



**REPUBLIC OF KENYA**

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

**PETITION NO. 53 OF 2018**

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

**HON. MARITA MMOJI AGUFANA.....PETITIONER**

**VERSUS**

**THE SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....1<sup>ST</sup> RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY OF VIHIGA.....2<sup>ND</sup> RESPONDENT**

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

**THE COUNTY SECRETARY, VIHIGA COUNTY.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY SERVICE BOARD, VIHIGA COUNTY.....5<sup>TH</sup> RESPONDENT**

**THE GOVERNOR, VIHIGA COUNTY.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petition was filed on 8<sup>th</sup> August 2018 in which the petitioner prays for the following reliefs: -

i. A declaration that the action by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to exclude the petitioner from the 3<sup>rd</sup> respondent's proceedings of 2<sup>nd</sup> August 2018 on the hearing of a motion to impeach the petitioner as a member of the County Executive Committee in charge of Sports, Youth and Gender and the decision of the 3<sup>rd</sup> respondent to impeach the petitioner as a consequence is unconstitutional and violates Articles 27,41,47 and 50 of the constitution read with standing orders numbers 62(a), 63(b) and 64(3) of the 3<sup>rd</sup> respondent and the same is null and void.

ii. Costs of the petition.

**Facts**

2. The petition is grounded on facts set out under paragraphs 7 to 25 of the petition which may be summarized as follows: -

3. On the 2<sup>nd</sup> August 2018, the Speaker of the County Assembly of Vihiga (the 1<sup>st</sup> respondent) convened the County Assembly (the 3<sup>rd</sup> respondent) for the purpose of deliberating a motion to adopt a report of a select committee on the impeachment of the petitioner as a member of the County Executive Committee in charge of Finance and Planning.

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not summon the petitioner in terms of standing orders no. 63, (b) and 64(3) to the floor of the house to defend himself.

5. The investigation committee had been constituted in terms of section 40(3)(a) of the County Governments Act 2012 and the petitioner had a right to be called on the floor of the house to defend himself before the Assembly made its decision in terms of Article 50 of the constitution of Kenya 2010.

6. That the petitioner was a state officer protected by Article 236(b) of the constitution and due process had to be adhered to before removing her from office.

7. Furthermore, the petitioner being a worker was entitled to be treated fairly as enshrined under Article 41 of the Constitution.

8. Furthermore, the petitioner was entitled to fair Administrative action under Article 47(1) of the constitution.

9. That the findings by the select committee lack merit and the petitioner would have ably demonstrated this had the Clerk of the County Assembly (2<sup>nd</sup> respondent) summoned him to defend himself before the house.

10. That the petition has merit and it be allowed and the reliefs sought granted.

### **The Response**

11. The respondents filed a response to the petition on 14<sup>th</sup> November 2018 in which they stated as follows: -

12. The respondents admitted the contents of paragraphs 1,2,3,4,5 and 6 of the petition in so far as the description of the parties were concerned.

13. The respondents also admit that the assembly was convened on 2<sup>nd</sup> August 2018 to deliberate the impeachment motion in respect of the petitioner pursuant to a report of a select committee that had been instituted by the assembly to investigate the matter.

14. The respondents deny the contents of paragraph 8 of the petition that the petitioner had a right to be summoned and be given opportunity to defend herself before the entire house upon tabling of the report of the adhoc committee.

15. It is therefore not in dispute that the petitioner was not called to defend himself before the floor of the County Assembly.

16. That the petitioner was accorded humble opportunity to defend himself before the Adhoc committee which made and presented the report to the whole house.

17. The respondents deny violation of any of the alleged constitutional rights of the petitioner.

18. That the petitioner was represented by Counsel before the Adhoc committee and Articles 41, 47 were adhered to.

19. That Article 50 only relates to criminal proceedings and is not relevant to the matter.

20. That there was sound basis to impeach the petitioner as happened.

21. That the petition lack merit and it be dismissed with costs.

### **Determination**

22. The parties filed submissions and list of authorities and the issues for determination are: -

i. Whether the Respondents violated the rights of the petitioners as alleged or at all.

ii. Whether the petitioners are entitled to the reliefs sought.

### **Issue (i)**

23. The procedure for removal of County Executive Committee member is provided under section 40(1) of the County Governments Act 2012 as follows: -

*‘ Removal of member of Executive committee.*

24. 40(1) subject to subsection (2) the Governor may remove a member of the County Executive Committee from office on any of the following grounds: -

*a. Incompetence*

*b. Abuse of office*

*c. Gross misconduct*

*d. Failure without reasonable excuse or with authority of the governor to attend three consecutive meetings of the County Executive Committee.*

*e. Physical or mental incapability rendering the Executive committee member incapable of performing the duty of that office, or*

*f. Gross violation of the constitution or any other Law.*

*1. A member of the County Assembly, supported by at least one third of all the members of the County Assembly, may propose a motion requiring the governor to dismiss a County Executive Committee member on any of the grounds set out in subsection (1).*

*2. If a motion under subsection (2) is supported by at least one third of the members of the County Assembly: -*

*a. The county Assembly shall appoint a select committee comprising five of its members to investigate the matter, and*

*b. The select committee shall report within ten days to the County Assembly whether it finds the allegations against the County Executive Committee member to be substantiated.*

*3. The County Executive Committee member has the right to appear and be represented before the select committee during investigations.*

*4. If the select committee reports that it finds the allegations:*

*a. Unsubstantiated no further proceedings shall be taken, or*

*b. Substantiated, the County Assembly shall vote whether to approve the resolution requiring the County Executive committee member to be dismissed.*

*5. 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 executive committee member”.*

25. The only dispute raised by the petitioner is that the County Assembly did not summon him to the floor of the house to defend himself before adopting a motion requiring the governor to dismiss the petitioner as a member of the County Executive Committee on the 2<sup>nd</sup> August 2018.

26. Section 40(1) does not provide for a member of the County Executive Committee who has already appeared personally and with counsel before the Adhoc select Committee that investigated the matter and tabled a report before the whole house to be given a further hearing before the assembly.

27. The petitioner relies on standing orders 63(b) and 64(3) for the submission that the assembly was duty bound to give him a hearing before adopting the report of the select committee to his loss and detriment.

28. The petitioner did not cite the alleged standing orders in the petition and/or in the final written submissions to demonstrate that he had a right of audience before the whole house.

29. Standing orders of the County Assembly must have a foundation either in the constitution of Kenya 2010 and/or in the relevant provisions of the County Governments Act, 2012 or any other relevant statute.

30. In particular section 14 of the County Governments Act 2012 provides that a County Assembly may make standing orders consistent with the constitution and Act regulating procedure of the County Assembly, in particular orders for the proper conduct of proceedings.

31. In the present case, section 40 of the County Governments Act, has provided an elaborate procedure for the removal of an Executive Committee member which includes provision of a right for the member to appear before an Adhoc select committee that has been mandated by the assembly to investigate specific allegations made against the Executive Committee member.

32. This elaborate statutory procedure does not provide that the member has a further right to appear before the whole house to defend himself further before the house adopts or rejects the report of the select committee.

33. The petitioner has failed in the body of the petition, supporting documents attached to the petition and in the final written submissions to demonstrate such right and/or entitlement.

34. Section 107 and 108 of the Evidence Act, cap 80 laws of Kenya places the burden of proof on he or she who alleges.

35. The petitioner has failed to discharge this onus and has failed to prove his case on a balance of probabilities.

36. To the contrary, the Court finds that the respondents have satisfied evidential/burden of rebuttal.

37. Accordingly, the petition lacks merit and in answer to issue (ii) above, the court finds that the petitioner is not entitled to the reliefs sought.

38. Each party to bear their own costs of the suit.

**Ruling Dated, Signed and Delivered at Nairobi this 25<sup>th</sup> day of June 2020.**

**Mathew N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court operations due to 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. Nyamwea for the petitioner

Mr. Bakewa for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Mr. Jure for 5<sup>th</sup> and 6<sup>th</sup> Respondents.