



**REPUBLIC OF KENYA**

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

**PETITION NO. 46 OF 2018**

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

**DANIEL OMONDI OGADA**

**DAMARIS ATIENO AMOLLO**

**COLLINS ODHIAMBO AGUTU**

**FLORENCE OUMA**

**CHRISTOPHER ODERRO LESSO**

**STEVE BIKO ODIDI**

**TOBIAS ODUNDO (MEMBER OF THE HOMA-BAY COUNTY**

**PUBLIC SERVICE BOARD).....PETITIONERS**

**VERSUS**

**COUNTY ASSEMBLY OF HOMA-BAY.....1<sup>ST</sup> RESPONDENT**

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

**THE GOVERNOR OF HOMA-BAY COUNTY.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petition was filed on 2<sup>nd</sup> July 2018 by the 7 members of the County Public Service Board seeking an order in the following terms:

(a) A declaration that the authority of the 1<sup>st</sup> Respondent to commence the action of removal of the Petitioners as members of the Homa-bay 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 1<sup>st</sup> 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 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have no authority both under the constitution and the law to discipline or remove the petitioners from office;

(d) 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 1<sup>st</sup> Respondent's report by the Administration and Security Committee dated 25<sup>th</sup> June, 2018 looking into the conduct of the Chairperson, Secretary and Members of Homa-Bay County Public Service Board;

(e) A prohibitory order do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and whomsoever from commencing

any disciplinary hearing against the Petitioners and/or removing them from office;

(f) 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 complaint as envisaged under *Article 251(1) and (2) of the Constitution of Kenya*;

(g) Costs of the Petition.

2. The petition is supported by facts set out in paragraphs 5 to 13 of the petition that may be summarized as follows:
3. The petitioners were appointed to serve Homa-Bay County Public Service Board on diverse dates for a period of six years. The six year contract of each of the petitioners is yet to expire.
4. The petitioners may only be removed from office in terms of *Section 58(5) of the County Governments Act*:
  - (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 all the members of the County Assembly.
5. The petition was filed following a resolution of the 1<sup>st</sup> respondent, the County Assembly of Homa-Bay, to remove the petitioners from office at its sitting held on 27<sup>th</sup> June 2018.
6. The motion to remove the members was originated by a member of the County Assembly pursuant to the provisions of *Article 185(3) of the Constitution of Kenya* dated 21<sup>st</sup> March 2018 in which he outlined various breaches by the petitioners on specific failures to comply with the requirements of *sections 59(1) (f) and 59(5) of the County Governments Act, 2012*.
7. The motion dated 21<sup>st</sup> March 2018 was debated by the Assembly and it resolved that its committee on Security and Administration do carry out investigations as to the compliance by the Board with the cited provisions.
8. The committee duly constituted undertook investigations as directed by the Assembly and presented a report dated 16<sup>th</sup> April 2018 which was deliberated upon by the Assembly at its sitting on 2<sup>nd</sup> May 2018. The report was adopted by the Assembly and resolution thereof communicated to the petitioners by a letter dated 4<sup>th</sup> May 2018.
9. The petitioners were then informed of the complaints against them in the said letter dated 4<sup>th</sup> May 2018 and were summoned to appear before the committee individually by notices dated 28<sup>th</sup> May 2018 to show cause why they should not be subjected to the provisions of *Article 251(1) of the Constitution and Section 58(5) of the County Government's Act, 2012* and be removed from office.
10. In the summons dated 28<sup>th</sup> May 2018, the petitioners were informed of the charges against them being, violation of *sections 59(1), 59(5) and 74 of the County Governments Act*.
11. The petitioners denied the allegations stating that they performed their work diligently and executed their functions in accordance with the constitution and the law without fear or favour.
12. The petitioners stated that there was no petition submitted to the County Assembly by an independent member of the public complaining against the petitioners. That the County Assembly acted out of their own volition without being moved as it were. That the process that the 1<sup>st</sup> respondent adopted is in contravention of *section 58(5) of the County government Act, and Article 251(1) and (2) of the Constitution*.
13. That the 1<sup>st</sup> respondent violated the constitutional rights of the petitioners under *Article 50 and 47 of the Constitution* and the rules of natural justice that dictates:
  - (a) That one cannot be condemned unheard;
  - (b) One cannot be both a complainant and a judge in one's cause
14. That the 1<sup>st</sup> respondent communicated its report dated 25<sup>th</sup> June, 2018 to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents being the County Government of Homa-Bay and the Governor of Homa-Bay County to remove the petitioners from office despite that the members of the County Public Service Board are independent and cannot be supervised or removed by the Executive Arm of the County Government.
15. The report purports to remove all members of the Homa-bay County Public Service Board and not a single member, effectively dissolving the County Public Service Board in its entirety.
16. That the consequences of such unlawful action are dire as it undermines the independence of County Government Institutions and subjects the employment, promotion and supervision of staff to the whims of the County Executive without checks and balance.
17. The court granted conservatory orders stopping the removal of the members of the County Public Service Board in its ruling delivered on

24<sup>th</sup> January 2019. The court ruled that:

*“The Public Service Board, Homa-Bay County as presently constituted remains in office until the petition is disposed of and/or the members contract of service come to an end”.*

### **Response**

18. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent's responded to the petition and averred that the petitioners collectively and as a statutory body had, since inception of the office, failed to submit to the County Assembly reports contrary to *Section 59(10) (f) and section 59(5) of the County Governments Act*.

19. That a member of the County Assembly Hon. Walter Muok, MCA, moved a motion at the assembly seeking that the Assembly do commit to the Assembly's committee on Administration and Security to investigate the Homa-Bay County Public Service Boards compliance with the requirements of *Section 59(1) (f) and Section 59(5) of the County Governments Act*.

20. That the 1<sup>st</sup> respondent resolved to commit the issue to the said committee for investigations. That the committee conducted investigations between 22<sup>nd</sup> March 2018 and 17<sup>th</sup> April 2018. That the Petitioners appeared before the committee of the 1<sup>st</sup> respondent on 11<sup>th</sup> April 2018.

21. Upon conclusion of investigations, the committee prepared a report dated 17<sup>th</sup> April 2018 which was tabled in the Assembly on 2<sup>nd</sup> May 2018 and the report was adopted unanimously as a report of the Assembly on 3<sup>rd</sup> May 2019.

22. The Assembly found the Board guilty of failing to comply with the provisions of *Sections 59(1) (f) and 59(5) of the County Governments Act* in failing to submit statutory reports to the County Assembly within the required time frame.

23. That indeed the Board had since its inception in the year 2013 not submitted any of the annual reports to the County Assembly. That the petitioners only availed copies of the statutory reports to the committee when they were summoned to appear before the committee.

24. The County Assembly then recommended to the County Government of Homa-Bay and the Governor to remove the petitioners from office. The respondents submit that the steps taken against the petitioners by the 1<sup>st</sup> respondent were lawful and procedural and the petition before court lack merit and it be dismissed with costs.

### **Determination**

25. The issues for determination are:

(a) Whether the 1<sup>st</sup> respondent acted within the law in recommending the removal of the petitioners to the Executive of the County Government of Homa-Bay.

(b) Whether the constitutional rights of the petitioners under Article 47 and 50 were violated by the 1<sup>st</sup> respondent.

(c) Whether the petitioners are entitled to the reliefs sought.

26. Article 251(1) of the Constitution of Kenya 2010 provides:

*“(1) A member of a commission (other than an ex-officio member), or the holder of an independent office may be removed from office only for:*

*(a) Serious violation of this constitution or any other law, including a contravention of chapter six.*

*(b) Gross misconduct, whether in the performance of the members or office holders functions or otherwise;*

*(c) Physical or mental incapacity to perform the functions of office;*

*(d) Incompetence; or*

*(e) Bankruptcy.*

*(2) A person desiring the removal of a member of a commission or a holder of an independent office on any ground specified in clause(1) may present a petition to the National Assembly setting out the alleged facts constituting that ground”.*

27. The 1<sup>st</sup> respondent purported to act in terms of *Articles 251(1) of the Constitution and section 58(5) of the County Government's Act 2012* in recommending the removal of the Homa-Bay County Public Service board to the Executive.

28. Section 58(5) of the County Governments Act 2012 reads:

*“The members 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 all the members of the County Assembly”.*

29. The reasons and procedure for removal of members of the County Public Service Board was discussed and restated in the case of **Mundia Njeru Gateria vs Embu, County Government** in which the court held that the only way the members of the County Public Service Board may be removed from office is on the grounds set out under *Article 251(1) of the Constitution* and by a vote of not less than 75% of all members of the County Assembly under sections 58(5) (b) of the County Government’s Act, 2012.

30. In **Hussein Roba Boru vs County Government of Isiolo and 2 others (2015) eKLR**, the matter was further elaborated as follows by Byram Ongaya – J.

*“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”.*

31. It is manifestly clear from the foregoing rendition whilst having a purposive construction of *Article 251(2) of the Constitution* that removal of a member of a County Public Service Board may only be commenced by presentation of a PETITION to the County Assembly. The intended petition under *Article 251(2) of the Constitution* cannot be substituted by a notice of motion brought internally by a member of the County Assembly alleging grounds upon which members of the board may be removed.

32. The clear intention of the framers of the constitution is that such a complaint against members of a County Public Service Board be originated from outside the Assembly since there is no provision for presenting a petition internally according to the standing orders of the house.

33. The 1<sup>st</sup> respondent failed this first constitutional hurdle in commencing the process of removing the petitioners from office hence the process was unconstitutional, unlawful *abinitio*.

34. That an independent person is required by the constitution to originate the process is not an empty requirement. It is in keeping with the rules of natural justice that no man shall be a judge in his own court. The 1<sup>st</sup> respondent therefore failed the test against innate bias in the manner the process was commenced.

35. In the **County Assembly of Kisumu and 2 others vs Kisumu County Assembly Service Board and 6 others (2015) eKLR**, the Court of Appeal per Musinga, Murgor and Maraga JJS stated:

*“It follows that in impeachment proceedings, the due process must be followed to the letter and the impeachment procedural provision set out in any statute. In this case the County Government Act, must be strictly complied with.*

*We are alarmed by the rampant action of some leaders in this County in blatant disregard of the rule of law. The impression we get in this case is that the Kisumu County Assembly thinks it can do anything under the sun as long as it passes a resolution to do it whether or not such an act is constitutional. That happens only in dictatorships”*

36. These words of wisdom from the appellate court ring true regarding the Homa-Bay County Assembly. The Assembly is subject to the supreme law of the land and all governing statutes and must learn to operate only within the confines of the law.

37. The Court of Appeal further observed:

*“In discharge of those mandates we stated, the National and County Assembly must act in accordance with the constitution.....we agree with counsel for the Respondent that contrary to Articles 47, 50(1) and 236(b) of the constitution, the rule of natural justice and this court’s decision in County Government of Nyeri and another vs Cecilia Wangechi Ndungu, she was denied an opportunity to defend herself”.*

38. In the present case the petitioner’s rights under Article 47, 50(1) and 236(3) were also violated by the 1<sup>st</sup> respondent in subjecting them to un-procedural and unlawful process unknown to the constitution.

39. Furthermore, there is considerable doubt upon strict interpretation of *Article 251(2) of the Constitution* that the constitution intended to delegate the role of the National Assembly in removing a member of a commission or a holder of an independent office on any ground specified in clause (1) to the County Assemblies.

40. It is the considered opinion and finding of this court that a member of a commission or holder of an independent office may only be removed from office under *Article 251(2)* by the National Assembly and not by any County Assembly.

41. Accordingly, a County Assembly cannot purport to dissolve or disband a duly constituted County Public Service Board under any circumstances. The Board is a body corporate with perpetual succession and may only be disbanded on lawful grounds by the National Assembly. The term of the members of six years is protected by law, they being holders of independent office and the County Assembly lacks authority to terminate their tenure of office until expiry of their six year term.

42. Accordingly, the court finds that the petition has merit and makes the following final orders:

- (a) The action by the 1<sup>st</sup> respondent in initiating the process of removal of the petitioners as members of the Homa-Bay County Public Service Board is unconstitutional, unlawful, null and void.
- (b) The 1<sup>st</sup> respondent violated the constitutional rights of the petitioners under *Articles 47, 50(1) and 236(b) of the Constitution of Kenya 2010*.
- (c) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have no authority under the constitution to discipline or remove the petitioners from office.
- (d) An order of judicial review in the nature of *certiorari* to remove to the Employment and Labour Relations Court for purposes of being quashed is issued against the 1<sup>st</sup> respondent's report by the Administration and Security Committee dated 25<sup>th</sup> June 2018, looking into the conduct of the Chairperson, Secretary and members of Homa-Bay County Public Service Board.
- (e) The 1<sup>st</sup> respondent to pay the costs of the petition.

**Judgment Dated, Signed and delivered at Kisumu this 15<sup>th</sup> 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 15<sup>th</sup> 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**

Mr. Odeny for petitioners

M/S Opare for 1st respondent.

Mr. Origo for 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Chrispo- Court clerk