



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**PETITION NO. 7 OF 2020**

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

**JOHN SAUL NAVIAVA.....PETITIONER**

**VERSUS**

**AMB. FRANKLIN ESIPILA.....1<sup>ST</sup> RESPONDENT**

**VIHIGA COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE COUNTY GOVERNMENT OF VIHIGA.....1<sup>ST</sup> INTERESTED PARTY**

**HON. VINCENT MMAITSI.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The applicant is the secretary Vihiga County Public Service board. The applicant was appointed on a six (6) year fixed contract from 31<sup>st</sup> March 2017 and due to end on 3<sup>rd</sup> April 2023.
2. The applicant received a letter dated 25<sup>th</sup> February 2020 by the 1<sup>st</sup> respondent requiring the applicant to proceed on 60 days compulsory/administrative leave pending investigation of non-disclosed acts of commission and omission.
3. The letter also directed the applicant to handover the office to a Board member who is the 2<sup>nd</sup> interested party on 26<sup>th</sup> February 2020.
4. The applicant prays for a conservatory order to stop the impugned action by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the basis that the action violates section 58 of the County Governments Act number 17 of 2012.
5. The applicant also prays the court to restrain the 1<sup>st</sup> interested party from assuming the office of Secretary Vihiga County Public Service Board on the grounds that his removal is unlawful and the 1<sup>st</sup> interested party lacks qualifications to hold the position of secretary of the Board stipulated under Section 58 of the Act.
6. The application is opposed vide a replying affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> respondents deposed to by the

Mr. Franklin Esipila, the Chairman of the Board, who deposed that the applicant was sent on compulsory leave to give room to investigations of his conduct by a letter signed by himself, dated 29<sup>th</sup> February 2020. That the applicant is merely on administrative leave enjoying all his emoluments and has not been removed from office.

7. That the application is premature, misconceived and the same be dismissed with costs.

### **Determination**

8. The appointment as the secretary to the County Public Service Board of any member of the Board is governed by Section 58 of the County Government Act, number 17 of 2012.

9. The provision reads as follows:

*“58 (1) The County Public Service Board shall comprise*

*(a) A chairperson nominated and appointed by the County Governor with the approval of the County Assembly;*

*(b) Not less than three but not more than five other members nominated and appointed by the County Governor, with the approval of the county assembly; and*

*(c) A certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.”*

10. In the **Nairobi E&LRC Cause No. 935 of 2018, Shukuri Alawso Muhamed vs Wajir County Secretary and 2 others**, Wasilwa J. found as follows:

*“I have also considered the advisory by the Attorney General dated 12<sup>th</sup> October 2015 to the Chairperson of the defunct Transitional Authority whereby the Secretary to the County Public Service Board was confirmed to be a member of the Board”.*

11. The judge cited the Advisory by the Attorney General as follows:

*“2. It is imperative to note that the construction of the members of the County Public Service Board as outlined in Section 58 thereof includes the Chairperson, members and the certified Public Secretary who is a distinct member of the Board but serves as the Secretary of the Board. For the purpose thereof, the analysis of the County Public Service Board Secretary and the Chairperson are to be construed jointly as members of the County Public Service Board”.*

12. It follows that the only procedure applicable for removal of a member of County Public Service Board under Section 58 is applicable to the Secretary of County Public Service Board *mutatis Mutadis* as follows:

*“(5) The member 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 the members of the County Assembly”*

13. From the facts set out on the face of the application and the supporting affidavit, and the bare representations in the replying affidavit of the respondents, the applicant has satisfied the requirements for grant of a conservatory order enunciated by the Supreme Court in the case of **Gatirau Peter Munya vs Dickson Mwende Githinji & 3 Others [2014] eKLR** as follows:-

*“(86) Conservatory orders bear a more decided public law connotation for there 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 services as “prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the applicant’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. Accordingly, without pre-determining the merits of the petition the applicant has demonstrated the inherent merit of the petition considered against the public interest disclosed. It is paramount that the independence of County Public Service Board be respected and maintained at all times and where there is need to remove a member from the board, strict adherence to the provisions of *Section 58(5)* be observed.

15. Accordingly, and in line with the decision of *E&LRC sitting at Nyeri in Mundia Njeru Gateria case;* per Byram Ongaya J. :

*“The person who is desirous that the Chairperson (read Secretary) is removed from office must satisfy the substance and the procedure first, alleging the details of the grounds that satisfy any of those enumerated in the constitution and secondly, submitting the appropriate petition to the County Assembly for the assembly’s consideration and resolution”.*

16. Accordingly, the application is granted in terms of prayers 3, 4 and 5 of the Notice of Motion.

**Ruling Dated, Signed and delivered this 16<sup>th</sup> 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 15<sup>th</sup> March 2020, this ruling 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. Musiega for Applicant

Mr. Getada for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and 1<sup>st</sup> and 2<sup>nd</sup> interested parties.

Chrispo – Court Clerk