



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 46 OF 2018

(Before Hon. Justice Mathews N. Nduma)

**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 THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF THE HOMABAY COUNTY PUBLIC SERVICE BOARD

BETWEEN

DANIEL OMONDI OGADA

DAMARIS ATIENO AMOLLO

COLLINS ODHIAMBO AGUTU

FLORENCE OUMA

CHRISTOBER ODERO LESSO

STEVE BIKO ODIDI

TOBIAS ODUNDO (members of the

HOMABAY COUNTY PUBLIC SERVICE BOARD.....PETITIONERS

AND

COUNTY ASSEMBLY OF HOMABAY.....1ST RESPONDENT

COUNTY GOVERNMENT OF HOMABAY.....2ND RESPONDENT

THE GOVERNOR OF HOMABAY COUNTY.....3RD RESPONDENT

R U L I N G

1. The Notice of Motion Application dated 2nd July, 2018 was filed on the even date seeking conservatory order restricting the Respondent

from removing the applicants as members of the Homa Bay County Public Service Board, declaring their seats vacant and/or advertising any vacancy of the members of the Homa Bay County Public Service Board and/or recruiting new members pending the hearing and determination of the suit. Temporary order was granted to that effect on 2nd August, 2018 pending the hearing and determination of this application.

2. The application is supported by grounds (a) to (f) set out on the face of the application and by the supporting affidavit of Daniel Omondi Ogada the Chairman of the Homa Bay County Public Service Board.

Facts of the Application

3. The members of the Board are on a six year contract that had not expired. The Respondents had commenced the process to remove the board members from office. The process adopted is said to be unlawful and in violation of the constitution of Kenya, 2010. The members would suffer irreparable loss if the conservatory orders are not granted.

4. The applicants stated that the removal was commenced in absence of a petition envisaged under Article 251(2) of the constitution. The 1st Respondent notwithstanding on 25th June, 2018 prepared a report on the conduct of the Chairperson, Secretary and Members of the Board for purposes of the removal. The 1st Respondent adopted the report dated 25th June, 2018. The process was not fair as it violated Article 251(1) & (2) of the Constitution. Process further violated section 58(5) of the County Government Act. That the rights of the Petitioner under Articles 47 and 50 were violated as they were condemned unheard and by the complainant and judge in one process. 1st Respondent communicated its report dated 25th June, 2018 to the 2nd and 3rd Respondents to process the removal of the board members from offices. It is clear the Board is independent and members of the County Public Service Board cannot be supervised or removed by the executive arm of the County Government. That the application be allowed with costs.

Response

5. The application is opposed by replying affidavit of Otieno Bob Kephais the clerk of the 1st Respondent (Homa Bay County Assembly). The material facts deponed in the replying affidavit may be summarized thus:-

That on 21st March, 2018 the County Assembly in exercise of its legislative authority debated a motion by Hon. Walter Muok a member of the Assembly and resolved that the committee on security and Administration conduct investigations on the compliance of section 59(1)(f) and 50(5) of the County Government Act, 2012 by the County Public Service Board.

6. The Committee tabled its report pursuant to the investigations before the Assembly on 2nd May 2018. The report was adopted by the County Assembly. The resolution was communicated to the secretary of the Board on 4th May, 2018.

7. On 3rd May, 2018, the County Assembly debated a motion by Hon. Oscar Aboholee dated 14th May, 2018 and resolved to summon the County Public Service Board Members to appear before the Committee on Security and Administration to show cause why they should not be subjected to the provisions of Article 251(1) of the constitution as read with section 58(5) of the Act. The members were to appear before the committee on 11th May, 2018 and they did appear on 11th May, 2018 where they were examined under oath.

8. The committee tabled its report dated 25th June, 2018 before the Assembly on 27th June, 2018 and the report was debated and approved by fifty one (51) Members of the County Assembly of Homa Bay for the removal of the Members of the County Assembly Service Board on grounds set out under Article 251 (1) of the Constitution.

9. On 28th June 2018, the clerk of the County Assembly communicated to the Governor of Homa Bay County, the 3rd Respondent the Assembly's resolution.

10. The 2nd and 3rd Respondents did not file any replying affidavit to the Petition regarding any steps taken by the 2nd and 3rd Respondents pursuant to the report of the 1st Respondent.

11. The 1st Respondent prays that the application be dismissed for failure to meet the threshold of granting conservatory orders. The applicant and the 1st Respondent filed written submissions on the competing arguments of facts and law.

Determination

12. The issue for determination is whether the Applicant has satisfied the requirements for grant of conservatory orders pending the hearing and determination of the Petition.

13. The principles governing the grant of conservatory orders in a constitutional petition were set out by the supreme court in **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others, SCK Petition No. 2 of 2013** in which Ojwang and Wanjala JJSC stated that:-

'Conservancy orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, hearing in mind the public interest, the

constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

14. 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 mis-conduct, whether in the performance of the members or office holder’s 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 or any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.”

15. This provision of the constitution with respect to members of County Public Service Boards was operationalized vide section 58 (5) of the County Government Act 2012, which provides that a speaker of County Assembly may be removed:-

- (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.

16. Courts have deliberated on removal of County Public Service Board members and County Assembly Public Service Board Members which are both independent bodies subjected to the threshold under Article 251 of the constitution. The requirement for removal of members of the County Public Service Board were extensively discussed in **Mundia Njeru Gateria v Embu County Government** in which the court held that the only way the members of the County Public Service Board could 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 section 58(5) (b) of the County Government Act, 2012.

17. In **Hussein Roba Boru v County Government of Isiolo & 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 by 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.”

18. It is clear that the process must be originated by a person separate and independent of the County Assembly presenting a petition to the County Assembly for consideration and resolution.

19. Furthermore, further requirements were set out by the court of appeal comprising of Musinga, Murgor and Maraga JJA in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 Others (2015) EKlR** regarding the due process of removal of members of County Public Service Board which rendition 1 opine applies Mustatis Mutandis to all members of independent constitutional bodies as follows:-

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

We are alarmed by the rampant actions of some leaders in this County in flagrant 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.”

20. In constitutional democracies like ours, the entire object of the doctrine of separation of powers, which the Appellants harped on, albeit erroneously, is to limit the powers of each of the three arms of government. As stated the mandate of the legislative authorities is limited to enactment of legislations. In addition the constitution has given the National and County Assemblies oversight roles. In discharge of those mandates we have 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 & Another v Cecilia Wangechi Ndungu, she was denied an opportunity to defend herself.”

21. We are still at the interlocutory stage in this petition and I am loathe to pronounce myself on the merits or otherwise of the Petition.

However guided by the dictates in the **Gatirau Munya Case** aforesaid, based on the inherent merit of this case, and having considered the public interest questions that arise, especially as regards the manner in which independent institutions ought to deal with each other keeping in mind the constitutional values under part six (6) of the constitution and the proportionate implications of removing members of an independent body en mass on allegations made not in a petition by a party independent of the County Assembly, we find that there is merit in confirming the conservatory orders pending the hearing and determination of the petition.

22. Accordingly the application is granted with costs and the Public Service Board, Homa Bay County as presently constituted remains in office until the petition is disposed of and/or the members' contracts of service come to an end.

Ruling Dated, Signed and delivered this 24th day of January, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Odeny for the Petitioner/applicants

M/s. Lina Akoth Dhikusoka for 1st Respondent

Chrispo – Court Clerk