



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 16 OF 2019

(Before Hon. Justice Mathews N. Nduma)

ISAAC FELIX OLWERO.....PETITIONER

VERSUS

SIAYA COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF SIAYA.....2ND RESPONDENT

COUNTY ASSEMBLY OF SIAYA.....3RD RESPONDENT

RULING

1. The applicant was appointed as the clerk of County Assembly of Siaya. The applicant was suspended from office by the Speaker, County Assembly by a letter dated 1st March 2019 on grounds of “gross misconduct” for a period of three (3) months with effect from 1st March 2019 to allow investigations on circumstances under which cheque no. 000041 in the sum of Kshs. 2,977,281 was withdrawn from co-operative Bank, Siaya Branch on 1st September 2015. This followed internal audit report dated 26th February 2019 on the County Assembly of Siaya car loan and mortgage fund. The Applicant responded to the letter of suspension by a letter dated 11th March 2019 and wrote a letter of appeal to the Speaker dated 25th March 2019.

2. On 9th May 2019, the Siaya County Assembly Service Board, invited the applicant to a disciplinary committee hearing scheduled on 20th May 2019. The Applicant appeared on the date with his advocate and explained himself.

3. By a letter dated 23rd May 2019, the suspension of the applicant was extended by the Public Service Board for a further period of three (3) months with effect from 1st June 2019 for the 1st respondent to consider the submissions by the applicant.

4. On 3rd June 2019, the 1st respondent adopted the report of the disciplinary committee and directed the Chairman of the Committee to table a notice of motion before the Assembly, with a view to revoke the appointment of the applicant.

5. The Assembly invited the applicant by a letter dated 7th June 2019 to appear before a select committee of the Assembly to exculpate himself of the charges leveled against him being:

a. Misappropriation of funds.

b. Concealment and non-disclosure of official information.

c. Abuse of office; and

d. Inability to discharge functions of the clerk to the County Assembly of Siaya and Secretary of the Board.

6. On 10th June 2019, the applicant filed this application. The court issued interim conservatory orders on 13th June 2019. On 13th June 2019, the Assembly received, debated and adopted the report of the select committee and a motion of removal of the applicant was adopted by the assembly. However acting on advice of the advocate of the respondent, a letter of revocation was not written.

7. The respondents filed replying affidavit on 25th July 2019 sworn to by Mr. Eric Ogenga, Acting clerk of the County Assembly of Siaya. The acting clerk opposes the application stating that under *section 42(7) of the leadership and integrity Act, 2012*, a state officer may be suspended from office pending investigations. That by a letter dated 1st September 2015, without the approval of the Board, the applicant together with the principal finance officer authorized co-operative bank to transfer a sum of Kshs. 1,984,427 from the car loan and mortgage account to the account of the applicant and yet the applicant was not entitled to such a facility at the time.

8. That internal audit report revealed improprieties in the management of the fund and in particular withdrawal of monies which were not recorded.

9. That the Board followed due process to suspend the applicant pending investigations and the applicant was subjected to a full disciplinary hearing before a decision to remove him was made by the Board and the same was tabled before the Assembly for adoption and removal of the applicant. That the respondents followed all statutory and constitutional provisions in this regard and the applicant has not made out a *prima facie* case warranting interference with the authority of the Board and the Assembly to duly remove the Applicant from the position of clerk for gross misconduct as set out in the motion tabled before the Assembly. That the application be dismissed with costs.

Determination

10. The issue for determination is whether the Applicant has met the prerequisites for grant of conservatory orders to stop his imminent removal from office for gross misconduct.

11. Both parties filed written submissions in which the applicant relies on the decision in *Daniel Mudanyi Ocheja vs Judicial service Commission (2019) eKLR* in which the court stated:

“The right to fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded”

12. From the deposition by the applicant and the respondents, it would appear at this interlocutory stage of the suit, that the applicant was afforded a hearing throughout the process. The court is not inclined to get into the merits of the suit at this interim stage but is satisfied that the respondent was involved and afforded opportunity to respond in writing to the allegations made against him at the time of his suspension. The applicant was subsequently allowed to appear with his advocate before a disciplinary committee of the Board and was accorded a hearing before the full board adopted the decision of the committee to table a motion for removal of the applicant before the Assembly. Furthermore, the Assembly accorded the applicant a hearing before a select committee of the Assembly which committee recommended the removal of the applicant which recommendation was adopted by the Assembly but not implemented due to the injunctive relief granted by the court.

13. Upon considering arguments from both parties, the court is satisfied that the Applicant has not established inherent merit of the case which is a key prerequisite in the grant of interlocutory conservatory order before the hearing of the petition as set out in the case of *Gitirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR*.

14. Furthermore, the court is loath to interfere with the proceedings of a County Assembly before a final decision has been made by the Assembly and communicated to the public.

15. In *Simon Wachira Kogiri vs County Assembly of Nyeri and 2 others (2013) eKLR*, the court stated:

“The only possible scenario in which the court may be prepared to interfere with the proceedings and decision of the County Assembly and indeed parliament is in extreme situations when these bodies act or conduct their proceedings in a manner that amounts to abrogation of the constitution”.

16. The case presented by the applicant has not disclosed a prima facie case tending to show blatant disregard of statutes or the constitution.

17. Accordingly, the application lacks merit and is dismissed.

Ruling Dated, Signed and delivered this 5th day of March, 2020

Mathews N. Nduma

Judge

Appearances

Mr. Okello for Applicant.

Gordon Ogola for Respondents

Chrispo – Court Clerk