



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

COLLINS ODHIAMBO AGUTU

TOBIAS ODUNDO (members of the

HOMABAY COUNTY PUBLIC SERVICE BOARD)PETITIONER

VERSUS

COUNTY ASSEMBLY OF HOMABAY.....1ST RESPONDENT

COUNTY GOVERNMENT OF HOMABAY.....2ND RESPONDENT

THE GOVERNOR OF HOMABAY COUNTY.....3RD RESPONDENT

JUDGMENT

1. The parties herein have filed submissions in respect of the petition. The court in the circumstances regard the submissions in respect of the interlocutory applications to have been overtaken by events and the court will proceed to determine the petition on the merits. The petitioners are enjoying interim orders granted by the court on 2nd December 2020 and on 28th April 2020 in respect of two applications hitherto filed by the petitioners.

Facts of the petition.

2. The petitioners pray for orders (a) to (l) set out in the petition as follows:

(a) A declaration that the authority of the 1st Respondent to commence the action of removal of the petitioners as members of the Homabay County Public Service Board under Article 251 only comes into operation upon a person presenting a petition in accordance with the provisions of *Article 251(1) and (2)*;

(b) A declaration that the unilateral decision by the 1st respondent to proceed to prepare a report on the removal of the petitioners in the absence of a formal petition as envisaged by *Article 251(2) of the Constitution of Kenya* amounts to a violation of the petitioners right to a fair administration of justice and fair trial as envisaged under *Article 47 and 50 of the Constitution*;

(c) A declaration that the 2nd and 3rd respondents have no authority both under the constitution and the law to discipline or remove the petitioners from office;

(d) A declaration that the action of the 2nd and 3rd respondents by themselves or their employees or officers of withholding, deducting or continuing to deduct or to withhold any of the petitioners' salaries and/or allowances due, earned or which ought to have been earned or any portion of the approved budget is illegal.

(e) A declaration that any action by the 2nd and 3rd respondents in advertising, shortlisting, selecting, appointing or in any way purporting to replace the petitioners as members of the Homabay County Public Service Board is illegal.

(f) An order of judicial review in the nature of a certiorari to remove into the Employment and Labour Relations Court for purposes of being quashed the 1st respondents report by the Administration and Security Committee dated 24th November, 2019 looking into the conduct of the Chairperson, Secretary and Member of Homabay County Public Service Board;

(g) An order of judicial review in the nature of a certiorari to remove into the Employment and Labour Relations Court for purposes of being quashed the 3rd respondents letter dated 26th November, 2019 relieving the petitioners of their duties as the Chairperson, Secretary and Member respectively of Homabay County Public Service Board;

(h) A prohibitory order do issue restraining the respondents, their agents, servants and whomsoever from commencing any disciplinary hearing against the petitioners and/or removing them from office unless as per law established;

(i) An order of permanent injunction restraining the respondents, their agents, servants and or whomsoever from commencing any disciplinary hearing against the petitioners in the absence of a formal complainant as envisaged under Article 251(1) and (2) of the Constitution of Kenya;

(j) An order of permanent injunction restraining the respondents, their agents, servants and or whomsoever from blocking the petitioners from accessing their officers taking away their vehicles, tools of trade, staff or in any way interfering with the petitioners from exercising their duties and mandates as members of the Homabay county Public Service Board.

(k) Costs of the petition; and

(l) Any other orders that the Honourable Court may deem just and fit to grant.

3. The petition is premised on facts that may be summarized as follows:

4. The petitioners are members of the Homabay County Public Service Board.

5. The petitioners allege that the respondents have moved to unlawfully remove them from office before expiry of their term. That the attempted removal is in violation of the provisions of the constitution set out in the petition including *Article 28, 41(1) and (2); 43, 47, 48, 50, 185, 236 and 251*.

6. That the action by the respondents also violates *Section 58(5) of the County Government Act and section 45 of the Employment Act*.

7. The respondents admit that they have intention to remove the petitioners from the board but argue that the intended removal is procedural and lawful.

8. The issues for determination by the court are:

(i) Whether the mechanism adopted by the respondents to remove the petitioners as members of the Homabay County Public Service Board is lawful.

(ii) If the above is in the negative, whether the petitioners are entitled to the reliefs sought.

9. In *Kisumu ELRC petition no. 38 of 2017, Nashon Oguya and others vs County Assembly of Kisumu and others (2018) eKLR*, and in *Mundia Njeru Gateria vs Embu County Government*, courts have held that the only way members of County Public Service Board may be removed from office is on the grounds set out for removal of constitutional and independent office holders under *Article 251(1) of the constitution* and by a vote of not less than 75% of all members of the County Assembly under *Section 58(5) (b) of the County Governments Act*.

10. Further in *Hussein Roba Boru vs County Government of Isiolo and 2 others (2015) eKLR*, Ongaya J. stated:

“The person desirous that the Chairperson 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....”

11. In the present case there was no petition presented to the Assembly setting out the alleged facts constituting the grounds for removal by an independent person outside the County Assembly. Instead there was a motion moved by a member of the Assembly for removal of the petitioners from office.

12. Secondly, under Article 236 of the constitution a public officer shall not be:

(a) Victimized or discriminated against for having performed the functions of office in accordance with the constitution or any other law or

(b) Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.

13. The Court of Appeal in the case of **County Assembly Service Board of Kisumu vs County Assembly of Kisumu and others**

emphasized the need to adhere to the rules of natural justice in dealing with matters that may have punitive consequences against a person. This aspect was also emphasized by Ongaya J. in Hussein Boru case (supra)

14. The respondents state in their written submissions that the 1st respondent received petitions from members of the public which was presented before the 1st respondent by Hon. Nicholas Owaka for debate on 17th September 2019.

15. The respondent did not provide the Hansard proceedings and/or copies of the alleged petitions presented to the Assembly by members of the public.

16. The response to the petitioners' statement of fact in support of the petition is at best hollow and devoid of any substantive support to be believable.

17. The court finds therefore that no petition was presented to the Assembly containing grounds of removal of the petitioners by a known member of the public in terms of *Article 251(1) and (2) of the constitution as read with Section 58(5) (b) of the County Government's Act, 2012*.

18. Accordingly, the mechanism employed by the respondents in removing the petitioners from the offices of member of County Public Service Board was faulty, unlawful and in violation of *Articles 251(1) and (2) read with section 58(5) (b) of the Constitution*.

19. The respondents therefore violated the rights of the petitioners protected under *Articles 41(1), 47, 48, 50 and 236 of the constitution of Kenya 2010*.

20. Accordingly, the court finds that the petition has merit and makes an order in the following terms in favour of the petitioners against the respondents:

(a) The authority of the 1st respondent to commence the action of removal of the petitioners as members of the Homabay County Public Service Board under Article 251 only comes into operation upon a person presenting a petition in accordance with the provisions of *Article 251 (1) and (2) of the Constitution as read with section 58(5) (b) of the County Government Act, 2012*.

(b) The 2nd and 3rd respondents have no authority both under the constitution and the law to discipline or remove the petitioners from office.

(c) The action by the 2nd and 3rd respondents in advertising, shortlisting, selecting, appointing or in any way purporting to replace the petitioners as members of the Homabay County Public Service Board is illegal.

(d) An order of judicial review in the nature of a certiorari to remove into the Employment and Labour Relations Court is issued for purposes of being quashed the 1st respondent's report by the Administration and security Committee dated 24th November 2019 looking into the conduct of the Chairperson, Secretary and Members of Homabay County Public Service Board.

(e) A further order of judicial review in the nature of a certiorari to remove into the Employment and Labour Relations Court is issued for purposes of being quashed the 3rd respondent's letter dated 26th November 2019 relieving the petitioners of their duties as the Chairperson, Secretary and member respectively of Homabay County Public Service Board.

(f) The respondents are directed to pay all arrear and future remuneration due to the Petitioners

(g) Costs of the petition to follow the event.

Judgment Dated, Signed and delivered at Kisumu this 15th day of October, 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

Bruce Odeny for the petitioners

Otieno Yogo for the respondents

Chrispo – Court Clerk