



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT KISUMU**

**PETITION NO. 27 OF 2020**

**(Consolidated with Petition No. 32 of 2020)**

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

**AND**

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

**AND**

**IN THE MATTER OF SECTIONS 12 AND 13 OF THE COUNTY GOVERNMENTS ACT, 2012**

**AND**

**IN THE MATTER OF SECTIONS 5, 17, 19, 22 AND 23 OF THE COUNTY ASSEMBLY SERVICES ACT, 2017**

**AND**

**IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER (INTER ALIA) ARTICLES 10, 27, 28, 29, 41, 47 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**DANIEL ODHIAMBO KAUDO**

**PETITIONER**

**v**

**SPEAKER, COUNTY ASSEMBLY OF**

**HOMA BAY**

**1<sup>st</sup> RESPONDENT**

**COUNTY ASSEMBLY SERVICE**

**BOARD**

**2<sup>nd</sup> RESPONDENT**

**AND**

**HON. MICHAEL NYANGI**

**1<sup>st</sup> INTERESTED PARTY**

**HON PETER JUMA AWUOR**

**2<sup>nd</sup> INTERESTED PARTY**

**HON JOSEPH OKOTO**

**3<sup>rd</sup> INTERESTED PARTY**

JUDGMENT

1. Daniel Odhiambo Kaudo (hereinafter the Clerk) was gazetted as the Clerk of the County Assembly of Homa Bay around 29 March 2019. The Clerk of a County Assembly also serves as the Secretary of the County Assembly Service Board.
2. On 24 July 2019, the Speaker of the County Assembly issued a Memorandum to the members of the County Assembly and other staff notifying them of the suspension of the Clerk under section 22 of the County Assembly Services Act, 2017 by the County Assembly Service Board.
3. The Clerk was aggrieved and on 27 July 2020, he moved the Court asserting that the suspension violated his rights not to be discriminated, the security of the person, protection from cruel, inhuman and degrading treatment, fair labour practices and fair administrative action/due process.
4. The Clerk also alleged that the decision violated sections 5, 45 and 46 of the Employment Act and sections 5, 11, 17, 19, 22 and 23 of the County Assembly Services Act.
5. At the same time, the Clerk filed a Motion under a certificate of urgency seeking conservatory orders interdicting the suspension.
6. On the same day, some 4 members of the County Assembly Service Board met and resolved that the decision to suspend the Clerk was illegal.
7. When the application was placed before the Court on 27 July 2020, it directed that parties file and exchange affidavits and submissions ahead of highlighting of the submissions.
8. The next day, the Clerk filed another Motion seeking orders similar to the ones in the earlier application.
9. When the application was placed before the Court on 29 July 2020, it held that the application was an abuse of the court process and a duplication and directed the Clerk to elect which of the applications he intended to pursue.
10. Consequent upon the orders of 27 July 2020, the following were filed
  - (i) 1st and 2nd Interested Parties replying affidavits on 19 August 2020.
  - (ii) Notice of Appointment filed on 19 August 2020 by Mwamu & Co. Advocates to represent the Interested Parties.
  - (iii) The Clerk's supporting affidavit on 20 August 2020.
  - (iv) The Clerk's submissions on 21 September 2020.
  - (v) The Respondents' Grounds of Opposition on 24 September 2020.
  - (vi) The Clerk's supplementary affidavit on 28 September 2020.
11. On 20 August 2020, the Clerk had filed yet another motion seeking an order staying proceedings of a Select Committee established by the County Assembly on 18 August 2020 to investigate allegations of misconduct against him.
12. The Court, on 24 August 2020 directed that the Motion be served and that the parties file and exchange affidavits and submissions.
13. On the same day, the firm of Onsongo & Co. Advocates filed a Notice of Appointment of Advocates to act on behalf of the Speaker of the County Assembly and the County Assembly Service Board (a similar Notice was filed on 25 September 2020).

14. However, on 25 September 2020, the firm of Lumumba & Ayieko Advocates also filed a Notice of Appointment to act for the County Assembly Service Board.

15. To add to the confusion, the firm of Owiti, Otieno & Ragot Advocates filed on 28 September 2020, a Notice of Appointment to act for the Speaker of the County Assembly.

16. On the same day, the Clerk filed a List of Documents while a Motion was filed by N.E. Mogusu & Associates to join Hon Jeff Ongoro and Hon Richard Ogindo to the Petition as Interested Parties.

17. Not to be outdone, the Clerk filed a supplementary affidavit on 28 September 2020, ostensibly to bring to the Court's attention (new) developments in the dispute.

18. On 29 September 2020, the Court ordered that this Petition, Petition No. 32 of 2020 (the Petitioner therein hereinafter referred to as the Petitioner) and Judicial Review Application No. 12 of 2020 be consolidated and that parties exchange all pleadings within 7 days (the Court delivered Judgment in respect of Judicial Review Application No. 12 of 2020 on 11 December 2020 and therefore this Judgment relates to this Petition and Petition No. 32 of 2020, *Brian Odhiambo v County Assembly Service Board, Homa Bay & Ors*).

19. At the same time, the Court directed that responses to the suits be filed and exchanged within 7 days of service and that the Clerk and Petitioner file and serve any further affidavit(s) together with submissions within 7 days and that the Respondents and Interested Parties file submissions within 7 days of service.

20. On the same day, the Court directed that the *status quo* as of 27 July 2020 be maintained pending further direction by this Court on 2 November 2020 (the Judge who had hitherto handled the files was on transfer).

21. To continue the flurry of filings, the Clerk filed a fresh motion on 1 October 2020 seeking a conservatory order preserving his employment and stopping the implementation of the report by the Select Committee.

22. The Court certified the Motion urgent and directed that since the parties had agreed on 30 September 2020 to abandon all applications pending on record in lieu of hearing the Petition on the merits, this Petition, Judicial Review Application No. 12 of 2020 and Petition No. 32 of 2020 be placed before the incoming Judge on 2 November 2020 for further directions.

23. On 2 October 2020 when the Clerk's motion dated 1 October 2020 came up, the Court reiterated the orders issued on 30 September 2020 which included

THAT this means no further disciplinary proceedings are to take place nor is the suspended Clerk to assume office until the consolidated Petition is heard and determined.

24. The Clerk was not amused with the directions and/or orders given on 2 October 2020 barring him from office and he filed a Notice of Appeal on 12 October 2020

25. The Petitioner filed his submissions on 30 October 2020.

26. When the Petition was placed before this Court on 2 November 2020, it gave the following directions

(i) The Clerk, the Petitioner and *ex-parte* applicant to file and serve their documents together with submissions on or before 13 November 2020.

(ii) The Respondents to file and serve responses together with submissions on or before 27 November 2020.

(iii) The Clerk, the Petitioner(s) and *ex-parte* applicant to file and serve any further submissions of not more than 5 pages on or before 4 December 2020.

(iv) Any contempt application be dealt with after judgment.

27. Pursuant to the Court directions the following were filed

(i) The Clerk's further supplementary affidavit and submissions on 13 November 2020.

(ii) The 1st Interested Party's further affidavit on 30 November 2020.

(iii) The Interested Parties submissions on 1 December 2020.

(iv) The Clerk's further submissions on 4 December 2020.

(v) 2nd Respondent's replying affidavit on 9 December 2020.

(vi) 1st and 3rd Respondents' replying affidavit in Kisumu Judicial Review Application No. 12 of 2020 on 9 December 2020.

(vii) The Speaker's replying affidavit on 9 December 2020.

(viii) The Speaker's Response to Petition on 9 December 2020.

(ix) The Speaker's consolidated submissions on 9 December 2020.

(x) The Clerk's supplementary submissions on 10 December 2020.

(xi) The Clerk's supplementary replying affidavit on 14 December 2020.

28. On 9 December 2020, the firm of Owiti, Otieno & Ragot Advocates filed a Notice of Appointment to come on record for the County Assembly Service Board (2nd Respondent).

29. The Clerk identified the following Issues as germane for the Court's determination

(i) Whether or not the process of the suspension of the Petitioner was done in accordance with the laid down procedures and whether a process started by an illegal body can lead to a legal end.

(ii) Whether or not the Petitioner's rights have been infringed.

(iii) Whether the Petitioner is entitled to the reliefs sought.

(iv) Who should bear the costs of the Petition?

30. The Petitioner (Petition No. 32 of 2020) identified 3 Issues to wit

(i) Whether the Respondents have violated any of the Interested Parties rights under the Constitution, the Employment Act and the County Governments Act.

(ii) Whether the Respondents followed the laid down procedures before removing the Interested Party from office.

(iii) Whether the Petitioner is entitled to the orders sought.

31. The Interested Party on his part raised issues (loaded in vagueness and typos)

(i) Whether the suspension of the applicant were generally, procedurally conducted in accordance with the applicable law.

(ii) Whether the decision was irrational, unreasonable, made in bad faith and with for removal meet the threshold as provided in Article 251(1) of the Constitution.

(iii) Whether the Respondents contravened any statute?

### **Practice and Procedure**

32. Before addressing the issues as identified by the parties, the Court has been constrained to deal with a practice which has bothered it in no small measure and which it has come across only in this Court station.

33. The firm of Onsongo & Co. Advocates filed a Notice of Appointment to act for the Speaker of the County Assembly and the County Assembly Service Board on 24 September 2020.

34. On 25 September 2020, the firm of Lumumba & Ayieko Advocates purported to file another Notice of Appointment to act for the County Assembly Service Board.

35. A few days later, on 28 September 2020, the firm of Owiti, Otieno & Ragot Advocates filed a Notice of Appointment to act for the Speaker of the County Assembly.

36. Similarly, the firm of Owiti, Otieno Ragot Advocates filed a Notice of Appointment to act for the County Assembly Service Board on 9 December 2020.

37. It is not lost to the Court that the firm of Lumumba & Ayieko Advocates had filed a Notice of Appointment on 19 May 2020 to act for the Clerk, County Assembly of Homa Bay, County Assembly Homa Bay and County Assembly Service Board in Kisumu Judicial Review Application No. 5 of 2020

38. Without apportioning blame, the Court finds the decision of the Respondents to instruct several advocates to place themselves on record to act on their behalf when another firm was already on record, and without filing a Notice of Change of Advocate as a contrary to the requirement for prudent use of public resources.

39. The filing of the Notices of Appointment(s) is not supported by any practice and/or a procedure known to this Court.

40. The Court, *suo moto*, strikes out and expunges from the record, the Notices of Appointment(s) filed by the firms of Lumumba & Ayieko Advocates and Owiti, Otieno & Ragot Advocates to act for the Speaker and County Assembly Service Board (as may be applicable).

41. The consequence of the striking out is that the Speaker's consolidated submissions filed on 9 December 2020 cannot stand. They are equally struck out.

42. The Court will, however, admit and consider the substance of the Speaker's replying affidavit filed on 9 December 2020.

43. After considering the material properly on record, the Court has come to the view that the consolidated Petitions will either survive or crumble upon a determination of a foundational legal issue.

### **Lawful/valid Contractual relationship**

44. The office of the Clerk of a County Assembly is established under section 13 of the County Governments Act. The appointment is made by the County Assembly Service Board with the approval of the County Assembly.

45. Under section 18 of the County Assembly Services Act, the recruitment of a Clerk of a County Assembly should be through a competitive process.

46. The Speaker challenged the foundation of the instant proceedings on the ground that the Clerk was never recruited or appointed to the office of Clerk of the County Assembly.

47. According to the Speaker, the purported gazette of the Clerk as the Clerk of the County Assembly by an acting Speaker on or around 29 March 2019 was also unlawful and null and void.

48. Null and void, because according to the Speaker, the Court had on 6 November 2018 in Kisumu Petition No. 67 of 2018, *Hon Elizabeth Ayoo v County Assembly Service Board, Homa Bay* issued an order that the Speaker be reinstated to the office and that by the date the Clerk was being gazetted as Clerk, she was the lawfully elected Speaker and it was upon her to issue such gazette notice.

49. The recruitment of a Clerk of a County Assembly is underpinned by specific statutory provisions. There was no evidence that the gazette of the Clerk on 29 March 2019 was preceded by a recruitment process as contemplated by the County Governments Act and the County Assembly Services Act.

50. When the Clerk was being gazetted as the Clerk of the County Assembly by a person designated as acting Speaker of the County Assembly of Homa Bay, one E.D. Marieba, the Court had reinstated the Speaker herein to office.

51. The Court had in the same Ruling issued an order restraining the County Assembly from electing any other person as Speaker but the Clerk purported to swear an acting Speaker on 6 November 2018.

52. On 7 February 2019, the Court confirmed the orders reinstating the Speaker into office.

53. The said E.D. Marieba, therefore, had no legal competence to purport to gazette the Clerk as Clerk of the County Assembly on 29 March 2019. He was an impostor in the office of the Speaker. The Clerk he gazetted equally became a trespasser in the office of the Clerk of the County Assembly.

54. In the view of the Court, and the Court so finds, the purported gazette of the Clerk of the County Assembly on 29 March 2019 was tainted with illegality and outright disobedience of court orders.

55. Since the Petition was anchored on the assumption that the Clerk was validly in office, the finding herein leads to the conclusion that the orders in the Petition cannot be granted for lack of a legal foundation.

56. In the same vein, it would be a futile exercise for the Court to embark on an examination of the question whether the suspension and removal proceedings against the Clerk were in consonance with the legal provisions governing the process of suspending and/or removing a County Assembly Clerk from office.

57. Despite the finding, it is obvious to the Court that the parties herein did not make candid disclosure. How is it that the Respondents were purporting to suspend and/or commence a removal process for the Clerk if he did not have some form of contractual relationship with the County Assembly?

## **Conclusion and Orders**

58. Flowing from the foregoing the Court orders that the consolidated Petitions be dismissed.

59. The Clerk kept on filing application after application, leaving the Court no room or sufficient time to determine any of the Motions. Such conduct does not augur well for efficient and optimal use of judicial resources and time.

60. The Petitioners are ordered to meet the costs of the Respondents.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 17<sup>th</sup> day of December 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr. Theuri instructed by Makallah, Theuri & Co. Advocates

For Petitioner (Petition No. 32 of 2020) Mr. Obach instructed by H. Obach and Partners

For Respondents Mr. Onsongo instructed by Onsongo & Co. Advocates

For Interested Parties Mwamu & Co. Advocates

Court Assistant Chrispo Aura