



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 7 OF 2019

(Before Hon. Justice Mathews N. Nduma)

ISMAEL NOO ONYANGO.....PETITIONER

VERSUS

THE GOVERNOR COUNTY OF SIAYA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF SIAYA.....2ND RESPONDENT

JUDGMENT

1. The petition was filed on 8th March 2019 and amended on 9th May 2019.

2. The petitioner prays for an order in the following terms:

(a) This court does declare that the stipulation in the appointment by the 1st respondent of the petitioner as a member of the Board of a term of office of five years from the 25th March, 2014 was in violation of *Section 58(4) (a) of the Act*, contrary to *Articles 10 and 232 of the Constitution* and therefore null and void

(b) This court does declare that the petitioner shall serve in office as a member of the Board for the full statutory one term of six years from the 25th March, 2014 as required by law.

(c) This court does permanently restrain the 1st and 2nd respondents from treating as vacant the office of member of the Board occupied by the petitioner before the expiry of six years from the effective date of his appointment, from taking any steps in purported recruitment of any person to serve in said office in replacement of the petitioner before expiry of the term of his office as aforesaid and from the stoppage of his remuneration, rights, obligations, powers, privileges and responsibilities connected with said office.

(d) This court does award to the petitioner compensation in terms of the sums in remuneration and allowances that the respondents failed and/or refused to pay to the petitioner for the period of his full statutory terms of six years in office for which he is kept out of office.

Facts

3. The facts, the basis of the petitioner set out in the petition are that the petitioner was appointed a member of the Siaya County Public Service Board by a letter dated 27th March 2014 for a period of five (5) years from the 25th March, 2015. At the time of appointment, one year had lapsed from the date of General elections, and so, the petitioner's term was to end with that of the Board being one year after the next general elections in 2019.

4. The petitioner wrote to the Governor Siaya County on 7th November 2014, requesting that the appointment be rectified to the statutory term of six (6) years.

5. The secretary of the Board also wrote to the governor on 5th October 2017 notifying him of the resolution by the board to have the anomaly corrected.

6. That the appointment of the petitioner for a five (5) year term was a clear violation of *Section 58 (4) (a) of the County governments Act* read with *Articles 10 and 232 of the constitution of Kenya 2010*.

7. That this was also unfair labour practice in violation of *Article 41 (2) (b) of the constitution* and also violated the dignity of the petitioner protected under *Article 28 of the constitution*.

8. Furthermore, the conduct by the respondents discriminated the petitioner in violation of *Article 27 of the constitution* in that the petitioner was subjected to different treatment from that of other members of the Board, who were appointed on a six (6) year term as mandated by law.

9. That the 1st and 2nd respondents intend to irregularly terminate the appointment of the petitioner with effect from 25th March 2019 in a manner not provided under *Section 28(5) of the County Governments Act*.

10. That the court permanently restrain the respondents from this illegal conduct. That in the event, the petitioner is so unlawfully removed, the court directs that he be paid full remuneration due to him until completion of six (6) years at the rate of Kshs. 244,978.50 per month including gratuity payable at the end of the term in terms of the law.

Response to Amended Petition.

11. The respondents have responded to the petition vide a replying affidavit of Joseph Ogutu, acting County Secretary of the 2nd Respondent.

12. The respondents depose that the petitioner was appointed member of the first Board of Siaya County government which board was to be in office for a period ending in 2019 where upon the 2nd board was to be constituted. The petitioner was appointed member on 27th March 2014, when the term of the first board was remaining with only five (5) years to end of term.

13. That the petitioner duly accepted the appointment at a time when the term of the first board had run for one year. That the appointment of the petitioner, which he accepted was for the remainder of the term. That the petitioner having accepted to serve for the remaining term is estopped from claiming a non-existent one year further, since the term of the board has expired and a new board had to be constituted upon expiry of the first board.

14. That in terms of Section 68 of the County Governments Act, every appointment to the County Public Service shall be evidenced in writing. The petitioner accepted the appointment by a letter dated 16th April 2014. The petition is therefore misconceived, abuse of court process and it be dismissed. That the appointment of the petitioner terminated by effluxion of time. That no right of the petitioner has been violated as alleged or at all. That the petition be dismissed with costs.

Submissions

15. Both parties filed written submissions and provided list of authorities which the court has carefully considered and is grateful to counsel for the parties for their industry.

16. Section 58 of the County Governments Act, No. 17 of 2012 provides:

“(4) A member of the Board shall:

(a) Hold office for a non-renewable terms of six (6) years; and

(b) May serve on a part- time basis.

(5) The members of the board may only be removed from office:

(a) On grounds set out for the removal of members of a constitutional commission under article 251 (1) of the constitution; and

(b) By a vote of not less than seventy five percent of all the members of the County Assembly”

17. Of most relevance is section 57 of the County Governments Act which establishes the County Public Service Board as follows:

“57 establishment of the County Public Service Board-

There is established a County Public Service Board in each county, which shall be:

*(a) A body corporate with **perpetual succession** and a seal and*

(b) Capable of suing and being sued in its corporate name. (emphasis Mine)

<https://definitions.uslegal.com>, provides definition of perpetual succession as follows:

“Perpetual succession refers to continuous succession of a corporation. Perpetual succession is one of the remarkable features of a corporation..... perpetual succession along with a common seal, is one of the features defining a corporation’s legal existence as separate from those of its owners”.

18. On the other hand, perpetual existence is defined thus:

“The characteristic of most corporations meaning that they can continue indefinitely, until dissolved by either the corporation itself or the state (dissolution).”

19. It is clear from the foregoing definition that the County Public Service Board exists indefinitely until it is dissolved according to law notwithstanding the five (5) year national and county governments election cycle.

20. Furthermore, the board exists as a body corporate, separately from its members who are appointed under the provisions of *Section 58(1) (2) (3) and (4) of the County Governments Act*.

21. Key to the appointment of a member of the board is the fixed term of six (6) years, which term is mandated by the wording of *Section 58(4)* by the use of word shall. I repeat this for emphasis:

“A member of the board shall:

(a) Hold office for a non-renewable terms of six years”

22. It is the court’s considered decision that a member of a County Public Service Board **SHALL** serve, for a mandatory period of six (6) years regardless of whether the member is appointed at the beginning of the County Government election cycle or in the middle of the cycle of the County Government. Where a vacancy arises in the middle of the term of the County Public Service Board, the vacancy shall be filled by a member appointed for a period of six (6) years, since the existence of the board is continuous. Such a member may only be replaced after serving the full term in the successive board with new members appointed to replace whose six (6) years term have expired.

23. The court finds that none of the authorities cited by the parties was on fours with the present case. This matter raised a peculiar novel point regarding succession of appointed members of the County Public Service Boards and not removal of a member pursuant to impeachment proceedings by the County Assembly.

24. Accordingly, the petition succeeds and the court makes the following orders:

(a) The appointment of the petitioner as member Siaya County Public Service Board is declared to be for a six (6) year fixed term by operation of the law (*Section 58(4) (a) County Governments Act, No. 17 2012*).

(b) The petitioner shall serve in office as a member of the board for the full statutory term of six years.

(c) The respondents are directed to pay the petitioner full remuneration and gratuity in respect of the full six (6) year term the petitioner is mandated to serve.

Judgment Dated, Signed and delivered at Nairobi this 16th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Okello for Petitioner.

M/S Namusubo for Respondent

Chrispo – Court Clerk