



**REPUBLIC OF KENYA**

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

**PETITION NO. 15 OF 2019**

*(Before Hon. Justice Mathews N. Nduma)*

**FREDRICK ODERO.....PETITIONER**

**VERSUS**

**THE GOVERNOR HOMABAY COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER COUNTY GOVERNMENT OF HOMABAY.....2<sup>ND</sup> RESPONDENT**

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

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. Applicant filed the Notice of Motion Application on 20<sup>th</sup> May 2019, seeking a conservatory order *inter alia*

*“staying the resolution of the County Assembly of Homa Bay passed on 17<sup>th</sup> May 2019 removing the Petitioner/Applicant from office as the County Executive Member for Tourism, Sports, Youth, Culture, Gender and Social Services Homa Bay County pending the hearing and determination of the petition”*

2. The application is on the basis that the process undertaken in impeaching the Petitioner /Applicant from office violated his right to fair administrative action, fair hearing and equal protection of the law.

3. The application is opposed by a replying affidavit of Daniel Odhiambo Kando, the clerk, Homabay County Assembly, in which he deposes that by a resolution passed on 17<sup>th</sup> May 2019, by a majority vote the County Assembly of Homa Bay impeached the Applicant from office as County Executive Committee member for Tourism, sports, Youth, Culture and Social Service on grounds of incompetence; gross misconduct; abuse of office and gross violation of the constitution as set out in a select committee report dated 16<sup>th</sup> May 2019 attached to the replying affidavit.

4. That removal followed a public outcry regarding mismanagement of the docket that had been allocated Kshs. 9.7 Million. That removal was preceded by a motion moved by Hon. Richard Ogindo, Member of County Assembly on 23<sup>rd</sup> April 2019 that sought to investigate the conduct of the Applicant which motion was approved by the Assembly.

5. That the Applicant was invited to appear before the committee on powers and privileges that was mandated to investigate the matter to defend himself on 25<sup>th</sup> and 26<sup>th</sup> April 2019. That recommendations of the committee were tabled before the Assembly on 30<sup>th</sup> April 2019. That the Applicant was removed by a motion supported by a third of members of the Assembly in terms of standing order No. 62(2). That the application lacks merit and it be dismissed with costs.

6. In the supporting affidavit the applicant deposes that a motion to remove him from office was moved in the County Assembly on 23<sup>rd</sup> April 2019. That the motion was approved by the County Assembly and a select committee was formed to investigate his conduct. That the applicant appeared before the select committee on 25<sup>th</sup> and 26<sup>th</sup> April 2019 and he was allowed opportunity to address the three charges leveled against him.

7. The Applicant denies having misappropriated funds as alleged or at all. The Applicant further alleges that he was victimized for his fearless defence of Article 10 and chapter 6 of the constitution of Kenya. The Applicant admits that he was removed from office by a

resolution passed by majority vote of members of the Assembly on 17<sup>th</sup> May 2019 but states that the resolution was unlawful and unfair. The Applicant prays that he be granted conservatory orders pending the hearing and determination of the suit.

### **Determination**

8. The issue for determination is whether the applicant has satisfied the prerequisites for grant of conservatory orders pending the hearing and determination of the petition.

9. The application was brought after the impeachment had taken place by the County Assembly, pending communication to the Governor, County Government of Homa Bay to remove the applicant in terms of *Section 40 (6) (b) of the County Governments Act, 2012* to dismiss the applicant from office.

10. Section 40(6) of the County Governments Act, 2012 provides:

*“(6) if a resolution under subsection (5) (b) is supported by a majority of the members of the County Assembly:*

*(a) The Speaker of the County Assembly **SHALL** promptly deliver the resolution to the Governor; and*

*(b) The Governor **SHALL** dismiss the County Executive Committee member” (emphasis mine).*

11. The provision is couched in mandatory terms and the Speaker and the governor have no option in implementing the impeachment decision of the County Assembly. The aggrieved party may only approach court upon completion of this process by the Legislature in adherence and respect of the doctrine of separation of powers by the courts. It is this court’s finding that the applicant approached the court prematurely and the prayer for the court to injunct the implementation of the resolution of Homa Bay County Assembly by the Speaker and the Governor is misconceived.

12. The Applicant must await completion of the process and once in court is obliged to establish a *prima facie* case that the County Assembly violated the applicant’s right to fair administrative process; fair hearing and/or the Assembly did not abide by the mandatory procedure and threshold for impeachment provided in the *County Government’s Act, 2012, the County Assembly Standing Orders* and the relevant provisions of the constitution.

13. Furthermore, *in Gitirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR* the Supreme Court stated as follows:

*“(86) Conservatory orders bear a more decided public law connotation for these are orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders therefore are not, unlike interlocutory injunctions linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or high probability of success in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes”*

14. This is a mandatory mouthful by the Supreme Court. We have considered the inherent merit of this application grounded by the stated reasons for the impeachment of the applicant and the public interest in the matter including that the position is one of the County government, cabinet and the removal was actuated by public outcry before it was debated and approved by the County Assembly.

15. Accordingly, the application has not met the threshold aforesaid, same lacks merit therefore and is dismissed with costs in the cause.

**Ruling Dated, Signed and delivered this 5<sup>th</sup> day of March, 2020**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Mwamu for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Petitioner/Applicant in person

Chrispo – Court Clerk