



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 194 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 10, 27, 28, 29, 41, 47 AND 236 THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTIONS 5, 45 AND 46 OF THE EMPLOYMENT ACT of 2007.

AND

IN THE MATTER OF: SECTION 12 AND 13 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: SECTION 5, 10, 17, 19, 22, 23 OF THE COUNTY ASSEMBLY SERVICE ACT, 2017

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 9(2)(d)

OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT 2017

AND

IN THE MATTER OF: VIOLATION AND CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEES UNDER ARTICLES 10, 27, 28, 29, 41, 47, AND 236 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

THE CLERK,

NAIROBI CITY COUNTY ASSEMBLY

PETITIONER

VERSUS

THE SPEAKER,

NAIROBI CITY COUNTY ASSEMBLY

1ST RESPONDENT

NAIROBI CITY COUNTY

ASSEMBLY SERVICE BOARD

2ND RESPONDENT

AND

ORANGE DEMOCRATIC PARTY

1ST INTERESTED PARTY

THE JUBILEE PARTY

2ND INTERESTED PARTY

HON. ABDI HASSAN GUYO

3RD INTERESTED PARTY

HON. MAURICE GARI

4TH INTERESTED PARTY

HON. MARK NDUNG'U

5TH INTERESTED PARTY

JUDGMENT

This petition is brought in the name of the Office of the Clerk, Nairobi City County Assembly. The Petitioner, Jacob Muvengi Ngwele held the office of the Clerk of the National Assembly and the Secretary to the 2nd Respondent from April 2013.

The 1st Respondent, Kedeversia Beatrice Elachi held the office of the Speaker of the County Assembly and was the Chairperson of the 2nd Respondent until she resigned from the position of the Speaker to the Nairobi City County Assembly during the pendency of this petition until 10th August 2020 when she resigned for the position.

The 2nd Respondent is a statutory body established under section 12 of the County Governments Act 2012 whose functions include *inter alia* to provide services and facilities to ensure the efficient and effective functioning of the county assembly and constituting offices in the county assembly service, and appointing and supervising office holders.

The Petitioner filed this Petition on 23rd October 2019 to challenge the 1st Respondent's actions that purportedly threatened his rights and employment. He sought the following remedies from this Court–

a. A finding and holding that the 1st Respondent has engaged in a malicious scheme of orchestrating the unlawful and unfair suspension, termination and/or removal of the Petitioner and other senior officers and staff of the Nairobi City County Assembly from their respective offices since September 2017.

b. An injunction restraining the Respondents whether acting directly or through third parties, agents and/or proxies, from illegally or unfairly suspending, terminating and/or otherwise removing the following persons from their respective offices–

i. Muvengi Jacob Ngwele, currently serving as the Clerk of the Assembly and Secretary of the 2nd Respondent;

ii. Guyo Abdi Hassan, currently serving as the representative of the majority party/coalition in the membership of the 2nd Respondent;

iii. Okumu Elias Otieno, currently serving as the Representative of the minority party/coalition in the membership of the 2nd Respondent;

iv. Adah Awuor Onyango currently serving as the Deputy Clerk of the Nairobi City County Assembly;

v. Philomena Kavinya Nzuki, currently serving as the Principal Accountant of the Nairobi City County Assembly;

vi. Fredrick Macharia Mwangi, currently serving as the Senior

Finance Officer of the Nairobi City County Assembly.

vii. Nancy Cheron Mutai, currently serving as the Principal

Human Resource Officer of the Nairobi City County Assembly; and

viii. Garvin Romeo Castro, currently serving as the acting Principal Clerk Assistant of the Nairobi City County Assembly.

c. An injunction restraining 1st Respondent, whether acting directly or through third parties agents and/or proxies from illegally or irregularly reconstituting the membership of the 2nd Respondent whether at the behest of the Governor of the Nairobi City County, the Orange Democratic Movement Party, the Jubilee Party or any other person or authority.

d. An order of certiorari quashing purported changes in the membership of the 2nd Respondent as published by the 1st Respondent in Gazette Notice No. 9978 (Volume CXXI – No. 144) dated 22nd October 2019.

e. The costs of and incidental to this Petition.

f. Interest on (e) above at court rates from the date of filing this Petition to the date of full and final settlement; and

g. Such other, further, incidental or alternative reliefs as the Court may deem just and expedient.

The orders sought in the petition are two faceted; it was instituted to seek orders on behalf of Board members of the 2nd Respondent who were serving by virtue of nominations by their political parties as well as employees who were serving in the Nairobi County Assembly. However, the Ruling of 15th November 2019 by Makau J. struck out the petition in so far as it related to the political dispute and the reliefs sought for and on behalf of the 3rd Interested Party and Hon. Okumu Elias Otieno.

On 8th August 2020 this Court issued directions upholding the said ruling. According to the ruling, the Interested Parties were no longer necessary for the determination of the petition and were discharged from any further proceedings in this petition. Further, the Court observed that the issues relating to the other persons whose interests had been represented in this petition were also settled. There is however no record of the Petitioner amending his petition to reflect the changes. As such, the prayers are as outlined in the Petition.

The Petition has been opposed by the 1st and 2nd Respondents vide the 1st Respondent's Replying Affidavit sworn on 4th November 2019 and the Replying Affidavit of Maurice Otieno Gari sworn on 7th August 2020.

The Petitioner's Case

The Petitioner averred that on 13th September 2017, the 1st Respondent attended a political meeting that orchestrated a scheme to unlawfully interfere with his position as the clerk of the Nairobi City County Assembly. The same was unsuccessful so on 26th June 2018 the 1st Respondent lodged a complaint against the Petitioner and five other senior staff members of the Assembly, with the Directorate of Criminal Investigations (DCI).

They were accused of corruption, economic crimes, abuse of office and breach of public procurement laws and regulations, which resulted in their arrest and prosecution in **Milimani Chief Magistrate's Court Anti-Corruption Case 36 of 2018; Republic v Jacob Ngwele Muvengei & 5 Others**. However, it was found that they had no case to answer and that the complaint had been premature and maliciously aimed at unlawfully interfering with the Petitioner's position as the clerk.

The Petitioner averred that the 1st Respondent's motive had been to interfere with his position, harass, vex, intimidate and thereafter replace him in order to punish him for failing to acquiesce to her fraudulent scheme of inflating the purchase price of the Speaker's house. This was done through television shows, newspaper articles and radio broadcasts between June 2018 and February 2019.

It is his case that the 1st Respondent blamed him for her impeachment. He averred that one of the 1st Respondent's agendas following the quashing of her impeachment was to ensure that the Clerk was properly recruited and vetted in accordance with the provisions of section 13 of the County Governments Act.

The Petitioner avers that the operations of the Assembly were paralyzed because of these wrangles and the 1st Respondent's attempts to interfere with his appointment. In his view, the 1st Respondent's actions were aimed at populating the 2nd Respondent with individuals who could easily acquiesce to her plans to defraud the Assembly.

The Petitioner averred that the 1st Respondent's actions violate the provisions of articles 27, 28, 29, 41, 47 and 236 of the Constitution, and the provisions of section 5 and 45 of the Employment Act, Section 12(5) of the County Governments Act and Sections 5, 10, 11, 17, 19, 22 and 23 of the County Assemblies Services Act. The Petitioner further averred that her actions have caused him grave and irreparable loss in the form of job insecurity, malicious suspension, mental and psychological trauma, exposure to public ridicule, hatred, moral censure, social stigma, opprobrium and scandal. He prayed for grant of orders as sought in his petition.

The 1st Respondent's Case

The 1st Respondent averred that the petition is frivolous as no constitutional rights or provisions have been violated. Further, that the Petitioner is guilty of material non-disclosure concerning his employment.

The 1st Respondent averred that the claim in the Petition herein is non-justiciable as there is no evidence adduced before this Court to prove that there were threats to the Petitioner's employment hence this Court should down its tools in determining the matter. It was her position that she had proved that the Petitioner had misrepresented facts to this Court by alleging that an illegal act had been committed. As such, the Petitioner should not benefit from misrepresentation of facts.

She contended that the Petitioner's allegation that there was conflict between them because he allegedly contributed to her impeachment is without basis. Further, that no evidence was adduced to prove the allegation of suspension or dismissal.

The 1st Respondent further contended that the Petitioner opted to rush to Court instead of presenting himself before the 2nd Respondent as had been requested in the memo of 23rd October 2019. It was her position that this Petition was instituted to stop the investigations against the Petitioner on the misuse of the 2nd Respondent's resources and abuse of his office and powers as the clerk of the Nairobi City County Assembly. It was thus her case that the petition was a tactic used to block any disciplinary action against the Petitioner since he could only be disciplined by the 2nd Respondent when the Board was properly and lawfully constituted.

She denied seeking the manipulation of the procurement system or that she sought to interfere with the Petitioner's employment using dubious means.

The 2nd Respondent's Case

The 2nd Respondent contended that the import of section 13 of the County Government's Act 2012 and Section 18 of the County Assembly Services Act is that a person serving in the position of the clerk to the county assembly must be competitively recruited and cannot assume office unless approved by the County Assembly.

The 2nd Respondent averred that Section 4 of the Transition to the Devolved Government Act 2012 (repealed) established the Transition Authority to advise on the effective and efficient rationalization and deployment of the human resource at both levels of government. As such, the secondments of interim officers from the national government to the county governments was to aid the transition process.

It was its position that the transition period was to run for 3 years from March 2013 to March 2016 after which those seconded had the option of reverting to their previous work stations or compete for the positions in the devolved units in accordance with the provisions of the County Governments Act 2012.

The 2nd Respondent contended that the Petitioner was never an employee of the Nairobi City County Assembly as he was never lawfully recruited or appointed by the Board, approved by the Assembly or take oath of office. It is contended that his secondment from the Parliamentary Service Commission (PSC) was on a temporary basis from 12th February 2013 until 31st December 2014. It was further contended that on 14th October 2014, the Petitioner was informed by the PSC that his secondment was coming to an end so he was required to resume his normal duties at the PSC before 1st January 2015. That if he wished to continue serving the County Assembly beyond his term, then his service with the PSC would be deemed as terminated.

It was averred that a resolution was passed in the meeting held on 10th June 2014, to confirm the Petitioner to the position of the clerk by dint of Section 13(1) of the County Governments Act, and a letter to that effect was issued to him. That since the letter confirming him did not comply with the procedure for appointment of Clerk, the Petitioner was a clerk through an illegal process.

The 2nd Respondent averred that the Petitioner misled the PSC to presume that he was still an employee of the PSC when he wrote to PSC requesting to have his secondment extended so that he could complete the process of recruiting a substantive clerk and oversee the smooth handing over of office on or before 30th June 2015. He was granted a 6 months' extension from 1st January 2015 to 30th June 2015. However, the then Speaker of the County Assembly wrote to the PSC seeking to extend the secondment for 3 years during which the Assembly would pay the Petitioner's salary and allowances.

Consequently, the Petitioner wrote to PSC requesting for a 3-year unpaid leave of absence and which was granted though on a non-renewable basis. He was expected to resume his parliamentary duties on 1st July 2018. He however resigned effective 1st August 2017, after a consent dated 21st July 2017 was recorded in **ELRC Cause No. 2108 of 2014**. The PSC never responded to the Petitioner's resignation letter until 8th September 2017 when parliament resumed its sessions. During this period, the Petitioner was drawing salaries from both PSC and the County Assembly.

It was the 2nd Respondent's position that the appointment was illegal on the face of it since at the time it was being entered into, the County Assembly was *sine die* hence could not consent to the order. Further, the Board lacked the quorum to pass any resolution during that period as its members who are members of the County Assembly were not in office.

The 2nd Respondent asserted that the Petitioner has not adduced evidence to show that he was lawfully appointed as the Clerk when he was never employed as such in the first place.

The Petition was disposed of by way of written submissions with only the Petitioner and the 1st Respondent filing theirs. There is no record of the 2nd Respondent's submissions in the Court file or the e-filing portal.

The Petitioner's Submissions

The Petitioner submits that he was duly appointed as the clerk of the Nairobi City County Assembly. It is submitted that the Petitioner was appointed by the Transitional Authority (now disbanded) as the first clerk of the assembly following secondment by the Parliamentary Service Commission and pursuant to Section 15(2) to the 6th Schedule to the Constitution and Section 138 of the County Governments Act

2012. The Petitioner further submitted that the 2nd Respondent resolved to confirm him as the clerk of the Assembly on 10th June 2014.

The Petitioner submits that the Respondents' contention surrounding the validity of his appointment as the clerk of the Assembly is misconceived. He elaborates this position as follows:

- a. Before his secondment to serve as the clerk of the assembly, he had been a public officer serving as a legal counsel in the Parliamentary Service Commission following an open and transparent process.
- b. The Respondents confirmed his employment as the clerk of the assembly vide the 2nd Respondent's resolution which was conveyed to him by the then Speaker.
- c. The Assembly approved the Petitioner's appointment as the clerk of the assembly through its conduct and accepted the services rendered by the Petitioner since 2013. As such, the doctrine of legitimate expectation precluded the Assembly from asserting that it never approved his appointment. The Petitioner noted that the Assembly had not made such an assertion in this Petition.

The Petitioner relies on the cases of **Silas Kipruto & Another v County Government of Baringo & Another [2014] eKLR** and **James Omariba Nyaoga v Speaker, Kisii County Assembly & 2 Others [2014] eKLR** whose findings are as outlined in the Petitioner's submissions, to fortify his above position.

The Petitioner contends that the provisions of Section 18 of the County Assemblies Service Act as relied upon by the Respondents cannot be successfully invoked to invalidate his appointment since the Act was not in force during his appointment and secondment to the Assembly. As such, its provisions cannot be applied retrospectively.

It is the Petitioner's submissions that the Respondents have orchestrated schemes to unlawfully remove him from office despite the existence of multiple court orders barring them from interfering with his employment. To support this position, the Petitioner posited that in **Anti-Corruption Court Criminal Case 36 of 2018**, the 1st Respondent confessed to attending a political meeting that hatched the scheme to interfere with his employment, lodging a false and malicious complaint against the Petitioner with the DCI and maliciously instigating his arrest and prosecution. The Petitioner also posited that the 1st Respondent blamed him for her impeachment and used the media to defame, intimidate and harass him.

The 1st Respondent's Submissions

The 1st Respondent argued her submissions according to the issues outlined therein. On the issue of whether the Petitioner was irregularly appointed as a clerk of the assembly, the 1st Respondent submits that subject to section 13 of the County Governments Act and section 18 of the County Assembly's Act the approval of the County Assembly was required before a clerk is appointed, which was not the case after the Petitioner's secondment.

The 1st Respondent further submits that any person serving in the capacity of a clerk must meet the tenets outlined in Article 10 of the Constitution to wit: good governance, integrity, accountability **and transparency**.

The 1st Respondent contends that though the Petitioner was a Clerk to the County Assembly, he still remained an employee of the Parliamentary Service Commission as he had sought extension of his secondment which elicited positive responses. As such, he was drawing salaries from the County Assembly and the Parliamentary Service Commission contrary to Section 26 of the Public Officers Ethics Act as revised in 2017.

The 1st Respondent submits that the Petitioner sought leave of absence from the Parliamentary Service Commission on 1st September 2015 but later resigned on 21st July 2017 by dint of the consent order of 21st July 2017 in **ELRC Cause No. 2108 of 2014** and at a time when the county assembly had been adjourned *sine die* on 29th June 2017, in preparation of the general elections and the 2nd Respondent was not in place.

The 1st Respondent contends that her actions were not driven by malice as she was discharging her mandate as the 2nd Respondent's chairperson pursuant to section 22 of the County Assembly Services Act which allows the Board to suspend or remove from office the clerk, for gross misconduct or violation of the Constitution. It is further submitted that the issue of the Petitioner's employment was tabled before the Assembly leading to the revocation of his engagement by the Assembly.

It is her position that the orders of 30th October 2019 did not bar the Respondents or the assembly from taking any disciplinary measures or conducting investigations in respect of the Petitioner. As a result, the members of the Assembly moved a motion of privilege, pursuant to standing Order 56(h) questioning the procedure of employment of the Clerk and why the name was never submitted for approval in accordance with section 13 of the County Governments Act and Section 18(2) of the County Assembly Services Act. The Petitioner's appointment was thus revoked on the ground that his continued holding of office was a violation of the Constitution.

The 1st Respondent submits that when a decision was made to form a Committee to investigate the Petitioner, he was issued with a notice vide the letter of 12th November 2019 inviting him to a hearing scheduled for 13th November which gave him leave to put in a response or appear in person. However, the Petitioner opted to run away thus relinquishing his right to be heard by the *Ad-hoc Committee* or appeal the

decision. As such, due procedure was followed in terminating the Petitioner's appointment. To fortify this position, she relied on the case of **BIFU v Barclays Bank of Kenya; Cause 1660 of 2013 (Unreported)**.

The 1st Respondent urged this Court to find that the facts in the present case and public interest militate against granting the prayers sought as was held in the case of **James Omariba Nyaoga & Another v Speaker of the County Assembly – Kisii County & 2 Others [2016] eKLR**.

Analysis and Determination

I have carefully considered the pleadings, the evidence adduced by

the parties together with their submissions and find that the issues for determination before this Court to be –

- a. Whether the Petition has met the threshold as set out in the case of **Anarita Karimi Njeru v Attorney Njeru [1979] KLR 154 [1976-80] 1 KLR 1272**.
- b. Whether the appointment of the Petitioner as the Clerk to the Nairobi City County Assembly was regular, procedural and lawful.
- c. Whether the Petitioner is the Clerk of the Nairobi City County Assembly.
- d. Whether the Petitioner has proved that the 1st Respondent violated his constitutional rights.
- e. Whether the Petitioner is entitled to the prayers sought.

The Petition

The 1st Respondent submitted that the petition has not set out the alleged infringement with a reasonable degree of precision hence has failed to meet the threshold set out in the cases of **Anarita Karimi Njeru v Attorney General [1979] KLR 154 [1976-80] 1 KLR 1272**. That for instance, the Petitioner alleged that he had been discriminated against but failed to particularize or adduce evidence to prove the same. The Court in **Anarita Karimi Njeru v Attorney General [Supra]** observed as follows –

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

What amounts to precision was expounded on by the Court in **Trusted Society of Human Rights Alliance v AG & 2 Others [2012] eKLR** whose decision on the issue of precision of constitutional petitions was upheld by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, observing as follows–

“46. We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

I find that the instant Petition meets the threshold outlined above. From the petition it is clear that the Petitioner is challenging the Respondents' actions which, in his view, threatened his employment and violated his constitutional rights.

The Petitioner has averred that the 1st Respondent hatched a scheme to have him suspended, his employment terminated or his removal from office by using her position as the speaker and the chairperson to the 2nd Respondent. He felt aggrieved by the 1st Respondent's alleged persistence in interfering with his employment. He viewed her actions as an infringement of his rights under the Constitution, the Employment Act, the County Governments Act and the County Assembly Services Act. He cannot thus be faulted for viewing the said actions as a violation of his rights. Whether the Petitioner has proved the alleged violations is an issue that this Court will determine in the later paragraphs of this judgment.

Though not systematic, there is no doubt in my mind as to the acts which the Petitioner finds vexatious and harmful to warrant an accusation of an infringement of his rights. I find that the petition herein has met the threshold set out in the case of **Anarita Karimi Njeru**. The Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [Supra]** held as follows–

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a

requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

Having determined this issue, I now proceed to the substantive issues arising from the petition.

Appointment of the Petitioner as the Clerk to the Nairobi City County Assembly

There have been conflicting accounts regarding the appointment of the Petitioner to the position of the Clerk to the Nairobi City County Assembly. The Petitioner asserts that his secondment by the PSC as the Clerk and his confirmation of 10th June 2014 as the Clerk validated his appointment. He further cites the Respondents' implied acceptance through their conduct as further proof that he was lawfully and regularly appointed to that position.

On the other hand, the Respondents assert that after the lapse of the Petitioner's secondment, he was un-procedurally and irregularly retained in that position. The details of the said irregularity have been outlined hereinabove.

Section 7(1) of the Transition to Devolved Government Act 2012 (Repealed) outlined the function of the Transition Authority as facilitating and coordinating the transition to the devolved system of government as provided under Section 15 of the Sixth Schedule to the Constitution. Section 15 provides as follows—

(1) Parliament shall, by legislation, make provision for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185.

(2) The legislation referred to in subsection (1) shall—

(a) provide for the way in which the national government shall—

(i) facilitate the devolution of power;

(ii) assist county governments in building their capacity to govern effectively and provide the services for which they are responsible; and

(iii) support county governments;

Sub-section (2) of section 7 of the Transition to Devolved Government Act (Repealed) elaborated the functions of the Authority to include *inter alia*—

(2) Despite the generality of subsection (1), the Authority shall—

(a) facilitate the analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments;

(b) determine the resource requirements for each of the functions;

(c) develop a framework for the comprehensive and effective transfer of functions as provided for under section 15 of the Sixth Schedule to the Constitution;

(d) co-ordinate with the relevant State organ or public entity in order to—

(i) facilitate the development of the budget for county governments during Phase One of the transition period;

(ii) establish the status of ongoing reform processes, development programmes and projects and make recommendations on the management, reallocation or transfer to either level of government during the transition period; and

(iii) ensure the successful transition to the devolved system of government;

The above provisions resulted in the Petitioner's secondment to the County Assembly vide the letter of 25th February 2013 (Ref No. TA/HRM/6) from the Transition Authority to the Petitioner, annexed to the Replying Affidavit of Maurice Gari at pages 24 and 25. The letter clearly indicated that the appointment would be on a temporary basis and that he would continue to draw his salary and allowances from the PSC. This position was echoed in the letter of 29th April 2013 Ref No. 99003885/40 from the Clerk of the National Assembly to the

Petitioner annexed to the Replying Affidavit of Maurice Gari at page 26.

The Petitioner served the Nairobi City County Assembly as its interim clerk. Vide the letter dated 14th October 2014 Ref No. 99003885/56 from the Clerk of the Senate and the Secretary to the PSC, the Petitioner was informed that he was to report to his normal duties before 1st January 2015 upon the expiry of his secondment, failure to which his employment shall be deemed as terminated on 31st December 2014.

The Nairobi City County Assembly Board resolved to confirm the Petitioner to the position of clerk in its meeting held on 10th June 2014. This was communicated to the Petitioner that very day. The Petitioner wrote to the PSC vide the letter of 11th December 2014 seeking to have his secondment extended until 30th June 2015 so that he could assist in the recruitment of a substantive clerk and report back to normal duties on 1st July 2015. The letter did not communicate the details of the meeting held on 10th June 2014 or the fact that the Petitioner had been confirmed to the position of Clerk. The letter only made reference to the then Speaker's letter of 25th March 2015 that requested the PSC to allow him to serve the Assembly during the period of transition. The minutes of the meeting of 10th June 2014 partly read as follows—

“MINUTES OF THE MEETING OF NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD (CASB) HELD ON 10TH JUNE 2014 IN THE OFFICE OF THE SPEAKER AT 11.00 A.M.

Members present:

- 1. Hon. Alex Ole Magelo – Speaker of County Assembly – Chairman.*
- 2. Hon. Elias O. Okumu – Leader of Majority – Vice Chairman.*
- 3. Hon. Abdi Hassan – Leader of Minority – Member.*
- 4. Mr. Jacob Ngwele – Interim Clerk of the County Assembly – Secretary.*

MIN: 176/6/2014 STAFF MATTERS

(ii) APPOINTMENT OF MR JACOB NGWELE AS CLERK OF THE NAIROBI CITY COUNTY ASSEMBLY

The Chairman tabled before members petitions to the CASB received from Hon. Diana Kapeen and Hon. Wilson Ocholla on filling in of the positions of Clerk and Deputy Clerk with substantive office Holders.

The Chairman noted that the interim clerk, Mr. Jacob Ngwele was seconded to the Assembly in March 2013 by the Transitional Authority. It was also noted that since his posting, the Interim Clerk has performed his duties efficiently and effectively and has produced tangible results in facilitating the Assembly to fulfil its constitutional mandate. Mr. Ngwele has enjoyed a reasonable working relationship with MCA's and the Board.

The Chairman further noted that the Transitional Authority in a letter ref: TA/8/48 (19) dated 20th January, 2014 and addressed to all Governors, Chairpersons of County Public Service Boards and County Assembly Service Boards gave detailed advice on retention or release of all interim Officers posted to the Counties.

Members deliberated having considered the provisions of Section 13(1) and (2) of the County Governments Act, together with Mr. Ngwele's qualifications and professional experience gained from Parliament, the Board resolved that Mr. Jacob Ngwele be appointed and confirmed as the Clerk to the Nairobi Assembly with immediate effect. The resolution was proposed by the leader of Minority and seconded by the leader of Majority party.

Resolution: *The Board unanimously resolved to confirm the Interim Clerk to the Position of Clerk of Nairobi City County Assembly and that a letter of confirmation be issued.*

Apart from being the secretary in that meeting, the Petitioner's role in that day's debate and decision is not known as it was not recorded.

The Petitioner submitted that since his position as the Clerk was confirmed on 10th June 2014, then he was lawfully appointed as such. However, he was still on secondment at the time. The case of **Mary Nyangasi Ratemo & 9 Others v Kenya Police Staff Sacco Limited & Another [2013] eKLR** discussed secondment as follows—

“In situations where an employee has been transferred, the original employer who transfers the employee is, in law, no longer regarded as his employer. Instead the company which, the employee has been transferred to it is now regarded as his employer. The opposite is however, the case where an employee has been seconded. In such a situation, the company which secondes the employee remains the employer at all material times and not the company to which the employee is seconded... The ordinary meaning of secondment as a temporary transfer is on the face of it the connotation that the employee is subject to recall by his employer. So he is not a permanent employee of the other... Therefore, so long as the contract is not terminated a new contract is not made, and the employee continues to be in the employment of the original employer.”

In view of this decision, the Petitioner's confirmation was invalid because at the time of the confirmation, his employment with the PSC was still in force. Further, section 26 of the Leadership and Integrity Act bars a state officer who is serving on a full-time basis from participating

in any other gainful employment. The Court in **Nicholas Rono v County Secretary County Government of Bomet & 3 others [2020] eKLR** reiterated this position and observed as follows–

“To allow the 4th respondent to hold both offices was unconstitutional and went contrary to section 26 and 13 of the Leadership and Integrity Act which required the 4th respondent not to hold any other office for gainful employment while in the full time service of the Municipal and Bomet County Government.

To hold dual offices with the 1st and 2nd respondents without disclosure to the 2nd respondent was contrary to section 22 of the Public Officer Ethics Act. It has been conceded by the 2nd respondent that on 11th October, 2018 following misrepresentation and concealment of information they appointed the 4th respondent as member of the Bomet County Assembly Service Board vide Gazette Notice No.10671.”

The Petitioner’s omission in disclosing his confirmation to the PSC is questionable and implies that the same was deliberate as he intended to benefit from the salaries and allowances paid by PSC by dint of Section 73 of the County Governments Act 2012. In PSC’s letter dated 14th October 2014, the Petitioner was informed that his employment would be deemed terminated if he failed to report back for normal duties with the PSC before 1st January 2015. This non-disclosure also breached the provisions of Section 13 of the Leadership and Integrity Act. Section 73 provides as follows–

(1) The national government shall put in place measures to protect its public officers on secondment to the counties from loss or disadvantage with respect to pension benefits, gratuity or other terminal benefits.

(2) Unless there is an agreement to the contrary, it shall be the responsibility of the national government to pay the salaries, remuneration, allowances and other benefits due to the staff seconded to a county government during the transition period.

(3) If for any reason it is not necessary for an officer on secondment to remain seconded and the secondment period has not lapsed, the officer shall be entitled to revert back to the public office held before secondment. [Emphasis Added]

The regularity and legality of the Petitioner’s confirmation has also been questioned by the Respondents. Section 13(1) and (2) of the County Governments Act provides as follows –

(1) There shall be a clerk of the county assembly, appointed by the county assembly service board with the approval of the county assembly.

(2) A person shall not be qualified for appointment as a clerk of the county assembly unless such person—

i. is a citizen of Kenya;

ii. holds a degree from a university recognised in Kenya or its equivalent;

iii. has had at least five years relevant professional experience;

iv. meets the requirements of leadership and integrity set out in Chapter Six of the Constitution. [Emphasis Added]

From the above provision, it is apparent that a clerk was to be appointed by the County Assembly Service Board with the approval of the County Assembly. Section 2 of the Act defines appointment to include an acting appointment, re-appointment, promotion and re-designation. Confirmation is not included in the definition of appointment neither does the Act define the term. Thus a confirmation is not an appointment. One can only be confirmed to a position after an initial appointment. The Petitioner was never appointed as required by Section 13(1). Moreover, Section 13(1) not only requires the appointment of the County Assembly Service Board, but also the approval of the County Assembly. The Petitioner did not produce the Hansard of any proceedings before the County Assembly or adduce any other evidence to prove that his confirmation of 10th June 2014 was approved by the County Assembly as required by Section 13(1).

Further to the foregoing, for a person to be qualified for appointment as a Clerk of the County Assembly under Section 13(2)(iv) they must meet the requirements of leadership and integrity as set out in Chapter Six of the Constitution. Article 73(2) of the Constitution provides as follows –

The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by —

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.

[Emphasis Added]

The Petitioner did not adduce any evidence to controvert the Respondents' evidence and demonstrate that his appointment if at all, had been as a result of a competitive recruitment by the County Assembly Service Board or that a process had been undertaken to confirm that he had met the threshold set out in Section 13(2)(iv) and Article 73(2) of the Constitution and was therefore qualified for **the appointment.**

Finally, a consent judgment was entered in **Nairobi ELRC 2108 of 2014; Jacob Ngwele Muvengei v Speaker Nairobi City Assembly & 2 Others** whose terms were as follows—

IT IS HEREBY ORDERED BY CONSENT

1. That by the Consent of all parties, the Claimant JACOB NGWELE MUVENGEI is hereby declared to have been duly appointed as the Clerk of the NAIROBI CITY COUNTY ASSEMBLY under section 13 of the County Government Act.

2. That this suit is hereby marked as settled with no order as to costs.

The Respondents challenged the validity of this consent arguing that at the time it was signed, the County Assembly had been *sine die* hence could not have consented to the consent judgment. Further, the Board lacked the quorum to pass any resolution during that period. The Petitioner did not adduce any evidence to explain how the Assembly and the 2nd Respondent had consented to the consent judgment yet the County Assembly had been prorogued *sine die* due to the impending elections at the time. The 2nd Respondent was also not properly constituted because the nomination of the Board members under Section 12(3)(c) depended **on the outcome of the elections.**

In view of the foregoing, I find that the Petitioner was irregularly and unlawfully confirmed as the Clerk of the Nairobi City County Assembly having not first been appointed to the position in the manner provided by law. Further, the consent judgment relied upon by the Petitioner to legitimise his appointment as the Clerk, was illegally and irregularly executed as the County Assembly was *sine die* and the Board improperly constituted at the time the same was recorded, and was therefore unavailable to give instructions for the consent. I believe that had this information been available to the court it would have not adopted the consent in the ELRC Cause No. 2108 of 2014.

A consent judgement literally and simply put, means that disputing parties in a proper disposing mind agree to solve a matter in a particular manner. The parties must have the authority and capacity to enter into a consent judgement. Where the authority and capacity of any party in a consent judgment is questioned to the satisfaction of the court, the only fate that lies for such a consent judgment is that it is void *ab initio*. As such, there is no doubt in my mind that the consent judgement proffered by the Petitioner does not meet the threshold under the law for it to be enforceable. Courts cannot give effect to an illegal agreement even if it is presented in the form of a consent judgement. **Holman v Johnson (1775) 1 Cowp 341** where Lord Mansfield CJ held that:-

“... No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa [“from an immoral cause”], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff...”

The provisions of the County Assemblies Act 2017 are not applicable to the consent as its date of commencement was 27th July 2017, 6 days after the consent order had been recorded by the Court. The law does not apply retrospectively.

Whether the Petitioner is the Clerk of the Nairobi City County Assembly

Section 12 (5) of the County Governments Act provides as follows—

A member of the county assembly service board shall vacate office—

(a) if the person is a member of the county assembly—

(i) at the end of the term of the county assembly; or

(ii) if the person ceases to be a member of the county assembly; or

(b) if the person is an appointed member, on revocation of the person's appointment by the county assembly; or

(c) if the person is the Speaker, when the person ceases to be such Speaker.

There had been no such motion prior to the issuance of the orders of 30th October 2019 which reinstated the Petitioner as the Clerk, Nairobi

City County assembly pending the hearing and determination of the Petition herein.

However, the 2nd Respondent averred that a motion of privilege was moved by Hon. Maurice Gari on 5th November 2019 questioning the procedure that was followed to employ the Petitioner and why his name was never submitted to the Assembly for approval. The Assembly unanimously decided to revoke the Petitioner's appointment because it was in gross violation of section 18(1) and (2) of the County Assembly's Act 2017. Further, another motion of privilege was moved by Hon. Peter Anyule Imwatok and it was resolved that the 2nd Respondent would table its reports between the years 2013 and 2017 including the period when the Assembly had adjourned *sine die*.

Similarly, another motion was moved by Hon. Kabiro Mbugua seeking to establish an *Ad-hoc* Committee to investigate the circumstances surrounding the Petitioner's employment. The Committee was formed and directed to steer clear of any matters before this Court. It is the 2nd Respondent's position that the issues before the Committee did not relate to those before this Court.

The Committee invited the Petitioner to appear before it but he refused. From the investigations of the Committee it was established that the Board that existed during the first county assembly erred in law by failing to competitively recruit a clerk of the County Assembly of Nairobi City at the end of the transition period and submit the name to the Assembly for approval. It was further established by the Committee that the Petitioner misled the PSC by seeking secondment through misrepresenting itself as its employee. As such, the Committee upheld the earlier decision of the Assembly to nullify the appointment of the Petitioner.

Having found that the Petitioner's appointment was shrouded by irregularities hence unlawful, it follows that he is not the Clerk to the Nairobi City County Assembly and never was, after his initial secondment by the Transition Authority which lapsed on 31st December 2014. The purported confirmation of the Petitioner as Clerk on 10th June 2014 was invalid as he had previously never been appointed to the position, but more fundamentally, because he was not eligible for such confirmation as he was at that time a full time employee of PSC. He resigned from the PSC on 1st August 2017.

Whether the Petitioner has proved that the 1st Respondent violated his constitutional rights

The Petitioner alleged constitutional infringements and human rights violations by the 1st Respondent but did not seek any reliefs regarding the same as anticipated by Article 23(3) of the Constitution. In any event, I will address the issue of whether the Petitioner proved that the 1st Respondent had violated his rights before delving into whether he is entitled to the reliefs sought, since he submitted on the same thereby making it an issue for determination before this Court.

No evidence was adduced to substantiate the alleged constitutional infringements and human rights violations under article 27, 28, 29, 41, 47 and 236 of the Constitution and the provisions of section 5 and 45 of the Employment Act, section 12 (5) of the County Governments Act and Sections 5, 10, 11, 17, 19, 22 and 23 of the County Assemblies Services Act.

Further, the Petitioner failed to demonstrate how the 1st Respondent's actions caused him irreparable and immeasurable loss and harm. The evidence adduced only went as far as to demonstrate that some of the 1st Respondent's actions might have been ill intended. However, as ill intended as they might have been, they did not amount to constitutional violations in light of the fact that the circumstances surrounding the Petitioner's appointment as the Clerk were indeed questionable, as has been stated herein above.

I note that in his submissions the Petitioner submitted on alleged violations of his rights by the 2nd Respondent. These were never pleaded in the Petition which only focused on the 1st Respondent's supposed violations. The Petitioner never amended his Petition despite being called upon to do so. It is trite law that parties are bound by their pleadings and cannot introduce new facts at the submissions stage. As such, this Court will not take into consideration the averments made in the submissions as regards the 2nd Respondent's actions and declines to make a determination on the same.

Whether the Petitioner is entitled to the reliefs sought

I have carefully examined the prayers sought by the Petitioner and I take cognizance of the fact that some of those prayers have been overtaken by events save for prayers (a), (b), (i), (e), (f), (g). In particular, the 1st Respondent resigned from being a Speaker which meant that she was no longer a member of the 2nd Respondent as anticipated in Section 12(5)(c) of the County Governments Act.

Further, the prayers regarding the parties whose interests were represented by the Petitioner in his petition have already been settled. As such, this Court will only make a finding on the following prayers –

The Petitioner sought a finding that the 1st Respondent had engaged in a malicious scheme of orchestrating the unlawful interference of his employment. However, he failed to prove this fact. As already stated above, the circumstances surrounding his appointment were questionable hence the 1st Respondent cannot be faulted for wanting to unearth those circumstances. The 1st Respondent was only doing what every Kenyan is called upon to do by the Constitution, to respect, uphold and defend the Constitution. Lastly, the Petitioner resigned from her position hence issuing this order would be of no legal consequence.

The Petitioner sought an injunction against the Respondents from illegally or unfairly interfering with the Petitioner's employment by way of suspension, termination or removal whether acting directly or through third parties, agents or proxies. Having found that the Petitioner's appointment was shrouded by irregularities hence illegal, this Court declines to grant the said orders.

In the end, I find that the petition is without merit and dismiss the same. In view of the dismissal of the petition, all the interim orders made

during the subsistence of this petition in order to preserve the subject matter of the petition, including the stay of **Petition No. 71 of 2020** and the order suspending Gazette Notice No. 5072 of 24th July 2020 are hereby discharged.

Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE