Respondents acted outside the law by failing to relieve the 2nd to 5th Respondents of their duties as required by law.

(b) The 1st Respondent herein do hereby issue suspension letters to the 2nd, 3rd, 4th and 5th Respondents from serving as board members/county assembly members until the conclusion of matter (sic) on corruption charges is determined.

(c) Costs for the Petition be provided for by the Respondents herein.

(d) Any other relief the Court may deem just to grant.

5. At the same time, the Petitioners filed a Motion under a certificate of urgency seeking temporary injunctive orders restraining the 3rd to 6th Respondents from serving in their respective public offices.

6. The Court directed the Petitioners to serve the Motion and Petition ahead of giving directions on 16 June 2021.

7. The 3rd to 5th Respondents caused a replying affidavit to be filed on 15 June 2021, in which it was primarily asserted that there was a pending application by the Director of Public Prosecutions before the Chief Magistrates Court for review of bond terms (seeking an order restraining them from accessing their offices among other orders) and, therefore, this Court would be usurping the mandate of the Chief Magistrate (an affidavit in response to the Petition was also filed the same day).

8. The Respondents also asserted in the affidavit that section 62 of the Anti-Corruption and Economic Crimes Act did not apply because the Constitution had at Articles 178 and 194 limited the grounds upon which they could be removed from office.
9. These Respondents further raised the issue of *sub judice* and the likelihood of contradictory orders being issued by the Chief Magistrates Court and this Court.
10. However, the Court was not satisfied with the service of the Motion upon the Director of Public Prosecutions, and it directed that service be effected afresh.
11. The 1st Petitioner filed a supplementary affidavit on 28 June 2021, and this prompted the 3rd Respondent to file a further replying affidavit on 30 June 2021.
12. On the same day, the 1st to 6th Respondents filed a Preliminary Objection contending:
 - (1) THAT this Honourable Court lacks jurisdiction to hear and determine this matter as it has been brought contrary to the provisions of sections 6, 7 and 8 of the Civil Procedure Act as read together with the provisions of sections 3, 4 and 5 of the Anti-Corruption and Economic Crimes Act and thus should be struck out with costs to the Respondents as the Petitioners brought current Petition while fully aware that Kisumu Chief Magistrates Court Anti-Corruption Case No. E002 of 2020 was still pending before the Court where similar issues they are raising in this Petition are already in dispute vide an application dated 23rd March 2021 as disclosed in the pleadings already filed.
 - (2) THAT this Honourable Court lacks jurisdiction to hear and determine this matter as it has been brought contrary to the provisions of Article 165(6) and (7) of the Constitution as read together with section 362 of the Criminal Procedure Code as the orders sought in the Petition if granted would have the effect of varying/revising the bond/bail terms already set in Kisumu Chief Magistrates Anti-Corruption Case No. E002 of 2020 against the 3rd to 6th Respondents. The Petition herein should therefore be struck out with costs.
 - (3) THAT this Honourable Court lacks jurisdiction to hear and determine this matter as it has been brought contrary to the provisions of Article 162(2) and (3) of the Constitution as read together with section 12 of the Employment and Labour Relations Court Act. The Petition herein should be struck out with costs.
13. On 1 July 2021, the Court took oral submissions on the Preliminary Objection.
14. The Court has considered the assertions in the Petition, Motion, affidavits and the oral submissions.
15. It is not in dispute that the statutory provision suspending public officers who have been charged with corruption or economic crimes is penal law anchored.
16. In general, the administration of the particular penal law is within the jurisdictional mandate of the special magistrates established under the Anti-Corruption and Economic Crimes Act.
17. Where parties are not satisfied with the application of the said law by the Magistrates Court, the practice is to move the High Court, being the Court with supervisory and appellate jurisdiction over the Magistrates Courts exercising criminal jurisdiction.
18. While admitting that the application of section 62 of the Anti-Corruption and Economic Crimes Act implicates employment rights of public officers, this Court is of the view that the appropriate Court to determine whether the aforesaid section comes into play as part of bond terms is the Magistrates Court at the first instance, and then the High Court.
19. The Magistrate who handled the bond application appears not to have made any reference to the applicability of section 62 of the Anti-Corruption and Economic Crimes Act to the case before him.
20. Consequently, the Director of Public Prosecutions made an application for review of the bond terms to include a condition anchored on the said provision of law in March 2021. The application is still pending determination by the Chief Magistrates Court.
21. The legal questions raised in this Petition are based on the same circumstances as obtained when the Director of Public Prosecutions filed the review Motion before the Chief Magistrate.
22. Therefore, it is this Court's view that it would have been legally prudent to let the Chief Magistrates Court address and determine the review application instead of moving this Court.
23. It is regrettable that the office of the Director of Public Prosecutions did not participate in this Petition to clarify the status of the Motion despite having been served with Petition.

Conclusion

24. For the above reasons, the Court declines jurisdiction and directs that the Petition herein be transferred to the High Court.

25. The Deputy Registrar to cause the file to be placed before the High Court on 1 December 2021.

26. Costs in the cause.

27. The Court regrets that it could not deliver this Ruling 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, MCIARB

JUDGE

APPEARANCES

FOR PETITIONERS IN PERSON

FOR 1ST TO 6TH RESPONDENTS NELSON JURA & CO. ADVOCATES

FOR 7TH RESPONDENT DID NOT PARTICIPATE DESPITE SERVICE

COURT ASSISTANT CHRISPO AURA