



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 67 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

**HON. ELIZABETH AYOO.....PETITIONER**

**VERSUS**

**HOMA BAY COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**HOMA BAY COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant filed a Notice of Motion Application on 2<sup>nd</sup> November, 2018 seeking various reliefs.
2. Matter was heard exparte by Hon. Justice J. Rika on 6<sup>th</sup> November, 2018 and he granted orders set out as (a) to (g). The order dated 6<sup>th</sup> November, 2018 signed by the Deputy Registrar ELRC on the even date bears a penal notice that should one disobey the court order, he/she shall be in contempt of court and liable to imprisonment for a term not exceeding six (6) months.
3. Interpartes hearing took place on 10<sup>th</sup> December, 2018.
4. An application filed by the Respondent on 23<sup>rd</sup> November, 2018 to set aside the interim orders by Rika J. was consolidated with the original application and the affidavit filed in support of the application deemed to be responses to the initial application by the Petitioner. The Respondents had however filed replying affidavit to the notice of motion dated 12<sup>th</sup> November, 2018 sworn to by the clerk to the County Assembly Mr. Odhiambo Daniel Kando.
5. The Petitioner/Applicant had also on 13<sup>th</sup> November, 2018 filed a further application seeking to have the Clerk, County Assembly of Homa Bay held liable for contempt of court with regard to the order dated 6<sup>th</sup> November, 2018 and mete out harsh penalties upon the Respondents for defying the orders of court.
6. The application dated 2<sup>nd</sup> November, 2018 is supported by facts set out in an affidavit of Hon. Elizabeth Ayoo, the Speaker of the Homa Bay County Assembly and on grounds set out on the face of the Notice of Motion and numbered 1 to 20.
7. The thrust of the matter in simple terms is that the petitioner received a notice of intended removal dated 29<sup>th</sup> October, 2018 on 31<sup>st</sup> October, 2018 from the Acting clerk of the County Assembly.
8. The letter invited the Petitioner to appear on the floor of the Assembly on 1<sup>st</sup> November 2018 to respond to allegations leveled against her.
9. The Petitioner immediately notified the Acting Clerk of her inability to attend the Assembly as she was indisposed following assault by members of the County Assembly on 16<sup>th</sup> October, 2018 in the course of her duties and on the floor of the house.
10. That notwithstanding, the motion was debated and voted upon in her absence on 1<sup>st</sup> November, 2018 at 9.30 am. The Petitioner alleges that she was not accorded a hearing in violation of standing order number 63 of the Assembly and Article 50 of the constitution.
11. That petitioner was not given sufficient time to respond to allegations levelled against her for the first time in violation of articles 27, 47 and 50 of the constitution; principles of natural justice and standing orders number 50 and 63 of the County Assembly and section 22(a) of the County Governments Act, 2012.

12. That the Petitioner was removed from office by members of the Assembly by a resolution supported by 38 members out of a total of 60 members, an equivalent of 63% contrary to section 11(1) of the County Governments Act, 2012 and standing order number 58(1) which requires that a resolution for the removal of the speaker be supported by at least 75% of all members of the county Assembly.

13. That this fact is evidenced by further affidavits by 21 members of the Assembly who state that they did not participate in the debate on the material date (1/11/2018).

14. That the application be granted confirming the conservatory orders in place and the court takes steps to ensure that the orders of the court are obeyed and those in defiance of the interim orders be held in contempt of court.

### **Replying Affidavit**

15. Mr. Daniel Kando, Clerk to the County Assembly deposes as follows in reply to the application:-

That on 16<sup>th</sup> October, 2018 Assembly proceedings were disrupted by disorder in the house and petitioner formally adjourned the proceedings to 17<sup>th</sup> October, 2018 at 9.30 am (Hansard is attached for 6<sup>th</sup> & 17<sup>th</sup> October 2018).

That on 17<sup>th</sup> October, 2018 the Petitioner did not report to work. The mace was also missing and matter was reported to the police at Homa Bay Police Station. At 9.30 A.M same day, the Assembly elected a member to preside as speaker under the standing orders and proceeded with its business with the monumental mace. That the County Assembly has proceeded with its business unhindered to date.

16. On 29<sup>th</sup> October, 2018 a staff was charged at Homa Bay Magistrate Court with theft of the mace.

17. On 30<sup>th</sup> October, 2018 Assembly debated matter of the mace and resolved that it is the Petitioner who had stolen the mace and recommended the Petitioner be removed from office. The petitioner has avoided Homa Bay since 16<sup>th</sup> October, 2018 in fear of imminent arrest for theft of the mace.

18. On 1<sup>st</sup> November, 2018 the motion to impeach the Petitioner from office, receipt of which the Petitioner confirms was debated and adopted by the Assembly hence the suit.

19. That Hon. Evance Dada Marieba was sworn to serve as Acting speaker on 6<sup>th</sup> November, 2018 in the absence of the substantive speaker following resolution by the Assembly under the standing orders. 'OKK 11 & 12' are copies of the motion dated 17<sup>th</sup> October, 2018 and oath of office.

20. That the Petitioner has falsely accused several members of County Assembly of having assaulted her during the proceedings of 16<sup>th</sup> October, 2018 and caused them to be arrested and charged before the Magistrates Court in Kisumu.

21. The members believe that the Petitioner is abusing the criminal Justice process to intimidate and harass members and is abusing court process to settle political disputes she had with members who voted for her impeachment.

22. The application and the petition be dismissed with costs.

### **Further Affidavit**

23. The Petitioner filed further affidavit on 7<sup>th</sup> December, 2018 in response to the replying affidavit by the Clerk of the Assembly.

24. The petitioner reiterates the deposition in the supporting affidavit dated 12<sup>th</sup> November, 2018 and states that the Clerk is the accounting officer of the Board and the Chief Administrative officer of the County Assembly and responsible for the day to day management and functioning of the County Assembly. That the Clerk therefore be held wholly responsible for the disobedience of the court order on 6<sup>th</sup> November, 2018. It is alleged in the application dated 12<sup>th</sup> November, 2018 that the Homa Bay County Assembly Service Board and Homa Bay County Assembly through actions by the Clerk blatantly disregarded the court order issued by Rika J. by preventing the Petitioner to serve in the position of Speaker and threatened untold violence upon the Petitioner. The Clerk further purported to swear in an Acting Speaker in a process unknown to the law and in blatant disregard of the court order expressly barring such a move. The clerk continues to prevent/or restrict the petitioner from accessing her office and allocating the same along with the official vehicle of the speaker to a person illegally occupying the office. That the Clerk and the County Assembly Public Service Board have set the rule of law in disarray and defeated the ends of justice. Wherefore the Petitioner prays that the application be allowed with costs and the Respondents and the Clerk be held in contempt of court.

25. In the supporting affidavit to the application to set aside by the Respondent dated 23<sup>rd</sup> November, 2018 and filed on 26<sup>th</sup> November, 2018 the Clerk reiterates the contents of the replying affidavit referred to herein. The Clerk questions the truthfulness of the depositions by 21 County Assembly Members to the effect that they were not present and did not participate in the impeachment proceedings on 1<sup>st</sup> November, 2018. That the prayers for reinstatement of the Petitioner should only issue upon hearing and determination of the petition on merit as the relief is final in nature and cannot issue exparte.

26. That an order allowing OCS Homa Bay Police Station to provide security to the Petitioner inside the chambers of the County Assembly is unlawful as no stranger is in law, allowed in the Assembly Chambers except members of the County Assembly only. That the Speaker is

elected by members of the County Assembly and is neither appointed by the Respondents nor imposed by courts.

27. That the Petition and application are unknown to law. It is not clear if it is a constitutional petition or judicial review application or an employment dispute before the specialized court.

28. That the application is misconceived, abuse of court process and it be dismissed with costs.

### **Determination**

29. The issues that fall for determination are as follows:-

(a) Whether the Petitioner/Applicant has satisfied the requirements for grant of a conservatory order in a public law dispute.

(b) Whether the Respondents and the Clerk to the County Assembly of Homa Bay County are in contempt of court order and if so what remedies should issue against them.

### **Issue (a)**

30. The Supreme Court of Kenya in **Gitirau Peter Munya vs Dickson Mwendu Githinji & 2 Others [2015]** eKLR set out the requirements for granting interim orders with regard to public institutions as follows:-

***“(86) Conservatory orders bear a more decided public law connotation for there are orders to facilitate ordered functioning within 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 services as “prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”***

31. In the light of the above, and bearing in mind the need not to pre-determine disputes of facts that must await the hearing and determination of the Petition on the merits, the court observes that the inherent merit of this case is hinged on whether or not the provisions of the constitution, the applicable statutes and standing orders were strictly adhered to in the ouster of the Petitioner from the office of speaker of the County Assembly of Homa Bay; the 2<sup>nd</sup> consideration is whether public interest is in favour of the organs of the County Governments observing the rule of law in all their dealings internally and with external persons.

32. Thirdly, determination of public interest is intertwined with the need to ensure strict observe of the rules of natural justice and acting not in excess of constitutional and statutory mandates by authorities dealing with matters that affect the rights and freedoms of public officers concerned.

33. These matters constitute constitutional values that all Public Officers are enjoined to observe in all their dealings in the name of the Public Office held by them.

34. Considering the guidance from the supreme court above, and the competing arguments of fact and law placed before court, the merits of this case dictate that the conservatory orders granted ex parte by Hon. Rika J. on 6<sup>th</sup> November, 2018 be confirmed pending the hearing and determination of the petition.

35. Observance of the rule of Law by all public officers is paramount in the court’s view. This court is mindful of the decision of the court of appeal in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015]** eKLR in which the court clarified in detail what is meant by observance of the Rules of natural justice and that any adverse action by an authority made without a reasonable and practical grant of a fair hearing to a person; being a judge in one’s own cause, and acting in excess of constitutional and statutory mandates is unlawful null and void.

36. Accordingly, the Notice of Motion Application dated 2<sup>nd</sup> November, 2018 succeeds and the interim orders granted by Hon. Rika J. confirmed until the petition is heard and determined.

37. The court will not proceed to determine at this stage whether or not the 1<sup>st</sup> Respondent and the Clerk to the Homa Bay County Assembly are in contempt of court. However, and for the avoidance of doubt, the Petitioner is to be fully facilitated by the Respondents and the Clerk to the Homa Bay County Assembly to assume the office of speaker of the Homa Bay County Assembly without any hindrance from any persons.

38. To this extent, any business conducted by the Respondents or any other person in defiance of the orders of this court is deemed unlawful, null and void and persons involved shall be held jointly and severally liable for defeating the ends of justice and in contempt of court orders and may be summarily punished upon application.

39. For the avoidance of doubt, the orders by the court are as follows:-

(a) The Petitioner is reinstated to her position as the Speaker of Homa Bay County Assembly pending hearing and determination of the Petition. The Respondents and the Clerk, Homa Bay County Assembly, shall not in any way interfere with the Petitioner’s terms

and conditions of service as the speaker of Homa Bay County Assembly, pending hearing and determination of the Petition.

(b) That the Respondents and the Clerk, Homa Bay County Assembly are restrained by themselves or any persons acting on their behalf from interfering with the Petitioner's execution of her duties as the speaker, Homa Bay County Assembly pending hearing and determination of the Petition.

(c) The Sargent at Arms of the Homa Bay County Assembly is enjoined to ensure the orders of the court are observed to the letter.

(d) That the Respondents are restrained from appointing any other person as speaker of the Homa Bay County Assembly to replace the Petitioner and any such appointment in defiance of the orders of the court, shall be null and void ab initio pending the hearing and determination of the Petition.

(e) Any conduct/action by the Respondents, the Clerk to the Homa Bay County Assembly or any other person acting at their behest in defiance of the court orders is deemed unlawful, null and void ab initio and may be punished summarily by the court upon application.

The Respondents to pay the costs of this application.

**Ruling Dated, Signed and delivered this 7<sup>th</sup> day of February, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Owino for the Petitioner/Applicant

Mr. Kaluma for Respondents

Chrispo – Court Clerk