



**REPUBLIC OF KENYA**

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

**PETITION NO. 42 OF 2019**

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

**DANIEL OMONDI OGADA.....1<sup>ST</sup> PETITIONER**

**COLLINS ODHIAMBO AGUTU.....2<sup>ND</sup> PETITIONER**

**TOBIAS ODUNDO (MEMBERS OF THE HOMABAY**

**PUBLIC SERVICE BOARD).....3<sup>RD</sup> PETITIONER**

**VERSUS**

**COUNTY ASSEMBLY OF HOMABAY.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF HOMA BAY.....2<sup>ND</sup> RESPONDENT**

**THE GOVERNMENT OF HOMA BAY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant in the application dated 14/1/2020 prays for an order in the following terms: -

An order of committal to jail be made against the following persons for such period as this Honorable court may deem fit and just: -

- a. Isaiah Ogwe – The county secretary of Homa Bay County Government and
- b. Cyprian Otieno Awiti – The Governor of Homa Bay County
- c. Costs of application

2. The application is premised on the following grounds *inter alia*: -

- (i) The court issued interim orders on 2<sup>nd</sup> December 2019 restraining the respondents from removing the petitioners from office or interfering with their duties and the orders were extracted and served upon the respondents together with penal notice.
- (ii) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents despite knowledge of the order proceeded to close the petitioners' offices and took away their staff and vehicles.
- (iii) The 1<sup>st</sup> contemnor Isaiah Ogwe is the County Secretary of the 2<sup>nd</sup> respondent whose term has since expired. The 2<sup>nd</sup> Contemnor Cyprian Otieno Awiti is the 3<sup>rd</sup> respondent. The two should be held responsible for willful defiance of the said court orders.
- (iv) That Mr. Ongwe instructed advocates for the Respondents to confirm the validity of the said orders from the court file. That the advocates did confirm the issuance of the said orders by the court.
- (v) That on 26<sup>th</sup> November 2019, long before the petitioners went to court, the 1<sup>st</sup> Respondent's report/recommendation had been received and acted upon as per the law by the 3<sup>rd</sup> respondent.

(vi) That consequently the County Public Service Board having been disbanded as per recommendations of the 1<sup>st</sup> respondent there was no Board member to carry out the operations of the Board.

(vii) That Mr. Ongwe therefore redeployed the officers from the Board to other departments on 29<sup>th</sup> November 2019. The contemnors be punished accordingly.

3. The respondents filed a replying affidavit sworn to by Isaiah Ongwe on 27<sup>th</sup> January 2020 in which he deposes that he is still the County Secretary and Head of Public Service of the 2<sup>nd</sup> respondent and his contract was due to end on 30<sup>th</sup> April 2022.

4. Mr. Ongwe deposes that it is apparent from the affidavit of service of David Elvis Ochieng that he never served the said orders personally on Mr. Ongwe or on the 3<sup>rd</sup> respondent to warrant grant of the orders sought.

5. That Mr. Ongwe and the 3<sup>rd</sup> respondents became aware of the said orders when the same was shared on social media by some media bloggers.

6. That the petitioners obtained orders from Court without disclosing material facts to the court hence the application dated 5<sup>th</sup> December 2019, by the respondents to have the orders set aside.

7. That on 20<sup>th</sup> December 2019, the respondents and petitioners' advocates appeared before the Judge for clarification on the orders that had been issued on 2<sup>nd</sup> December 2019 and the order was amended accordingly allowing for recruitment of other Board members whose terms of contract had earlier expired whereas the petitioners' issue was to await determination of their applications dated 28<sup>th</sup> November 2019 and 15<sup>th</sup> December 2019.

8. That the application lacks merit and it be dismissed with costs.

#### **Determination**

9. The issue for determination by the court is whether the applicants have proved that Mr. Isaiah Ongwe, the County Secretary and Mr. Cyprian Otieno Awiti are in willful defiance of the Court order issued on 2<sup>nd</sup> December 2019 to the standard of proof required by law being higher than on a balance of probabilities but not beyond reasonable doubt.

10. It is pertinent to note that the applicants call for penal measures to be visited on the alleged contemnors and therefore the applicants should be held to strict proof by the court.

11. The applicants did not file any supplementary affidavit to deny and/or join issue with all matters of fact raised by Mr. Ongwe in the replying affidavit.

12. Accordingly, the facts put forth by Mr. Ongwe especially to the effect that the horse had bolted when the petitioner came to Court and that the petitioners obtained interim orders without material disclosure to the court militate against granting of the punitive orders sought by the applicants against Mr. Ongwe and the Governor, the 3<sup>rd</sup> respondent.

13. The court finds that the applicants have failed to prove the facts alleged in their application to the standard set by law and have therefore failed to demonstrate that Mr. Ongwe and the 3<sup>rd</sup> respondent the Governor of Homa Bay were in willful defiance of interim Court orders issued on 2<sup>nd</sup> December 2019.

14. The application is dismissed with costs in the cause.

**Judgment Dated, Signed and delivered at Nairobi this 30<sup>th</sup> day of July, 2020**

**Mathews 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**

**Appearance**

Mr. Odenny for Petitioners/Applicant.

Mr. Yogo for Respondents.

Chrispo: Court Clerk