



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. E056 OF 2021**

**THOMAS TONGI MOGENDI.....1<sup>ST</sup> PETITIONER**

**ANDREW ONSERIO ONDIMU.....2<sup>ND</sup> PETITIONER**

**DANIEL OMWOYO MBAKA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**KISII COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**CLERK KISII COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**COUNTY ASSEMBLY OF KISII.....3<sup>RD</sup> RESPONDENT**

**THE DIRECTOR HUMAN**

**RESOURCE MANAGEMENT, KISII COUNTY.....4<sup>TH</sup> RESPONDENT**

**THE PAYROLL MANAGER, KISII COUNTY.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling relates to the representation of the 1<sup>st</sup> Respondent in the instant petition. Ms. Brenda Nyamwaya filed a Notice of Appointment dated 1<sup>st</sup> November, 2021 and filed in court on 2<sup>nd</sup> November, 2021, to represent the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents, while the Firm of Omusolo Mungai & Co. Advocates also filed a Notice of Appointment, to represent the 1<sup>st</sup> Respondent.

2. During hearing, Parties could not agree on who has instructions to act for the 1<sup>st</sup> Respondent and further, both Counsels had contradicting instructions on the petition, necessitating the need for this court to give directions on the issue of representation.

3. Ms. Githongo holding brief for Ms. Kiiru, told the court that they are among Advocates prequalified by the 1<sup>st</sup> Respondent and that their Firm had represented the 1<sup>st</sup> Respondent in previous suits. It is her submission that the dispute arises from a disagreement between members of the 1<sup>st</sup> Respondent, where one member is not agreeable to the decision of the majority.

4. Ms. Githongo submitted that members of the 1<sup>st</sup> Respondent sought an uninterested party to represent them in this suit and that is how their Firm was picked to act for the 1<sup>st</sup> Respondent in this matter. She further submitted that Ms. Nyamwaya, being an In-house Counsel, may be called as a witness in the matter and may thus not be the right person to represent the Respondents in the petition.

5. It is Ms. Githongo's further submission, that the Board of the 1<sup>st</sup> Respondent met and resolved to appoint them to act for the 1<sup>st</sup> Respondent in this matter and are thus properly on record as representing the 1<sup>st</sup> Respondent.

6. Ms. Nyamwaya submitted that she has instruction to act alongside Ms. Muma for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. She relies on the affidavit sworn by Mr. James O. Nyaoga, the Clerk of the county Assembly of Kisii.

7. A joint replying affidavit sworn by Hon. David Ondimu Kombo, Hon. Daniel Ombasa Apepo and Dr. Carren Nyanganyi Nyangweso was filed by the Firm of Omusolo Mungai & Co. Advocates in support of their position.

## **Determination**

8. I have considered the submissions by both counsels and the affidavits filed in the matter. The issues of quorum in the meetings where the decision on who is to represent the 1<sup>st</sup> Respondent in this the matter, is not subject of the proceedings before this court and this court declines an invitation to the Respondents' Board room wrangles.

9. The issue for this court to determine, is who by law has authority to issue instructions for representation such as this, and who has he/she instructed to act for the 1st Respondent in this matter.

10. By a letter dated 27<sup>th</sup> October, 2021, Mr. James O Nyaoga, the Secretary to the 1<sup>st</sup> Respondent and the Clerk of the 3<sup>rd</sup> Respondent, appointed Ms. Brenda Nyamwaya and Ms. Grace Muma to act for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in the petition.

11. Similarly, the Firm of Omusolo Mungai & Co. Advocates, were instructed vide a letter dated 29<sup>th</sup> October, 2021 by one Hon. David Ondimu Kombo, to act for the 1<sup>st</sup> Respondent in the same petition.

12. Section 17 of the County Assembly Services Act, 2017, provides as follows:

***“(1) The Secretary shall be—***

***(a) the chief executive officer of the Board;***

***(b) the accounting officer of the Board;***

***(c) the administrative head of the Service;***

***(d) the custodian of the Board's records;***

***(e) responsible for—***

***(i) the execution of the decisions of the Board; and***

***(ii) assignment of duties and supervision of the staff of the Board;***

***(f) the preparation and submission of the programmes necessary for the achievement of the Board's mandate for approval by the Board;***

***(g) causing to be kept records of the proceedings and minutes of the meetings of the Board and such other records as the Board may direct”***

13. Arising from these provisions, it is clear that the Secretary of the 1<sup>st</sup> Respondent, who is the Clerk of the Assembly, is the person who by law, keeps records of proceedings and minutes of the meetings of the Board, is the custodian of Board records and has the authority to execute Board decisions on behalf of the 1<sup>st</sup> Respondent.

14. It then follows that individual members of the 1<sup>st</sup> Respondent do not have authority to execute Board decisions like they have, in purporting to issue instruction to the Firm of Omusolo Mungai & Co. Advocates to act for the 1<sup>st</sup> Respondent in this petition.

15. The Upshot is that:

I. The Notice of Appointment of Advocates filed by the Firm of Omusolo Mungai & Co. Advocates, to act for the 1<sup>st</sup> Respondent is expunged from the court record.

II. Ms. Brenda Nyamwaya and Ms. Grace Muma are deemed to have lawfully been instructed and are properly on record for the 1<sup>st</sup> Respondent in this matter.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Ochoki present for the Petitioners

Ms. Nyamwaya present for the 1<sup>st</sup> & 3<sup>rd</sup> Respondents

Ms. Ochwal Present for the 2<sup>nd</sup> Respondent,

Ms. Kiiru Present for the 1<sup>st</sup> Respondent

Mr. Onsongo present for the Interested Parties

Ms. Christine Omollo-C/A