



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 6 OF 2019

OTIENO BOB KEPHAS.....PETITIONER

VERSUS

HOMABAY COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

HOMABAY COUNTY ASSEMBLY.....2ND RESPONDENT

JUDGMENT

1. The Petitioner Otieno Bob Kephas is the erstwhile Clerk of the Homa Bay County Assembly

2. The Petitioner filed suit on 21st February, 2019 seeking an Order in the following terms:

(i) A declaratory Order that all the actions and/or proceedings undertaken by the 1st respondent and the 2nd respondent concluding with the 13th February, 2019 adoption of the report of the Select Committee on Justice and Administration of Justice dated 12th February, 2019, violated the Petitioner's right to fair trial and are consequently null and void.

(ii) An Order of Certiorari bringing into this Honourable Court for the purpose of being quashed all the actions and/or proceedings undertaken by the 1st respondent and the 2nd respondent concluding with the 13th February, 2019, the adoption of the Select Committee on Justice and Administration of Justice dated 12th February, 2019.

3. The Petition is grounded on facts set out on the body of the Petition and the supporting affidavit of the Petitioner that may be summarized as follows:-

(a) The Petitioner was on 31/3/2014 appointed Homabay County Clerk on permanent and pensionable terms by the 1st respondent.

(b) The Petitioner worked until 22nd August, 2018 when the Petitioner and six other persons were arraigned before the Homabay Law Courts with the Criminal charges related to abuse of office and/or corruption and/or misuse of public funds.

4. Meanwhile on 4th September, 2018, that Speaker Homabay County Assembly suspended the Petitioner in terms of Section 62(1) of Anti-corruption and Economic Crimes Act, which provides:-

“A public Officer or State Officer who is charged with corruption or economic Crime shall be suspended at half pay, with effect from the date of the case.”

5. In the said letter of suspension, the Petitioner was invited to respond to allegations of gross violation of the Constitution by Friday the 18th January, 2019 at 5p.m. and the Petitioner to appear before the 1st respondent on Monday 21st January, 2019 at 9.am. The Petitioner deposes that the notice was served on his wife at home on 15th January, 2019 and was dated the even date. That the Petitioner received the letter on the evening of 17th January, 2019.

6. That the Petitioner faced seven (7) charges and did not have adequate time to respond to the charges. That the Petitioner did not have relevant documents to assist him make the response since he was out of office on suspension and could not access relevant records.

7. The Petitioner was accused inter alia of misuse of mortgage and car loan scheme, unlawful direct purchase of curtains, furniture and

rehabilitation of Clerk's office; overpayment of sitting allowances to members of the 1st Respondent; failure to remit statutory deductions to the Kenya Revenue Authority; unlawful payment of Kshs. 1,000,000 to Speaker Hon. Elizabeth Ayoo (See), irregular opening of a mortgage loan repayment account at Equity Bank and irregular employment of 16 persons.

8. The Petitioner alleges violation of Section 23(1) of the County Assembly Services Act, which provides the disciplinary process and removal of a clerk by the Board.

9. That the select Committee (on Justice and Legal Affairs) which considered a notice of motion for removal of the petitioner was not legally constituted and violated Section 23(4) of the County Assembly Services Act and Standing Order 153 of the Interim County Assembly Standing Orders.

10. That the Select Committee did not invite the Petitioner to appear before it in violation of Section 36(6) of the County Assembly Services Act and that the Select Committee did not provide the Petitioner with its report in violation of Standing Order 63(2) of the Interim County Assembly Standing Orders.

11. That the 2nd respondent unlawfully barred the Speaker of the 2nd respondent from presiding over the assembly despite valid Court Orders mandating the Speaker to resume office in violation of Article 178 (2) of the Constitution of Kenya, 2010 and Section 9(4) of the County Governments Act 2012.

12. That this unlawful process was meant to second guess the outcome of the pending criminal proceedings against the Petitioner, which action was prejudicial to the Petitioner and amounted to subjecting the Petitioner to double jeopardy.

13. The Petitioner therefore prays for the reliefs sought.

Response

14. The respondents filed a replying affidavit to the petition sworn to by one Daniel Odhiambo O. Kando, dated 12th September, 2019 and filed on 9th October, 2019 in which he deposes inter alia:-

(i) That he was the Clerk of Homabay County Assembly.

(ii) That the Petitioner held the position of Clerk Homabay County Assembly from 31st March, 2014 until 22nd August, 2018 when the Ethics and Anti-corruption Commission and the Director of Public Prosecution instituted Criminal charges against the Petitioner and he was subsequently suspended from office on half pay.

(iii) That the 1st respondent preferred charges of misconduct against the petitioner.

(iv) That on 30th January, 2019, during a special sitting the Speaker of the Homabay County Assembly referred a Notice of Motion from the Homabay County Assembly Service Board seeking to revoke the appointment of the Petitioner as the County Assembly Clerk.

(v) That the matter was referred to a Select Committee on Justice and Legal Affairs to conduct investigations and report to the House within 10 days.

(vi) That the Committee held series of meetings to which the 1st respondent and the Petitioner were invited to state their case.

(vii) That the petition was served with a letter dated 15th January, 2019 by the 1st respondent and the Petitioner was invited to respond to the allegations made against him in writing.

(viii) That the petitioner was further invited to appear before the 1st respondent on 21st January, 2019 at 9.00 am in person or accompanied by an Advocate of choice to defend himself.

(ix) That the petitioner responded to the allegations through his lawyer Ms Robert Ochieng Advocate on 17th January, 2019 in which response the Petitioner stated that the allegations made against him were *subjudice* since he faced criminal charges before Homabay Law Courts on the same allegations.

(x) That the 1st respondent responded to the letter by M/s Robert Ochieng Advocates by a letter dated 25/1/2019 informing him that the allegations against the Petitioner were not subject to any Court proceedings and as such the Principle of *subjudice* did not apply.

(xi) That the Petitioner failed to respond to the charges levelled against him by the 1st respondent in writing and the petitioner also failed to appear in person as requested before the 1st respondent.

15. The 1st respondent therefore submitted a Notice of Motion to the Speaker dated 29th January, 2019 praying that the County Assembly revoke the appointment of the petitioner as the Clerk of the Homabay County Assembly.

16. That on 30th January, 2019, the Speaker referred the matter to the Select Committee on Justice and Legal Affairs aforesaid. The Committee by a letter dated 31st January, 2019 invited the Petitioner to appear or be represented before it on Monday 4th February, 2019.

17. That the Petitioner and/or his representative failed to appear before the Select Committee.
18. That the seven (7) charges were considered by the Select Committee and the allegations made against the petitioner were found to have been substantiated with documentary evidence except in respect of Count 1 and 3 thereof.
19. That the Select Committee presented its report to the 2nd respondent on the 13th February, 2019 for debate and after serious deliberations the report was adopted. The Committee recommended the Petitioner be removed as the Clerk of the Homabay County Assembly on account of substantiated charges against the Petitioner.
20. The Petitioner did not file a further affidavit to deny and/or join issues with the depositions, on oath made in the replying affidavit of the respondents. There is no evidence before Court therefore that Mr. Daniel Odhiambo Kando was not authorised to swear the replying affidavit which effectively countered all the allegations made by the Petitioner in the petition and in the supporting affidavit.
21. The final word on the due process followed by the respondents in removing the Petitioner from the office of Clerk Homabay County Assembly is as set out in the replying affidavit by the respondents.
22. Accordingly, the Court finds as a matter of fact that the petitioner was suspended from the office of Clerk Homabay County Assembly on half pay pursuant to Criminal Charges levelled against him by the Director of Public Prosecutions which initial charges related to the Petitioner's performance in the office he held.
23. It is also a proven fact that the Petitioner was then charged with seven (7) disciplinary offences related to his work performance as Clerk Homabay County Assembly.
24. The Court is satisfied that the petitioner was duly served with the charges and was given adequate time to respond in writing to the charges and to subsequently appear before the 2nd respondent to answer to the charges.
25. The Court is equally satisfied that the Petitioner did not request for more time within which to respond in writing to the charges and/or within which to appear in person or by his advocate before the 1st respondent.
26. The Court finds that the Petitioner willfully refused and/or failed to answer to the administrative charges of misconduct levelled against him by the 1st respondent.
27. That the 1st respondent lawfully recommended to the 2nd respondent to commence the process of removal of the petitioner from the office of the Clerk Homabay County Assembly.
28. That as a matter of fact the 2nd respondent adopted the recommendation by the 1st respondent and by the Select Committee of the 2nd respondent to have the Petitioner removed from the office of Clerk of Homabay County Assembly.
29. Accordingly, the Petitioner has failed to prove on a balance of probability any violation of his rights and/or freedoms alluded to vaguely in the petition itself.
30. The petitioner has also failed to prove any violation of procedures set out under the County Assembly Act, and or under the Homabay County Assembly Standing Orders as alleged or at all.
31. It is the findings by the Court that the requirements of a fair hearing of a Public Officer set out by the Employment and Labour Relations Court in **Bernard Mbaru Mburu –vs- National Police Service Commission (2017) eKLR** and by the Court of Appeal in **County Assembly of Kisumu, and 82 Others -vs- Kisumu County Assembly Service Board and 6 Others – Civil Appeal No. 17 and 18 of 2015 (consolidated) eKLR** were fully adhered to by the respondents in the removal of the petitioner from office of the Clerk Homabay County Assembly.
32. Furthermore, it is trite law that an employer whether in private or public office need not await the conclusion of related criminal charges levelled by the Director of Public prosecutions against an employee in a Court of law to commence and/or conclude administrative disciplinary proceedings against the said employee.
33. In the final analysis, the Petition lacks merit in all fronts and is dismissed.
34. Each party is to meet their own costs of the petition in recognition of the Service rendered by the petitioner to the 2nd respondent between the years 2014 to 2018 and that the petition though lacks merit had raised serious issues for determination by the Court.

Dated and delivered at Kisumu this 27th day of November, 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

Mr. Okello for the Petitioner

Mr. Mwamu for the Respondent

Chrispo – Court clerk