



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. 42 OF 2017**

**(ORIGINALLY NAIROBI PETITION NO. 96 OF 2017)**

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF**

**ARTICLES 20, 24, 25, 27, 28, 29, 41, 43,47, 48, 50 AND 73 OF**

**THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, CHAPTER 226 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**BETWEEN**

**AMOS WILLIAM OMOLLO.....PETITIONER**

**v**

**COUNTY GOVERNMENT OF KISUMU.....1<sup>st</sup> RESPONDENT**

**GOVERNOR, KISUMU COUNTY.....2<sup>nd</sup> RESPONDENT**

**COUNTY SECRETARY, KISUMU COUNTY.....3<sup>rd</sup> RESPONDENT**

**CHAIRMAN, COUNTY PUBLIC SERVICE BOARD.....4<sup>th</sup> RESPONDENT**

**JUDGMENT**

1. Amos William Omollo (the Petitioner) was appointed as County Attorney through a letter dated 11th February 2015 by the County Public Service Board (the Board).
2. On 11th October 2017, the County Secretary notified the Petitioner that he was being sent on compulsory leave to facilitate investigations into allegations of his conduct in relation to:
  - (i) Petition No. 39 of 2016, Doris Chanda Ombara v County Government of Kisumu.
  - (ii) High Court Misc. Case No. 104 – 195 of 2015, Kevin Pundo & Co Advocates v County Government of Kisumu.
  - (iii) Legality of office and County Attorney and his appointment.
3. The compulsory leave was followed up with a show-cause dated 30th October 2017, calling on the Petitioner to respond within 21 days to

allegations of:

- (i) Acting ultra vires in ELRC Petition No. 39 of 2016, *Doris Ombara v County Government of Kisumu* by summoning and issuing directions to the City Manager against the scope of your powers.
  - (ii) Improper and careless attendance to duty in Kisumu HCMC No. 104 – 195 of 2015 *Ken Pundo & Co. Advocates v County Government of Kisumu & 3 Ors* leading to the County Government incurring unnecessary debts in terms of interests on the decretal sum and legal fees.
4. The Petitioner replied to the show-cause through email on 1st November 2017, contending that the subject allegations were *sub judice* amongst raising other issues.
  5. The next day, the Petitioner moved the Court in Nairobi, alleging that the compulsory leave was invalid and that the intended disciplinary action were meant to unfair terminate his employment.
  6. At the same time, the Petitioner filed a Motion seeking interim reliefs.
  7. The Court granted an order suspending the letter sending the Petitioner on compulsory leave on 3rd November 2017 pending *an inter-partes* hearing. The file was also transferred to Kisumu.
  8. The Respondents filed a replying affidavit to the Motion and joint Response to the Petition on 10th November 2017, and when the parties appeared before the Court on 16th November 2017, the Court declined to extend the *ex-parte* orders earlier granted.
  9. In a Ruling delivered on 12th April 2018, the Court dismissed the Motion.
  10. On 19th May 2021, the Court granted leave to the Petitioner to file and serve an Amended Petition on or before 26th May 2021. The amended Petition was filed on 26th May 2021.
  11. In the Amended Petition, the Petitioner sought the following remedies:
    - (i) A declaration that within the intendment of Article 41 of the Constitution, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents cannot impose compulsory leave on the Petitioner.
    - (ii) A declaration that within the intendment of Article 47(2) of the Constitution, the Respondents cannot take administrative actions without giving valid reasons for the same.
    - (iii) A declaration that within the intendment of Article 47 of the Constitution, the termination letter dated 15<sup>th</sup> February 2020 is null and void.
    - (iv) The Kisumu County Office of the County Attorney Act, 2018, be and is hereby declared unconstitutional.
    - (v) An order of judicial review in the nature of certiorari do issue to bring into the Honourable Court for purposes of quashing the 3<sup>rd</sup> Respondents letter dated 11<sup>th</sup> November 2017 sending the Petitioner on compulsory leave for being invalid, illegal and unconstitutional.
    - (vi) An order of judicial review in the nature of certiorari do issue to bring into the Honourable Court for purposes of quashing the 3<sup>rd</sup> Respondents letter dated 15<sup>th</sup> February 2020 purporting to terminate the Petitioners employment.
    - (vii) An order of judicial review in the nature of certiorari do issue to bring into the Honourable Court for purposes of quashing the 3<sup>rd</sup> Respondents show cause letter dated 30<sup>th</sup> October 2017 for being invalid, illegal and unconstitutional.
    - (viii) An order of judicial review in the nature of certiorari do issue to bring into the Honourable Court for purposes of quashing any other letter, memorandum and/or communication imposing sanctions upon the Petitioner for decisions and/or action taken by the Petitioner in the course of his employment and in performance of his duties as the County Attorney for the County Government of Kisumu.
    - (ix) An order of judicial review in the nature of mandamus does issue compelling the Respondents to recall and reinstate the Petitioner to his position as the County Attorney and Chief Legal Officer.
    - (x) An order of compensation for general and exemplary damages to compensate the Petitioner for the harassment, financial constraints, intimidations, defamation and mental torture he has suffered resulting from the unfair and unconstitutional imposition of compulsory leave.
    - (xi) A permanent injunction against the Respondents stopping them and their officials from proceeding with the intended unfair termination, dismissal and/or suspension of the Petitioner from his employment.

- (xii) A declaration that the 2<sup>nd</sup> Respondent lacks the capacity to unilaterally appoint a person to the office of the County Attorney.
- (xiii) A declaration that any appointment to the office of County Attorney for the County Government of Kisumu done after the institution of this suit was unprocedural and thus unconstitutional.
- (xiv) An order of judicial review in the nature of certiorari do issue to bring into this Court for purposes of quashing any appointment to the position of County Attorney for the County Government of Kisumu.
- (xv) An order compelling the 1<sup>st</sup> Respondent to pay the Petitioner his full salary and benefits from February 2020.
- (xvi) In the alternative, an order of judicial review in the nature of mandamus compelling the Respondents to compensate the Petitioner for the remaining period of his permanent and pensionable employment, which ends in the year 2028, in accordance with his monthly remuneration.
- (xvii) The costs of the Petition be borne by the Respondents.

12. The Respondents caused to be filed on 5th August 2021, a replying affidavit to the Amended Petition sworn by the 3<sup>rd</sup> Respondent (long after the agreed timeline).
13. The Petitioner filed his submissions on 2nd July 2021, while the Respondents filed their submissions on 13th August 2021.
14. The Court has considered the record and the submissions and come to the conclusion that the Petition is a legal non-starter.
15. However, the Court will first address a technical issue raised by the Petitioner. The Petitioner asserted that the (Amended) Petition was undefended because the Respondents had failed to file or serve upon him a response.
16. The record indicates that the Respondents initially filed a Response and replying affidavit to the Petition on 10th November 2017.
17. The Response and replying affidavit were and are validly on record, and the mere fact that an Amended Petition was filed and corresponding leave granted to file further responses does not invalidate the initial filings by the Respondents to make the Petition undefended.

#### **Exhaustion of alternative dispute resolution avenues**

18. The gravamen of the Petitioner's complaint revolves around the exercise or purported exercise of disciplinary powers by the Respondents as well as the appointment of a person to a county public service office and the terms and conditions of service.
19. In this regard, Article 234(2)(i) of the Constitution, as read with section 77 of the County Governments Act and sections 85, 86 and 87 of the Public Service Commission Act, has given the Public Service Commission first instance jurisdiction in these types of disputes.
20. Section 77(1) & (2) of the County Governments Act empowers the Public Service Commission to entertain appeals from any person dissatisfied with the exercise of these disciplinary and recruitment powers by the county public service boards.
21. The Court of Appeal had occasion to consider the implication of section 77 of the County Governments Act in *Secretary, County Public Service Board and Ar vs Hulbhan Gedi Abdille (2017) eKLR* where it stated as follows:

*There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not the only forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the Respondent's. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.*

22. On the other hand, section 87(2) of the Public Service Commission Act, 2017 expressly outlaws first instance court proceedings before the appellate procedures contemplated by the Act have been exhausted.
23. The Petitioner herein did not exhaust the appellate procedures.

#### **Opportunity to be heard/procedural fairness**

24. The Petitioner was informed of the allegations upon which the Respondents wanted to hold a disciplinary hearing, and he was requested to make written representations. The Petitioner made the representations.
25. Thereafter, the Petitioner was invited twice to appear before the County Public Service Board for an oral hearing, but he snubbed the invitations.
26. It cannot, therefore, come from the Petitioner to assert that his rights to fair labour practices, administrative action or hearing were

infringed. He failed to cooperate with the employer in a disciplinary process.

### **Double jeopardy**

27. Despite submitting that the County Public Service Board (differently constituted) had heard and determined the allegations set out in the show-cause, the Petitioner did not provide any minutes or records of such determination.

28. In the view of the Court, the recommendation letter dated 27th August 2018 does not satisfy or show that the Petitioner had been requested to address the allegations which led to the termination of employment or that he had been cleared of the allegations.

29. Lastly, the Petitioner was not diligent in the prosecution of the Petition. Instead of taking steps to prosecute the Petition, he filed application after application, and at one point, the Court, in a Ruling delivered on 17th December 2020, found he had secured orders which were not merited because of material non-disclosure.

### **Conclusion and Orders**

30. From the foregoing, the Court finds no merit in the Amended Petition. It is dismissed. Each party to bear own costs.

31. The Court regrets that the judgment could not be delivered as earlier scheduled due to other official engagements.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF DECEMBER 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Petitioner	Kibet, Adoli & Magina Advocates
For Respondents	Otieno, Yogo, Ojuro & Co. Advocates
Court Assistant	Chrispo Aura