



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 55 OF 2018**

*(Formerly ELRC Nyeri Petition No. 6 of 2018)*

**Before Hon. Lady Justice Maureen Onyango**

**IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 73, 75, 82, 235, 258 AND 259 OF THE**

**CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**UNDER ARTICLES 27, 28, 41, AND 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE COUNTRY GOVERNMENTS ACT 2012 (ACT NO. 17 OF 2012) AND COUNTY**

**PUBLIC SERVICE BOARD OF LAIKIPIA COUNTY**

**AND**

**IN THE MATTER OF THE PURPORTED TERMINATION OF APPOINTMENT/REMOVAL OF THE PETITIONER**

**FORM OFFICE AS A MEMBER OF THE LAIKIPIA COUNTRY PUBLIC SERVICE BOARD**

***BETWEEN***

**ESTHER NYAGUTHII WANJAU.....PETITIONER**

***VERSUS***

**THE GOVERNOR, LAIKIPIA COUNTY..... 1<sup>ST</sup> RESPONDENT**

**LAIKIPIA COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Petitioner filed a Petition on 12<sup>th</sup> June, 2018 seeking the following prayers:

a) *That a declaration be issued to declare that the 1<sup>st</sup> Respondent's decision contained in his letter dated 28<sup>th</sup> May, 2017 to remove from or terminate the Petitioner's appointment as member of the Laikipia County Public Service Board is illegal, null and void ab initio.*

b) *That a declaration be issued to declare that the removal of the Petitioner as a member of the Laikipia CPSB by dint of the letter*

of the 1<sup>st</sup> Respondent dated 28<sup>th</sup> May, 2018 is ultra vires section 58(5) of the County Governments Act, 2012 and Articles 251(1) of the Constitution and therefore null and void ab initio.

c) That an order of certiorari be issued to bring into this Court for purposes of being quashed the decision of the 1<sup>st</sup> Respondent contained in his letter dated 8<sup>th</sup> May, 2018 removing or terminating the appointment of the Petitioner as a member of the Laikipia County Public Service Board for being in contravention of section 58 (5) of the County Governments Act, 2012 read with Articles 47 and 251 of the Constitution.

d) That a declaration be issued to declare that under section 58 of the County Governments Act, 2012 read with Article 251 of the Constitution the Petitioner remains the lawful holder of the position of a member of the Laikipia Public Service Board.

e) That a declaration be issued to declare that the decisions, actions and omissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in respect of their scheme to remove the Petitioner as a member of the Laikipia County Public Service Board have violated the Petitioner's human rights and fundamental freedoms secured and guaranteed under Articles 27, 28, 41, 47 and 50 of the Constitution.

f) That the Court be pleased to find and hold that the decisions, actions and omissions of the 1<sup>st</sup> Respondent in respect of the scheme to remove the Petitioner from Laikipia County Public Service Board constitute conduct that violates Article 10, 73, and 75 of the Constitution.

g) That an order for damages to compensate the Petitioner for violation of her human rights and fundamental freedoms secured and guaranteed under Articles 27, 28, 41, 47 and 50 of the Constitution.

### **Petitioner's case**

The Petitioner avers that she was appointed as a member of the Laikipia County Public Service Board (the Board) in July, 2013 by the then Governor of Laikipia County, Hon. Joshua W. Irungu. She avers that pursuant to Section 58(4)(a) of the County Governments Act she was entitled to hold office for a non-renewable term of 6 years thus her term was to lapse in August, 2019.

She avers that following the General Election held on 8th August, 2017 the 1<sup>st</sup> Respondent was duly elected as the Governor of Laikipia County and was inaugurated on 21<sup>st</sup> August, 2017. She avers that during the official opening of the county Assembly on 20<sup>th</sup> February, 2018 the 1<sup>st</sup> Respondent accused members of the Board of incompetence, lack of professionalism, disloyalty and favouritism in discharge of their duties. He further stated that the members of the Board had violated the Constitution and therefore petitioned the County Assembly of Laikipia to make a resolution for the disbandment and removal of the board members from office.

She avers that members of the Board, including herself filed **ELRC Nyeri Petition No. 3 of 2018 at Mary Mutonyi & 5 Others v Laikipia County Government & 2 Others** in which they challenged the constitutionality of their removal. She avers that the Respondents then sent emissaries to various members of the Board to persuade them to enter into an agreement to resign or vacate office and be paid off their expected income for remainder of their contractual terms and in return withdraw their case.

The Petitioner contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in Petition No. 3 of 2018 entered into agreements with the Laikipia County Government and on 28<sup>th</sup> May, 2018 they were allowed to withdraw as Petitioners. However, she refused to vacate her office by executing an agreement to that effect whereupon the said emissaries told her they would still find a way to force her out as a member of the Board or prevent her from discharging any duty in that capacity.

She contends that on 18<sup>th</sup> May, 2018 the 2<sup>nd</sup> Respondent vide an advertisement published in the Daily Nation advertised for qualified persons to apply for the positions of Chairperson and members of the Board. She further contends that in line with a letter dated 22<sup>nd</sup> May, 2018, the 2<sup>nd</sup> Respondent suspended the implementation of all previous instructions to the Board as it was not properly constituted.

She contends that by a letter dated 28<sup>th</sup> May, 2018 the 1<sup>st</sup> Respondent terminated her appointment on grounds that she was a public officer serving in her position on the basis of initial unpaid 3 years leave which had not been renewed.

It is her case that the decision to terminate her appointment was unlawful, malicious and founded on misrepresentation of facts for reason that she had sought unpaid leave to enable her serve as a member of the Board. That upon the lapse of the 3 years unpaid leave, she successfully applied for a 3 year extension of the unpaid leave to enable her complete her contract as a member of the Board.

It is her case that the 1<sup>st</sup> Respondent had no power to terminate her appointment or remove her from office as a member of Board even assuming that the allegations made against her are true. She further avers that the letter dated 28<sup>th</sup> May, 2018 constitutes contempt of Court as the issue of her removal as a member of the Board is *sub judice* as it was subject of **Petition No. 3 of 2018** on account of which conservatory orders were issued on 1<sup>st</sup> March 2018.

She avers that the actions of the Respondents violate her rights and fundamental freedoms secured and guaranteed under Articles, 27, 28, 41, 47 and 50 of the constitution. Further, that these actions and omissions make it impossible for the government of Laikipia County to operate in compliance with Articles 174, 175, 232 and 235 of the Constitution as read with Section 57 of the County Government Act.

### **Respondents' case**

The Respondents filed a Response to the Petition on 17<sup>th</sup> July 2018 and a Replying Affidavit sworn by Karanja Njora the Acting County Secretary of the Laikipia County sworn on 16<sup>th</sup> July, 2018.

The Respondents aver that the County Assembly debated the Report of the Joint committee on whether the members of the Board should be removed and unanimously voted in support of the removal of the then members. He avers that 23 out of the 24 members voted in the affirmative. They contend that this was in accordance with Section 58(5) of the County Government Act.

Respondents aver that the Petitioner's appointment was an illegality thus she was not entitled to hold office and serve for any period of time in the Board. They aver that the Petitioner was also an employee of the Ministry of Health working as a Senior Personal Secretary hence a public officer; that the Petitioner elected to apply for unpaid leave instead of applying for secondment or relinquishing her position at the Ministry of Health; that the Petitioner illegally applied for and was granted unpaid leave in dubious circumstances contrary to section E.8 (1) of the Public Service Commission, Human Resource Policies and Procedure Manual and that she proceeded to dishonestly and illegally take up a 6 year contract for a period of 3 years. They aver that unpaid leave can only be for a maximum of 3 years and cannot be extended.

They aver that they wrote to the Ministry of Health and they were informed that the Petitioner had initially been on unpaid leave which the Ministry declined to extend vide its letter dated 17<sup>th</sup> August, 2017.

The 1<sup>st</sup> Respondent avers that in making his speech to the Laikipia County Assembly, he was acting within his powers under Section 30(2) (k) of the County Governments Act and Section 21(1) under Part V of the Laikipia County Assembly Standing Orders. He further avers that he pointed out clear violations of Article 251 of the Constitution by the Petitioner in conjunction with others. He avers that the Petitioner ought to have appeared before the County Assembly to respond to the issues raised.

The Respondents did not dispute the orders in **Petition 3 of 2018** but averred that the same cannot be relied upon as this would amount to *sub judice* and that issues in that Petition are distinct from those raised in this Petition.

They aver that the two Petitioners in **Petition 3 of 2018** elected to go for early retirement on their own volition without any coercion or undue influence and guided by their own personal reasons. They contend that the Board only had 2 persons therefore it could not exercise any functions so the County Government had no option but to ensure that it was fully composed.

They aver that the Petitioner cannot be removed from office because she had never been legally in office thus their actions were proper and justified.

They aver that the Petition should be dismissed with costs.

The Petition was disposed of by way of written submissions and each party filed its respective submissions.

### **Petitioner's Submissions**

The Petitioner relied on Article 162(2) of the Constitution and submitted that the issues before this Court transcend the employer-employee relationship and touch on the Petitioner's fundamental rights and freedoms guaranteed under Chapter 4 of the Constitution. For emphasis, she relied on the High Court decision in **United States International University (USIU) v Attorney General [2012] eKLR** where the Court held that this Court is a specialist court that deals with employment and labour relations matters. It further held that Articles 162(3) and Section 12 of the Industrial Court Act, now the Employment and Labour Relations Court Act, set out the matters within the exclusive domain of this Court.

She reiterated that she was to hold office for a non-renewable period of 6 years under section 58(4)(a) of the County Governments Act thus her engagement with the 2<sup>nd</sup> Respondent was scheduled to end in 2019.

She submitted that Section 58(5) of the County Government Act sets out the grounds for removal from office of a member of the Board and that Article 251(1) of the Constitution provides for when a member of a commission (other than an *ex-officio* member) or holder of an independent office may be removed from office. She argued that the 1<sup>st</sup> Respondent acted contrary to Section 58(5) of the County Government Act since his actions had not been sanctioned by a vote of 75% of all members of the Laikipia County Assembly.

She further argued that the grounds relied upon by the 1<sup>st</sup> Respondent do not meet the threshold set out under Article 251(1) of the Constitution. It was therefore her submission that the 1<sup>st</sup> Respondent acted in excess of his powers by circumventing the procedure for removal of members of the Board laid down by both the County Government Act and the Constitution.

She relied on the Court of Appeal decision in **Kisumu County Public Service Board & another v Samuel Okuro & 7 Others [2018] eKLR** where the Court held that the Respondents had proven that their contracts of employment were irregularly terminated as neither the provisions of the Constitution nor the County Government Act were followed and that they were not given a hearing or a proper reason for their termination.

She also relied on the case of **Cecilia Wangechi Ndungu v County Government of Nyeri & another [2014] eKLR** where the Court held that public authority must be exercised in accordance with the Constitutional tests. She submitted that section 3 (3) of the Employment Act provides that the provisions of the Act bind the government and that section 45 of the Employment Act provides that no employer shall terminate an employee unfairly.

She submitted that the actions of 1<sup>st</sup> Respondent are akin to application of the doctrine of pleasure which has no place in Kenya. She argued

that public service in Kenya is guided by the doctrine of due process and not by the doctrine of the servants of the crown and the pleasure doctrine. She relied on the Court of Appeal decision in **Narok County Government & Another v Richard Bwogo Birir & Another [2015] eKLR** where it was held that all persons holding public or state office are servants of the people of Kenya. Additionally, that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured by the Constitution.

She maintained that the 1<sup>st</sup> Respondent unilaterally terminated the Petitioner despite the fact that the Public Service Commission had granted her a further 3 years unpaid leave. She argued that this was despite the fact that the Petitioner made an effort to set the record straight vide the letter dated 7<sup>th</sup> May 2018 which confirmed that she was on unpaid leave.

She argued she was properly in office and that there was no process initiated to remove her from office as provided under Section 58(5) of the County Government Act. It was her submission that the 1<sup>st</sup> Respondent purported to terminate the Petitioner without giving her an opportunity to be heard which is against the rules of natural justice under Articles 25(d) and 47 of the Constitution.

She submitted that she is entitled to the reliefs sought. She relied on the case of **Oi Pejeta Ranching Limited v David Wanjau Mohoro [2017] eKLR**.

### **Respondents' Submissions**

The Respondents submitted that the Petition fails to disclose specifically fundamental rights and freedoms infringed upon by the Respondents, rather it dwells on the procedure through which the Petitioner ceased being a member of the Board. They submitted that the issues are not capable of being canvassed in a Petition but in a claim.

They submitted that the Petitioner failed to disclose that she was a public officer at the time of her appointment contrary to Section 58(3)(b) of the County Government Act and that her appointment was ethically and morally wrong.

They submitted that the letter extending her unpaid leave is disputed and the Court cannot ascertain the validity of the said extension of the unpaid leave for a further 3 years. They maintained that the Assembly independently tabled and passed the motion to remove her from office as is mandated under Article 251 of the Constitution.

They submitted that **Petition No. 3 of 2018** was dismissed on its own merit and that the Court cannot be referred to that suit because certified proceedings have not been placed before this Court as required by the Evidence Act.

They submitted that the Petitioner was properly removed from office and is still guilty of using deceptive means to remain in office. They argued that this Petition is crafted to attract this Court into interfering with the decision of the Assembly. They submitted that the Court in **Speaker of the Senate & Another v Attorney General & 4 Others [2013] eKLR** that the courts should not be seen to impede or circumvent the process and operations of county assemblies in the removal of members of the public service board. They further relied on the decision of the High Court in **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others [2013] eKLR**.

They submitted that the termination by the 1<sup>st</sup> Respondent is legal by dint of Section 58(1)(b) of the County Governments Act which stipulates that the 1<sup>st</sup> Respondent is the appointing authority and as such enjoys power to dismiss. They submitted that employment rights are not listed under Article 25 of the Constitution as rights that cannot be limited.

They argued that the Petitioner's allegation that the right to fair hearing was not accorded, is an issue of the procedure that transpired in the County Assembly which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not party to. They submitted that the Petitioner has failed to demonstrate any breach of constitutional provisions thus she is not entitled to the prayers sought.

### **Determination**

The issues for determination are:

- a) *Whether the Petitioner's appointment as a member of Laikipia County Public Service Board (the Board) was legal*
- b) *Whether the Petitioner's termination was unfair*
- c) *Whether the Petitioner is entitled to the reliefs sought*

#### **a) Whether the Petitioner's appointment as a member of the Board was legal**

The Petitioner's appointment as a member of the Board was vide the letter of appointment dated 7<sup>th</sup> August, 2013 and Gazette Notice Number 10703 of 30<sup>th</sup> July, 2013. Her appointment was effective 31<sup>st</sup> July, 2013 and she was to hold office for a non-renewable term of 6 years.

The Petitioner avers that she was granted unpaid leave for a period of 3 years, relying on letter dated 10<sup>th</sup> June 2013. However, this letter was not annexed to her supporting affidavit instead she annexed a letter dated 11<sup>th</sup> December 2013 which stated:

“ ...

*The Principal Secretary*

*Ministry of Health*

*NAIROBI*

*UNPAID:*

*MISS ESTHER NYAGUTHI WANJAU-P/NO.1999005526*

*Reference is made to your letter Ref. No. 1999005526/37 of 4<sup>th</sup> September, 2013 on the above subject.*

*It is noted that Ms. Wanjau was appointed Member of the County Public Service Board, Laikipia County. Approval is therefore, granted for Ms. Wanjau to proceed on unpaid leave for an initial period of three (3) years with effect from 10<sup>th</sup> June, 2013 to enable her take up appointment as Member of County Public Service Board of Laikipia County.*

*Please take necessary action.*

*J. T. Gechaga*

*For: PRINCIPAL ADMINISTRATIVE SECRETARY”*

It is the Respondent's case that this appointment was illegal as the Petitioner failed to disclose that she was a public officer at the time of the appointment and that her leave had been declined. The Petitioner on her part argued that she was legally in office by virtue of her appointment on 7<sup>th</sup> August, 2013 and the correspondence from the Ministry of Health.

The requirements for appointment as a member of a County Public Service Board are set out under Section 58(3) of the County Governments Act which provides: -

**(3) A person shall be qualified to be appointed as a member under subsection (1) if that person—**

**(a) satisfies the provisions of Chapter Six of the Constitution;**

**(b) is not a state or public officer;**

**(c) in the case of chairperson or vice-chairperson, possesses a minimum qualification of a bachelor's degree from a recognised university and working experience of not less than ten years; and**

**(d) in the case of any other members—**

**(i) possesses a minimum of a bachelor's degree from a recognised university and working experience of not less than five years; and**

**(ii) is a professional, demonstrates absence of breach of the relevant professional code of conduct.**

Article 260 of the Constitution defines a Public Office and a Public Officer as follows:

**“public office” means an office in the national government,**

**a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;**

**“public officer” means—**

**(a) any State officer; or**

**(b) any person, other than a State Officer, who holds a public office;**

Further, the Supreme Court in **Frederick Otieno Outa v Jared Oduyo Okello & 4 others [2014] eKLR** held:

*“Strictly speaking, the proper meaning of “public officer”, for purposes of the electoral law, is that embodied in Article 260 of the Constitution as read together with Section 2 of the Elections Act. The different definitions in other statutory provisions, such as those*

*enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” currently is: (i) the person concerned is a State officer; or (ii) any other person who holds “public office” – an office within the national government, county government, or public service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”*

The Ministry of Health is an office in the national government and its budget is subject to approval by Parliament. Evidently, the Petitioner being an employee of the Ministry of Health was a Public Officer thus she was disqualified from holding office as a member of the Board under Section 58(3)(b) of the County Governments Act.

On leave, it is undeniable that the Petitioner had sought unpaid leave for an initial three year period. Her leave was allegedly extended for a further 3 year period from 11<sup>th</sup> June 2016 to 10<sup>th</sup> June 2016, as stated in the letter dated 27<sup>th</sup> September 2017 from Simon K. Rotich on behalf of the Secretary/Chief Executive Officer of the Public Service Commission (PSC).

The extension is disputed by the Respondents for reason that on 17<sup>th</sup> August, 2017 V. M. Tenyeri stated that her request had been declined but in May, 2018 he stated that the letter was erroneously issued. However, on 6<sup>th</sup> November, 2017 the said V. M. Tenyeri wrote to the Petitioner through the Chief Economist stating that the PSC had approved Petitioner’s request for unpaid leave and that she was to resume duty on 11<sup>th</sup> June 2019.

Section E8 of the Human Resource Policies and Procedures Manual for Public Service provides:

***(1) Unpaid leave may be granted by the Authorized Officer on recommendation of the respective Human Resource Management Advisory Committee on the following grounds: -***

***(i) Urgent private affairs of exceptional nature not exceeding sixty (60) calendar days;***

***(ii) Officers whose spouses are posted to foreign missions during the tour of service;***

***(iii) Officers who are appointed to international organizations where they cannot transfer their service or be on 86 secondment for a period not exceeding three (3) years;***

***(iv) Spouses of officers appointed under (iii) above, will be granted unpaid leave for a maximum non-renewable period of one (1) year.***

***(2) Unpaid leave will not be increment-earning.***

***(3) During the period of unpaid leave, the Government will not make a contribution of its portion towards an officer’s pension under the Public Service Superannuation Scheme. The officer will however, be free to contribute his portion towards the Scheme.***

***(4) The period of unpaid leave will not be pension earning under the Pensions Act Cap. 189.***

***(5) There shall be no provision for unpaid study leave in the Public Service.”***

The Petitioner’s ground for unpaid leave was to enable her serve as a member of the Board. This ground is not one of those provided for under Section E.8(1) of the Human Resource Policies and Procedures Manual for the Public Service. Therefore, irrespective of the fact that she was granted unpaid leave, the said leave was contrary to the provisions of the Procedures Manual. Further, the extension of her unpaid leave is riddled with uncertainty as the letter dated 17<sup>th</sup> August, 2017 which declined her application for extension of leave was said to have been erroneously issued and no representative from the PSC or the Ministry of Health swore an affidavit to explain the turn of events in respect of the Petitioner’s application and extension of unpaid leave.

#### **b) Whether the Petitioner’s termination was unfair**

##### **Reason**

The 1<sup>st</sup> Respondent in the termination letter dated 28<sup>th</sup> May, 2018 stated that the Petitioner had been illegally in office as the extension of her unpaid leave had been declined. That she had absconded her duties at the Ministry of Health and that she was still a public officer. He further stated that the 1<sup>st</sup> Respondent would no longer consider her as a member of the Board.

A member of a County Public Service Board can only be removed pursuant to the provisions of Section 58(5) of the County Governments Act states:

**(5) 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.

Article 251(1) of the Constitution 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 member's or office holder's functions or otherwise;
- (c) physical or mental incapacity to perform the functions of office;
- (d) incompetence; or
- (e) bankruptcy.

The finding above is that the Petitioner was a public officer when she was appointed on the Board. Thus it was solely upon the Petitioner to disclose that she was already a public officer. The failure to make this disclosure portrays that the Petitioner was not honest and acted in contravention of Chapter 6 of the Constitution, specifically Article 73 of the Constitution. In accordance with Article 232 of the Constitution, the Leadership and Integrity Act and the Public Officer Ethics Act, the Petitioner was expected to carry out her duties efficiently and honesty. Such integrity and honesty was breached by serving without disclosure, as a member of the County Assembly Service Board while she was a public employee on unpaid leave. I therefore find that there was a valid ground for her removal under Article 251(1)(a) of the Constitution.

Recently, in **Nicholas Rono v County Secretary County Government of Bomet & 3 others [2020] eKLR** Mbaru J. held:

*"...The outcome of such process is not addressed save in the Replying Affidavit of the clerk, Isaac Kitur dated 5<sup>th</sup> April, 2019 he avers that upon discovery that the 4<sup>th</sup> respondent was occupying two public offices at the same time contrary to the constitution barring a state officer from participating in any other gainful employment, the 2<sup>nd</sup> respondent suspended the 4<sup>th</sup> respondent on 22<sup>nd</sup> February, 2019 and stopped any benefits to him.*

*In the circumstances, the misrepresentation and concealment of information by the 4<sup>th</sup> respondent for appointment as a member of **Bomet County Assembly Public Service Board** being in breach of the Leadership and Integrity Act and also the Public Officer Ethics Act places him in bad standing to hold any public office. As set out above, having put public resources and funds into waste by deception and concealment, he does not stand in good stead."*

It is therefore my finding that the Petitioner was illegally appointed as a member of the Board contrary to the express provisions of Section 58(3)(b) of the County Governments Act. I find that there was a valid reason for the removal of the Petitioner from office.

### **Procedure**

With respect to procedure, the Petitioner avers that the 1<sup>st</sup> Respondent had no powers to remove her from office. The Respondents aver that the County Assembly debated the Report of the Joint Committee and that there was a vote of 75% as 23 out of 24 members cast their vote in the affirmative for removal of members of the Board. They submitted that the 1<sup>st</sup> Respondent's letter dated 28<sup>th</sup> May, 2018 did not terminate or suspend her.

The letter terminating the petitioner's appointment stated that the Respondents would no longer consider her as a member of the Board and that she was required to clear her desk within 12 hours while under supervision. This would ordinarily constitute a termination by the 1<sup>st</sup> Respondent.

On whether the 1<sup>st</sup> Respondent has power to terminate the Petitioner, Section 58(5) of the County Governments Act provides that a member of the Board is to be removed by a vote of not less than seventy five percent of all the members of the county assembly. Such removal under Section 58 (5) is not conferred upon a Governor but upon a vote of the County Assembly.

In elaborating the procedure to be followed in the removal of a member under Section 58 of the County Governments Act, the Court in **Meru County Public Service Board v Clerk County Assembly, Meru & 2 others [2019] eKLR** held:

*"According to the law highlighted above especially Section 58 of the County Government Act the members of the County Public Service board are nominated and appointed by the County governor with the approval of the County Assembly.*

*On procedure, this is my considered thought: constitutionally-backed prudence dictates that a proper petition should be filed in the county assembly for consideration by the county assembly in accordance with the rules of the house. Due process must also be observed in considering the petition in order to attain fair hearing and fair administrative action requirements. The petition should*

also clearly set out the grounds for removal in accordance with Article 251 of the Constitution. I am aware that the County Government Act does not prescribe a specific format which the petition ought to take. I am also aware that according to the **Black's Law Dictionary 9<sup>th</sup> Edition Pg. 1261** a petition is described as;

*“a formal written request presented to a court or other official body.”*

*Be that as it may, it bears repeating that the petition must clearly set out the grounds in a manner that it conveys the substance of the grounds for removal. This enables the person to be removed to know the case he is faced with and therefore make appropriate response thereto.”*

The Respondents did not tender any evidence that the County Assembly deliberated the Joint Committee's Report or that a Petition was tabled before the Assembly for removal of the Petitioner on the said grounds. Moreover, there is no proof that the Petitioner was prior to this informed of the allegations made against her or given an opportunity to be heard as required under Article 47 of the Constitution. I therefore find that in the absence of any evidence by the Respondents, the Petitioner's termination was devoid of the procedure set out under Section 58(5)(b) of the County Governments Act.

#### **Whether the Petitioner is entitled to the reliefs sought**

The foregoing finding is that the Petitioner's appointment as member of the County Assembly was void. As a result, this Court cannot enforce the Petitioner's rights her contract which was *void ab initio* as the same offended the provisions of the Constitution, the County Governments Act, the Public Officer Ethics Act and the Leadership and Integrity Act.

#### **In Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR the Court of Appeal held:**

*“In the case of Kenya Airways Limited versus Satwant Singh Flora (supra), the Court set out the following guidelines when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract:-*

*(i) No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.*

*(ii) **If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.***

*(iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”*

*(iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.*

*(v) In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contract.”*

[Emphasis Added]

**The upshot is that the Petition lacks merit and is dismissed in its entirety.**

There shall be no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF DECEMBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B** 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.

**MAUREEN ONYANGO**

**JUDGE**