



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 99 OF 2019

BETWEEN

HAMISI BWENI DZILA.....CLAIMANT

VERSUS

- 1. COUNTY ASSEMBLY OF KWALE**
- 2. KWALE COUNTY ASSEMBLY SERVICE BOARD.....RESPONDENTS**

Rika J

Court Assistant: Benjamin Kombe

Aboubacar Mwanakitina & Company Advocates, for the Claimant

Muturi Gakuo & Kibara Advocates, for the Respondent

RULING

1. The Claimant filed his Statement of Claim on 17th December 2019.
2. He avers, he was appointed by the 1st Respondent, and confirmed by the 2nd Respondent as Kwale County Assembly Clerk, effective 1st August 2019.
3. Appointment was on permanent and pensionable terms. He was designated as the Accounting Officer in a letter issued by the County Finance Executive on 22nd August 2019, under the Public Finance Management Act, 2012.
4. He was issued a letter of appointment dated 23rd July 2019, detailing his terms and conditions of service. The letter is signed by the Claimant, his Witness and Chairman of the County Assembly Service Board, who is also the Speaker of the County Assembly, Hon. Sammy Ruwa.
5. Clause 5 of the letter of appointment indicates that the Claimant would serve probation of 6 months.
6. During this period, the Respondents state they observed the Claimant, and concluded he was not discharging his responsibilities in accordance with the County Assembly Services Act, 2017.
7. He was alleged to have caused the arrest, by Anti-Corruption Officers, of County Assembly Procurement Officer John Kalu, without referring the matter to the 2nd Respondent; the Claimant had occasionally failed to implement resolutions of the 2nd Respondent; he was the source of ethnic divisions in the Service; and he refused to subject himself to biometric register.
8. The Chairman noted that the Claimant was still under probation, and “ **the Board has therefore resolved not to confirm your appointment as Clerk of County Assembly of Kwale.**” The Claimant was advised further that, “ **in line with Section 42 of the Employment Act, the Board resolved to pay you, your seven [7] days’ wages in lieu of notice to terminate your services.**”

9. This prompted the Claimant to lodge the Claim herein, through which he seeks Judgment against the Respondents, on the following terms:-

a. A declaration that the termination of contract of service by Kwale County Assembly Service Board the 2nd Respondent herein, against the Claimant herein Hamisi Bweni Dzila is illegal as it contravenes the provisions of **Section 12 [5][b] of the County Governments Act, 2012** and **Sections 22 and 23 of the County Assembly Services Act, 2017**.

b. An order reinstating the Claimant to his employment as a Clerk of the Kwale County Assembly.

c. An order restraining the 1st and 2nd Respondent from preventing the Claimant from carrying out his duties, roles and responsibilities as Clerk of Kwale County Assembly.

d. General Damages.

e. Costs of the Claim.

10. Simultaneous with the Statement of Claim, the Claimant filed an Application under Certificate of Urgency, seeking reinstatement of the Claimant pending hearing and determination of the Claim; and an order of injunction restraining the Respondents from interfering with Claimant's discharge of his role as the County Assembly Clerk, pending hearing and determination of the Claim. The Application is supported by the Affidavit of the Claimant sworn on 16th December 2019, and Further Affidavit sworn on 9th January 2020.

11. The Application is opposed through a Notice of Preliminary Objection filed on 18th December 2019. The Respondents state that the Claim offends mandatory provisions of Section 42 of the Employment Act. Objection in main, is through Grounds of Opposition filed on 18th December 2019 and the Replying Affidavit of Acting Clerk of the Kwale County Assembly, Fatuma Hassan Mwalupa, sworn on 20th December 2019. There is a second Replying Affidavit sworn by 1st Respondent's Speaker, and who chairs the 2nd Respondent, Sammy Ruwa. This Affidavit is a replica of the one sworn by Fatuma, Acting Clerk. The two Officers also lodged separate Supplementary Affidavits, similar in content, sworn on 16th January 2020. Was it not possible to rely on one Replying Affidavit and one Supplementary Affidavit?

12. The Speaker and the Acting Clerk, both agree that the Claimant was appointed and removed as County Assembly Clerk, in the manner pleaded in the Statement of Claim. They emphasize that the Claimant signed a contract with a probationary clause. He was aware that he was on a 6 - month probation. The 2nd Respondent met, and found that the Claimant was not discharging his role in accordance with the County Assembly Services Act. The issues leading to this finding are as stated at paragraph 7 of this Ruling. It was resolved not to confirm the Claimant's appointment. His contract was terminated under Section 42 of the Employment Act. He had served 4 out of 6 months of probation, at the time of termination.

13. Section 22 and 23 of the County Assembly Services Act did not apply to the Claimant. He did not supply any transfer of service letter, and the last pay certificate, required under clause 5 of the letter of appointment. His appointment had not become permanent and pensionable. The Respondents state through the Supplementary Affidavits, that the 2nd Respondent is charged with the employment, supervision and dismissal of Officers of the Service. The letters of appointment and termination issued within this mandate. The Claimant signed his letter of appointment. The Clerk is an Officer of the Service, not a Member of the Board. The Clerk acts under the direction of the Speaker.

14. The Claimant appeared before the Vacation Duty Judge sitting at E&LRC Nairobi on 6th January 2020, and obtained interim order, preserving the position of Clerk County Assembly of Kwale, until this Application is heard and determined. That order has been extended as the proceedings unfolded at the Court in Mombasa.

15. On 23rd January 2020, Parties informed the Court they had agreed to file Submissions, and wished to highlight those Submissions. They underscored their Submissions on 28th January 2020.

Claimant's Submissions:-

16. The Claimant submits, the Employment Act 2007, and specifically Section 42 of the Act, does not apply to the employment of a Clerk of County Assembly. The employment of a Clerk of County Assembly is governed by the County Governments Act, 2012 and the County Assembly Services Act, 2017.

17. **Section 13 [1] of the County Governments Act** establishes the Office of the Clerk of the County Assembly. It provides that, the Clerk shall be appointed by the County Assembly Service Board, with the approval of the County Assembly. The Clerk is 'appointed' not 'employed,' in the manner envisaged under the Employment Act.

18. **Section 13 [2] of the County Governments Act**, provides for the qualifications the Board should consider, in appointment of the Clerk. A person shall not be appointed unless such person-

- **Is a citizen of Kenya.**
- **Holds a degree from a university recognized in Kenya or its equivalent.**
- **Has had at least 5 years relevant professional experience.**
- **Meets the requirements of leadership and integrity set out in chapter 6 of the Constitution.**

19. Qualifications, unlike under the Employment Act, are defined specifically. These qualifications ensure the County Assembly gets a person ready to serve from day one, without having to go through probation. Probation is meant to give time to the Employer, to monitor a new Employee and assess the Employee's suitability for the job. The Clerk of the County Assembly is meant to be recruited as a complete product.

20. **Section 16 of the County Assembly Services Act, 2017**, provides-

- **The nomination of a person for appointment as Clerk of the County Assembly under Section 13 of the County Governments Act, shall be done through open, transparent and competitive recruitment process.**
- **The name of the person nominated by the Board for appointment as the Clerk of the County Assembly shall be submitted to the County Assembly for approval in accordance with the Standing Orders of the County Assembly.**
- **The Board shall within 7 days of receipt of the resolution of the County Assembly approving a person for appointment as Clerk of the County Assembly, appoint that person as the Clerk of the County Assembly.**

21. The Board, once it has received the resolution of the County Assembly must appoint. Appointment is immediately permanent and pensionable. There is no room for introduction of new conditions. Appointment of the Claimant on probation, after his name was approved by the County Assembly, was illegal.

22. Termination process, is not regulated by the Employment Act. Sections 41 and 42 of the Employment Act do not apply. Removal of the Clerk from Office, is regulated under Sections 22 and 23 of the County Assembly Services Act.

23. It is submitted for the Claimant that the Clerk is the Secretary to the County Assembly Service Board, under **Section 12[4] of the County Governments Act**. A Member of the Board, shall vacate Office under **Section 12 [5] of the County Governments Act-**

[a] If, the person is a Member of the County Assembly,

[i] at the end of the term of County Assembly; or

[ii] if the person ceases to be a Member of County Assembly; or,

[b] if the person is an appointed Member, on revocation of the person's appointment by the County Assembly; or

[c] if the person is the Speaker, when the person ceases to be such Speaker.

24. The Clerk is therefore a Member of the County Assembly Service Board, by virtue of his Office. He can only be removed in the mode prescribed by the law on removal of Board Members.

25. **Section 2 of the County Governments Act**, defines the term 'Clerk' as Clerk of the County Assembly. 'Office' in relation to the Service, is defined as a paid Office of an Employee of the Service, not being the Office of a Member of the Board.

26. **Section 11 [1] [b] of the County Assembly Services Act**, mandates the Board to determine and review the terms and conditions of service of persons holding or acting in the Offices of the Service.

27. Terms and conditions of service of the Clerk, are provided for under **Section 17, 19, and 20 of the County Assembly Services Act 2017**. They are not left to the Board to determine. The Clerk cannot be an Officer envisaged under **Section 11[1] [b] of the County Assembly Services Act** because he is a Member of the Board.

28. **Section 25 of the County Assembly Services Act** makes the Clerk responsible for administration of scheme of services for Staff. This includes appointment, confirmation, termination, scales of salaries and allowances, of Staff. It is inconceivable that the Clerk would draw a scheme of service for himself. The correct understanding is that he is a Member of the Board.

29. The Claimant submits he did not find an Authority of the Court which deals with issues in dispute directly, in particular, with regard to the County Assembly Services Act which was only enacted in 2017, but cites a decision of the E&LRC, in **Silas Kipruto & Another v. The County Government of Baringo & The Chairman, Baringo County Assembly (2014)e-KLR**, as being relevant and of persuasion to the Court in considering the dispute at hand.

30. The Claimants in the dispute above, were employed by the County Council of Koibatek, before the advent of devolution. On 12th December 2012, the 2nd Claimant applied to the Public Service Commission to be employed as Clerk to the County Assembly Baringo, after the Transitional Authority advertised to fill the position. He was successful.

31. The dispute arose after the Respondents alleged to terminate Claimants' services, on the ground that the Claimants were appointed on probationary contracts. The Court held *inter alia*, that the Claimants were experienced Civil Servants, who had been carefully identified as fit for the job, by the Transitional Authority. The Officers, the Court held, were not eligible for probation. In the case of the 2nd Claimant, the Court considered that he was appointed as Clerk, with the approval of the County Assembly of Baringo, in accordance with Section 13 [1] of the County Governments Act. The Respondents were deemed to have absorbed the 2nd Claimant into permanent and pensionable terms, without the need for probation.

32. Lastly, the Claimant submits that the Court has jurisdiction to grant interim reinstatement and make such other suitable orders under Section 12 of the E&LRC Act, 2011. On the holding by the *Court of Appeal in Kenya Tea Growers Association & Another v. Kenya Plantation and Agricultural Workers Union [2018] e-KLR*, and that of the *E&LRC in Alfred Nyungu Kimungui v Bomas of Kenya Limited [2013] e-KLR*, that reinstatement should normally be granted after hearing the Parties in full, the Claimant submits that the Courts have not stated interim reinstatement should not be granted at all. The Court is required to enquire if there are special circumstances, to allow an order of interim reinstatement. The Claimant's application falls within special circumstances.

Respondents' Submissions: -

33. The Respondents submit that the Claimant was offered the position of Clerk of the County Assembly of Kwale, with effect from 1st August 2019. The letter of offer is dated 17th July 2019. It expressly states, the Claimant would serve probation of 6 months.

34. He was issued a letter of appointment thereafter, which expressly states in clause 5, that the Claimant would be on probation for 6 months. Employment would become permanent and pensionable subject to the provision of transfer of service letter and the last pay certificate, on or before the expiry of the 6 month probationary period.

35. The County Assembly Service Board held a meeting on 8th December 2019 to assess the Claimant's performance. He was found not to have performed satisfactorily, in accordance with the County Assembly Services Act, and his contract terminated under Section 42 of the Employment Act.

36. The County Assembly Service Board is created under **Section 12 [1] of the County Governments Act 2012**. Composition of the Board is provided for under **Section 12 [3]. Section 12[4] of this Act**, states that the Clerk of the County Assembly shall serve as the Secretary to the Board. **Section 13 [1]** provides for appointment of the Clerk by the County Assembly Service Board, with the approval of the County Assembly. It is clear from these provisions that the Clerk, is not a Member of the Board, but an Officer of the Board.

37. The Respondents rely on Industrial Court decision in *Abigael Nyandoro & 4 Others v. Clerk County Assembly of Vihiga & Another [2014] e-KLR*, where it was held that **Section 13 [5] of the County Governments Act 2012**, stipulates that, "the Office of the Clerk of County Assembly and the Offices of Members of Staff of the Clerk of the County Assembly, shall be Offices in the County Assembly Service Board." The Clerk as well as his Staff, are Employees of the County Assembly Service Board, under the direction and control of the Board. **Section 17 of the County Assembly Services Act**, states that in discharging his role, the Clerk shall be under the direction of the Speaker. The Clerk is not a Member of the Board.

38. **Section 11 [1] [b] of the County Assembly Services Act** obligates the Board to determine and review the terms and conditions of service of persons holding or acting in the Offices of the Service. The Board had the mandate to determine Claimant's terms and conditions of service. These were as communicated in the letters of offer and appointment.

39. The Claimant wilfully signed both letters. The letters satisfied the formal validity requirements under Section 9 of the Employment Act.

40. At the time the Board resolved not to employ the Claimant on permanent and pensionable terms, he was still on probation, having served for 4 months, with 2 months to go. **Section 22 and 23 of the County Assembly Services Act** do not apply, because the Claimant was not on permanent and pensionable terms.

41. Reinstatement cannot be granted at interlocutory stage. The Respondents rely on the Court of Appeal decision cited at paragraph 32 of this Ruling. Reinstatement is a substantive relief, requiring that the Claim is heard in full. The remedy is discretionary, but the Court must take into account matters listed under Section 49 [4] of the Employment Act. It would be impracticable to reinstate the Claimant, as the Court has not conducted hearing in full as contemplated by law. Employment law tilts against orders of specific performance. The Respondents cite *Kenya Airways Limited v. Aviation & Allied Workers Union [2014] e-KLR*, where the Court of Appeal held that reinstatement is not an automatic right of an Employee. Courts should not compel Parties into an unworkable relationship.

The Court Finds:-

42. The issues have been identified fairly, by the Respondents in their Submissions on record, to comprise:-

- **Whether the Clerk is a Member of the County Assembly Service Board.**
- **Whether the 2nd Respondent has authority to determine the terms of service of the Claimant.**
- **Whether the 2nd Respondent complied with the law in terminating the Claimant's contract.**
- **Whether the Claimant should be reinstated at this interlocutory stage.**

43. **Member or Officer of the Board?** The County Assembly Service Board, is established under Section 12 of the County Governments Act, 2012.

44. Its composition is given under **Section 12 [3] of the County Governments Act 2012**, as amended through **Section 46 of the County Assembly Services Act, 2017**.

45. The 2 Acts provide that the Board consists:-

- **The Speaker of the County Assembly as the Chairperson;**

- **A Vice-Chairperson, elected by the Board from the 2 Members of the County Assembly appointed under Section 12 [3] [c] of the County Governments Act.**
- **2 Members of the County Assembly, nominated by the Political Parties represented in the County Assembly, in accordance with their numerical strength.**
- **1 Man and 1 Woman, appointed by the County Assembly from amongst persons who are experienced in public affairs, but are not Members of the County Assembly.**

46. The law defining composition of the Board, does not include the Clerk of the County Assembly as a Member. It clearly states, ‘**the Board shall consist,**’ and lists specific persons from **Section 12 [3] [a] to [d] of the County Governments Act**, read with **Section 46 of the County Assembly Services Act**, as the Members of the Board. If it was intended that the Clerk is considered as a Member of the Board, this would have been stated in continuation to the phrase ‘**the Board shall consist,**’ probably with the inclusion of a Section 12 [3] [e], of the County Governments Act.

47. Instead, Section 12[3][d] is followed by Section 3A, which states that Members of the Public appointed under Section 12[3][d] shall serve on part -time basis, and **Section 12 [4] specifying that the Clerk, shall be the Secretary to the Board.**

48. The Clerk is therefore an Officer of the County Assembly, serving the Board as such, and not as a Member of the Board, with a voting right on the resolutions made by the Board.

49. The provisions on removal of Board Members do not include the removal of the Clerk. **Section 12[5] of the County Governments Act** defines how Members are to be removed from the Board. The persons mentioned under this provision include the Members of the County Assembly, Members appointed by the County Assembly [under Section 12 (3) (d)] and the Speaker of the County Assembly. The Clerk is not among the persons whose removal is contemplated under Section 12 [5] of the County Governments Act.

50. The Clerk’s Office is an Office within the meaning of **Section 2 of the County Assembly Services Act**, as he is not an appointed Member of the Board, part-time or fulltime.

51. **Part IV of the County Assembly Services Act**, running from Section 18 to 30, provides for the terms of service of the **Clerk and Other Staff of the County Assembly**. The Clerk is lumped with other staff, which would indicate he is considered as part of the staff, of the County Assembly. If he was considered as a Member, rather than an Officer of the County Service Board, his appointment and other terms and conditions of service, would fall under **Part 111 on County Assembly Services Act**. Instead, his appointment and terms and conditions of service, is provided for, under Part 1V alongside other Staff of the County Assembly.

52. The Court agrees with the ruling of the Industrial Court *in Abigael Nyandoya & 4 Others v. Clerk of the County Assembly Vihiga & Another [2014] e-KLR*, that the Clerk and all his Staff, are Employees of the County Assembly Service Board. This is amplified by Section 38 on taking of oath by Members of the Board. **Section 38 [1] of the County Assembly Services Act**, provides for the oath to be taken by the **Chairperson, the Vice-Chairperson, and Members. Section 38 [2]** provides for the oath to be taken by the **Secretary and such Other Officers of the Board**. There are different forms of oath for the Members and the Secretary/Other Officers, shown in the 3rd Schedule to the Act. By the way of analogy, Article 128(2) of the Constitution provides that the Offices of the Clerks (Senate and National Assembly), and Offices of Members of the Staff of the Clerks, shall be Offices in the Parliamentary Service. It is the same principle that applies, with respect to the Office of the Clerk, County Assembly.

53. **Does the 2nd Respondent determine the Clerk’s terms and conditions of service?** **Section 25 of the County Assembly Services Act**, stipulates that the Board shall formulate and disseminate to Officers of the Service, Schemes of Service, setting out the terms and conditions of the appointment of **Officers, and Other Staff**. The terms include appointment, confirmation, promotion, resignation, secondment, transfer, scales of salaries and allowances, designation and grade of Officers and Other Staff.

54. As the Clerk is an Officer as concluded above, his terms and conditions of service fall within the mandate of the County Assembly Service Board. The role of the Clerk, includes administration of the Schemes of Service.

55. Importantly, the control of County Assembly Service Board, over its Officers and other Staff, includes disciplinary control.

56. **Section 27 of the County Assembly Services Act**, allows the Board to terminate the employment of an Employee of the Service, in accordance with the Act and Regulations made under the Act. In exercise of its control, the Board is required to observe Article 236 of the Constitution of Kenya, on protection of Public Officers. The Board therefore has the mandate to draw the terms and conditions of service of the Clerk, and the power to hire and fire the Clerk, but this mandate must be exercised in accordance with the County Assembly Services Act, the County Governments Act, the Employment Act and the Constitution of Kenya.

57. **Did termination follow the law?** The Claimant was nominated and appointed as Clerk, in accordance with **Section 13 of the County Governments Act**, read with **Section 18 of the County Assembly Services Act**. He applied for the position which was advertised by the County Assembly Service Board. He was nominated by the Board and his name submitted to the County Assembly for approval. His name was approved. The Board is required to within 7 days of receiving the resolution of the County Assembly, approving the name submitted for appointment, **appoint that person as Clerk of the County Assembly**.

58. There is no provision for probation under this law on appointment. It could therefore not be included in the terms and conditions of service, contained in the contract documents issued to the Claimant, on 17th July 2019 and 23rd July 2019.

59. Nowhere in the County Governments Act and the County Assembly Services Act, is the Clerk of the County Assembly required to serve on probation.

60. The terms and conditions of service formulated by the Board, under its mandate given under Section 25 of the County Assembly Services Act, did not allow for introduction of clauses in the Claimant's contract, which go against the minimum standards of employment, provided for under the County Assembly Services Act. The Board cannot introduce probation, when the law says *shall appoint*, without any other conditions.

61. The probation clause in the letter of appointment appears to be cut and paste from some contract which must have issued, during the transition period from the Public Service of Kenya to County Services. It requires the Claimant to provide transfer of service letter. Transfer of service from where? It requires him to supply last pay certificate. Again from which Employer? The clause seems to presuppose that the Claimant worked in Public Service before, and was joining the 2nd Respondent on transfer of service. There is no provision in the County Assembly Services Act, requiring the Clerk to avail transfer of service letter or display last pay certificate, in order to be appointed as the Clerk. He was advised his terms would be pensionable only upon fulfilling these conditions and serving probation of 6 months. These requirements were illegal, unreasonable and totally unworkable.

62. An Employee is placed on probation, to enable the Employer gauge if the Employee suits the position over which he has been recruited. The law, including the Employment Act, does not require that an Employee must serve on probation before confirmation. The Preliminary Objection raised by the Respondents, stating that the Claim offends mandatory provisions of Section 42 of the Employment Act, is misconceived. Section 42 regulates probation where Parties have lawfully agreed there would be probation, in the contract. The Employment Act 2007 declares and defines the fundamental rights of Employees. It applies to the Clerk of the County Assembly. It must however be applied in the context of any other written law applicable to the Parties. If the other law, or labour instrument, offers superior benefits to the basic ones provided by the Employment Act, the superior terms shall prevail, as provided for in Section 26 of the Employment Act. Even if it was correct that Section 42 of the Employment Act is a mandatory provision, there is no provision for probation in the County Laws involved, and the superior terms, in these County Laws, which State *shall appoint*, would prevail. The law prescribes the qualifications for persons to be appointed as Clerk of the County Assembly. The processes taken before appointment- interview, nomination, and vetting – are rigorous enough, that the law does not intend there would be need to gauge the appointee further, through probation. The Board appoints, and the Clerk is sworn in, to serve without being taken through other preconditions, to be confirmed. The Claimant was taken through all the procedures relating to appointment of the Clerk. He was even designated as the Accounting Officer, on 22nd August 2019, in accordance with the Public Finance Management Act, 2012. How is a probationary Officer to be designated as the Accounting Officer responsible for all the financial and accounting records of the County Assembly?

63. Public and State Officers who take oath of Office, are not suitable material for probation. The high legal standards to be met by these Officers before their ascension to Office, ensure there is no need for probation, once in Office.

64. In event the Board, even within the 1st month of the Clerk's service, felt he did not pass muster, termination of service would have to follow the provisions relating to removal of the Clerk from Office. All termination clauses, in any contract of employment crafted by the Board, would have to conform, or be an improvement, to the removal from Office provisions contained in the law.

65. **Section 22 of the County Assembly Services Act**, allows the Board to suspend or remove the Clerk from Office, for inability to perform the functions of Office, whether arising from infirmity of the body or mind; gross misconduct or behavior; incompetence; bankruptcy; violation of the provisions of the Constitution including Chapter 6 of the Constitution; or violation of the provisions of the Act.

66. The terms of appointment and removal given under the law, must be read into the contract issued to the Claimant, and if any terms and conditions of service in the written contract issued by the 2nd Respondent contradict the law, they must be superseded by the law.

67. Removal procedure is under **Section 23 of the County Assembly Services Act**. It requires the Board to frame charges against the Clerk; forward the charges to the Clerk together with a brief statement of the facts; invite the Clerk to respond to the charges in writing setting out exculpatory grounds; and invite the Clerk to appear before the Board in person or accompanied by his Advocate. If the Clerk does not furnish a reply, or fails to exculpate himself, the Board shall submit a Notice of Motion to the Speaker, seeking that the Board revokes appointment. The Board does not revoke appointment directly, but must abide debate and outcome of the Notice of Motion submitted to the County Assembly.

68. The Speaker refers the matter to a Select Committee made up of eleven Members of the County Assembly, to investigate. The Committee submits its report to the Assembly. The Clerk has a right to appear before the Select Committee. The Assembly then debates the Motion. If the Motion is approved, the Clerk is removed from Office.

69. There is no room in these procedures, which are an integral part of the terms and conditions of service of the Clerk to the County Assembly, for removal while on probation.

70. The Respondents made certain allegations against the Claimant. Those allegations should have been investigated and the procedures for removal from Office, defined by the law above, fully put in play.

71. Resort to Section 42 of the Employment Act, and the illegal probation clause in the contract, was the quickest but the wrong way for the Respondents to get rid of the Clerk.

72. The Respondents are aware about the law relating to removal of the Clerk from Office. In ***Denis Musyoka Mutui v. Kwale County Assembly Service Board & Another [2018] e-KLR***, the Claimant, then Clerk of the County Assembly of Kwale, sought to restrain the 2nd Respondent herein, from disciplining him by removal from Office. The Court then, found and held that the 2nd Respondent had adhered to the law on removal of the Clerk from Office, and declined to issue an order of injunction restraining the 2nd Respondent from disciplining the Clerk. Why is it difficult to follow the law with regard to the current Clerk? The removal procedure is arduous, but there is no shortcut in protection of Public Officers. **Article 236 [b] of the Constitution** requires that **“a Public Officer shall not be dismissed, removed from Office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.”**

73. The last issue is whether the Court has the power to order reinstatement at an interlocutory stage, or should the dispute go to full trial? The other way to look at this aspect of the dispute is to ask if there are issues left for trial after the Court has considered and determined the Application. Does it prejudice any of the Parties if the dispute is not taken through a full trial? Is reinstatement suitable, reasonable and practicable at this stage?

74. This Court has stated in the past, as submitted by the Respondents, in *Alfred Nyungu Kimungui v Bomas of Kenya Limited [2013] e-KLR*, and as endorsed by the *Court of Appeal in Kenya Tea Growers Association & Another v. Kenya Plantation and Agricultural Workers Union [2018] e-KLR*, that reinstatement is a remedy that should **normally** be granted, upon full trial.

75. The holding above does not mean reinstatement must always await full trial. The Court agrees there can be special circumstances justifying reinstatement through an interlocutory intervention. The sanctity of a key Public Officer's contract of service, is underpinned by the Constitution, and must be protected by the Court at all times.

76. Does the dispute herein disclose special circumstances? As concluded above, termination of the Claimant's service, or more appropriately his removal from Office, was a complete aberration of the Statutes and the Constitution of Kenya, which governed the employment relationship.

77. The facts themselves are largely not disputed. The Claimant's appointment to the position of Clerk, and the circumstances of his removal are not in dispute. The contract documents signed by the Parties are not contested. The only issues which are disputed are legal in nature. Should such legal issues compel the Court and the Parties to await full trial before the order of reinstatement can be granted?

78. The Office of the Clerk is protected under Article 236 of the Constitution. It is similarly protected under 2 Acts of Parliament, relating to County Assembly Service. The appointee needs to be in Office, to discharge the obligation to the Public, over which he was appointed.

79. Removal took place only approximately 2 months ago. The Court gave orders preserving the position of the Clerk, pending the outcome of the Application. The Respondents are not prejudiced in having the Clerk back in Office, as the removal procedures are still open to them to invoke. If the Claimant has done wrong, he can still be investigated and removed, in accordance with the law. His other prayer in the Claim would follow grant or denial of the order of reinstatement, so that the Court does not see what purpose is served by taking those other prayers to full trial. If he is reinstated, the Respondents would have no reason to interfere with the Claimant's discharge of his role. Invoking the removal procedure prescribed by the law would definitely not amount to such interference. The prayer for damages would be satisfied by an order for payment of salary for December 2019, January and February 2020. Declaration has already been made in the Ruling, that termination was illegal.

80. The Court is satisfied that the Claimant has shown he merits reinstatement through his Application; there are no issues left to keep the matter pending in Court, as the issues in dispute are largely legal in nature and have been argued by the Parties at length; determination of such issues by this Court can be challenged on appeal, rather than being subjected to a full trial; there are special circumstances to justify grant of the orders sought; it is reasonable and practicable to grant orders sought; and the Respondents are not prejudiced, because they have the option of removing the Claimant from Office, following the right procedures given by the law. Courts should not keep matters which are argued at length through interlocutory applications, and which are largely and clearly disputes about the law, pending full trial.

81. **Rule 17 [10] of the E&LRC [Procedure] Rules 2016**, bars the Court from issuing orders of reinstatement *ex parte*. It does not bar the Court from issuing such orders *inter partes*. **Section 12 [3] [vi] of the E&LRC Act 2011**, allows the Court to grant an order of reinstatement, subject to such conditions as the Court deems fit to impose under circumstances contemplated under any written law; or, under **Section 12 [3] [viii]**, to grant any other appropriate relief as the Court may deem fit to grant. **Section 3 [1] of the E&LRC Act**, states the principle objective of the Act, is to enable the Court to facilitate the just, expeditious and proportionate resolution of employment disputes.

IT IS ORDERED:-

a. The Claimant is reinstated with immediate effect to his position as the Clerk to the County Assembly of Kwale.

b. He shall be paid his back-salary from the date of termination, 11th December 2019, to-date.

c. The Respondents shall not interfere with the Claimant's discharge of mandate as the Clerk, provided that any steps taken by the Respondents to remove the Claimant from Office, in accordance with the law, shall not be deemed to amount to interference with discharge of mandate.

d. No order on the costs.

e. This Ruling shall be adopted as the Judgment of the Court within 30 days, and the file closed, unless the Parties demonstrate to the Court there are triable issues pending.

f. Mention on 31st March 2020.

Dated and delivered at Mombasa this 28th day of February 2020.

James Rika

Judge