



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. 42 OF 2019**

**IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2, 19, 20, 21, 22, 23, 43, 47, 48, 50, 185 AND 251 OF THE CONSTITUTION OF KENYA, 2020**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF: THE HOMA BAY COUNTY PUBLIC SERVICE BOARD**

**BETWEEN**

**DANIEL OMONDI OGADA**

**COLLINS ODHIAMBO AGUTU**

**TOBIAS ODUNDO (members of the Homa County Public Service Board).....PETITIONERS**

**VERSUS**

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

**COUNTY GOVERNMENT OF HOMABAY.....2<sup>nd</sup> RESPONDENT**

**GOVERNOR, COUNTY OF HOMABAY.....3<sup>rd</sup> RESPONDENT**

**RULING**

1. In a Judgment delivered on 15 October 2020, the Court ordered

(a) 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) & (2) of the Constitution as read with section 58(5)(b) of the County Governments Act, 2012.

(b) 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.

(c) The action of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in advertising, shortlisting, selecting, appointing or in any way purporting to replace the Petitioners as members of the Homa Bay 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 1<sup>st</sup> Respondents report by the Administration and Security Committee dated 24<sup>th</sup> November 2019 looking into the conduct of the Chairperson, Secretary and member of Homa Bay 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 3<sup>rd</sup> Respondents letter dated 26<sup>th</sup> November 2019 relieving the Petitioners of their duties as Chairperson, Secretary and member respectively of Homa Bay County Public Service Board.

(f) The Respondents are directed to pay all arrears and future remuneration due to the Petitioners.

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

2. The Respondents were aggrieved and they filed a Notice of Appeal on 19 October 2020.

3. On 3 November 2020, the Respondents filed a Motion under a certificate of urgency seeking orders

1. ...

2. ...

3. **THAT** pending the hearing and determination of the Appeal, this Honourable Court be pleased to grant an order for stay of execution of the judgment and orders dated 15/10/2020 herein.

4. **THAT** the costs of this application be costs in the Appeal.

4. Pursuant to Court directives, the following were filed

(i) 3<sup>rd</sup> Petitioner's replying affidavit on 10 November 2020.

(ii) Respondents' further affidavit on 11 November 2020 (County Secretary).

(iii) Respondents' submissions on 13 November 2020.

(iv) Petitioners' submissions on 17 November 2020.

#### **Respondents' contentions**

5. In seeking a stay of execution pending Appeal, the Respondents asserted that the Court had misdirected itself in finding that the Petitioners had not been granted an opportunity to be heard; finding that the Respondents were carrying out disciplinary proceedings against the Petitioners and in finding that the County Assembly had no legal authority to initiate the removal from office of the Petitioners.

6. The Respondents also contended that the final orders were incongruent with an earlier finding by the Court in a Ruling delivered on 30 July 2020 that

12. Accordingly the facts put forth by Mr Ogwe especially to the effect that the horse had bolted when the Petitioners came to Court and that the Petitioners obtained interim orders without material disclosures to the Court militate against granting of the punitive orders sought by the applicants against Mr Ogwe and the Governor, the 3<sup>rd</sup> Respondent.

7. The Respondents further asserted that compliance with the judgment/decreed would lead to the unlawful expenditure of public funds and breach of the law.

8. The Respondents offered to deposit the Petitioners remuneration into Court as a form of security.

9. The cases of *Multimedia University & Ar v Professor Gitile Naituli* (2014) eKLR; *Butt v Rent Restriction Tribunal* (1979) eKLR and *Kenya Shell Ltd v Benjamin Kibiru & Ar* (1986) eKLR were relied on.

#### **Petitioners' rebuttals**

10. Challenging the Motion, the Petitioners contended that the Respondents had not demonstrated that they had an arguable case as they had not yet filed an Appeal to challenge the findings of the Court and that the application was an exercise in forum shopping by the Respondents.

11. In the view of the Petitioners, the Respondents had misapprehended the case which was presented before the Court which revolved around the question of due process in the removal of a member of a county public service board as prescribed by section 58(5) of the County Governments Act as read with Article 251(1) of the Constitution and section 45 of the Employment Act, 2007.

12. Further, the Petitioners were of the view that any Appeal would not be rendered nugatory if successful, as the Petitioners had remained in office all through the litigation.

13. The Petitioners also faulted the Respondents for laxity as there was nothing to show that they had applied for certified copies of the proceedings.

14. Lastly, the Petitioners accused the Respondents of material non-disclosure for failing to declare that at the time of filing the Motion before this Court, they had filed a similar application before the Court of Appeal, seeking a stay of execution.

15. The Court has considered the Motion, affidavits and submissions placed before it and condensed the pertinent Issues as examined hereunder.

### **Abuse of the court process/sub judice**

16. The Respondents filed on or around 15 October 2020 a Motion before the Court of Appeal being Kisumu Civil Application No. 126 of 2020, *County Assembly of Homa Bay & Ar v Daniel Omondi Ogada & Ors* seeking stay of execution pending appeal under Rule 1(2), 5(2) (b) and 41 of the Court of Appeal Rules.

17. On 3 November 2020, the Respondents moved this Court under Section 12(3)(i) of the Employment and Labour Relations Court Act, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules seeking an order of stay of execution pending appeal of the judgment of 15 October 2020.

18. It is therefore correct that the Respondent had two similar applications before this Court and the Court of Appeal.

19. When the duplicity of applications was raised, the Respondents filed a further supporting affidavit. In the further affidavit, it was deposed that the Motion before the Court of Appeal had been withdrawn on 11 November 2020.

20. With the Notice of Withdrawal of the parallel Motion before the Court of Appeal, the Court will not consider as decisive the objection on *sub judice* or abuse of court process.

### **Stay of execution pending Appeal**

21. The law and legal principles applicable to an application for stay of execution pending an Appeal before this Court are now legion and do not require a rehashing of the authorities.

22. The legal principles are direct derivatives from Order 42 of the Civil Procedure Rules and these are, *grant of the order of stay is an exercise of discretion on the part of the Court; there is sufficient cause shown; that an application is brought without inordinate delay; that it is demonstrated that substantial loss may be occasioned if stay is not granted and that security for due performance of the decree is provided for.*

23. This Motion was filed within weeks of the judgment and the question of delay does therefore not arise.

24. Turning to the element of substantial loss, the High Court in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, stated thus the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit....it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

25. The Respondents asserted that they would be occasioned substantial loss because payment of the Petitioners salaries was not budgeted for and any payments would lead to audit queries.

26. It is true that keeping the Petitioners in office would occasion expenditure of public funds.

27. The Petitioners made no response to the assertion on the budgeting or audit queries. They also did not address the question whether they would be in a position to refund the remuneration paid to them if the Appeal before the Court of Appeal were to succeed.

28. The Court of Appeal in Nairobi Civil Application No. 238 of 2005, *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)* stated

**This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.**

29. The Court agrees with the Court of Appeal. However, the Court must balance between the rights and interests of a judgment creditor who is entitled to enjoy the fruits of any judgment and public interest in a case such as this which involves public expenditures.

### **Material disclosure**

30. The Court, in its Ruling of 30 July 2020 on a contempt application, made a definitive finding that the Petitioners had failed to make material disclosure when they moved the Court seeking interim conservatory orders.

31. A finding of material non-disclosure would ordinarily disentitle a party to relief and/or the exercise of the Courts discretion in their

favour.

32. The Court however did not address itself to this earlier finding while fashioning the remedies it granted.

33. From the foregoing and balancing the scales as between the Petitioners and the Respondents, the orders which commend themselves to the Court are

(a) Stay of execution pending Appeal is granted on condition that the Petitioners are paid all outstanding remuneration and allowances up to end of December 2020 on or before 5 January 2021.

(b) The remuneration the Petitioners would have earned up to the end of their terms of office are deposited into Court on or before 5 January 2021.

(c) In default of compliance with (a) and (b) above, the stay order will automatically lapse without any further Court order or directions.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 11<sup>th</sup> day of December 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioners                      Mr. Odeny instructed by Bruce Odeny & Co. Advocates

For Respondents                    Mr. Yogo instructed by Otieno, Yogo, Ojuro & Co Advocates

Court Assistant                    Chrispo Aura