



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 378 OF 2016

(Before Hon. Justice Mathews N. Nduma)

PHILIP OTIENDE ADUNDO.....CLAIMANT

VERSUS

THE CHAIRPERSON, KISUMU COUNTY ASSEMBLY

SERVICE BOARD.....1ST RESPONDENT

THE KISUMU COUNTY SERVICE BOARD.....2ND RESPONDENT

THE COUNTY SECRETARY.....3RD RESPONDENT

BENSON OLOO OPIYO – KISUMU COUNTY.....4TH RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE

AND PLANNING, COUNTY GOVERNMENT OF KISUMU.....5TH RESPONDENT

THE CHIEF FINANCE OFFICER,

COUNTY GOVERNMENT OF KISUMU.....6TH RESPONDENT

J U D G M E N T

1. The claimant served as a clerk to the County Assembly of Kisumu until 14th July 2017, when he was summarily dismissed from service of the County Assembly by the 2nd Respondent, the County Assembly Service Board. The removal followed charges of misconduct by the claimant on matters raised in the letter of summary dismissal.

2. Prior to the summary dismissal, the claimant had been suspended from duty by a letter dated 1st December 2016.

3. In the Amended Statement of claim dated 1st August 2017, the claimant seek the following reliefs inter alia:-

(a) A declaration that the 1st respondent had no authority to suspend and/or dismiss the claimant and that the decision of December 1st 2016 and/or 14th June 2017 and communicated by letter dated 14th July 2017 is null and void.

(b) The court order full payments of the claimant’s emoluments due to him from the 2nd respondent from date of suspension to date.

General damages

(c) The court in the other orders sought is being asked to declare all processes leading to the suspension and dismissal of the claimant, unlawful null and void.

Memorandum of Response by 1st, 2nd and 4th Respondents

4. The 1st, 2nd and 4th respondents filed memorandum of response dated 18th July 2017. The claim is denied in its entirety and the respondents plead that the claimant was lawfully summarily dismissed from service of Kisumu County Assembly Service Board on 14th July 2017.

5. The letter of summary dismissal produced as annexure "1" to the memorandum of response dated 14th July 2017 provide the reasons for the summary dismissal to be that the claimant was charged for gross misconduct was given opportunity to defend himself and was found guilty as charged and summarily dismissed as the clerk of the County Assembly of Kisumu with effect from 14th July 2017.

6. The claimant was given 90 working days within which to Appeal the decision.

7. The minutes of the meeting held by the Kisumu County Assembly Service Board meeting held on 14th June, 2017, in which the Board unanimously resolved to summarily dismiss the claimant on grounds of gross misconduct and financial mismanagement were produced as annexure "2". The Board observed that the claimant had walked away from the meeting and refused to honour the Board invitation to defend himself.

Determination

8. On 20th February 2018 Mr. Siganga for the claimant informed the court that the parties had filed a consent in which all the pending applications were dispensed with. The claimant applied for a hearing date for the main suit. M/S Nyamita represented the 1st, 2nd and 4th respondents. On the day M/S Nyamita confirmed that the applications had been dispensed with and the matter to be given a hearing date on the mention of the case.

9. The court granted the hearing date on 5th July 2018. The claimant was to serve counsel for the 3rd, 5th and 6th respondents who were absent on the day.

10. On 5th July 2018, Mr. Siganga informed court that he had filed written submissions on behalf of the claimant. The court was informed by M/S Aron for 1st, 2nd and 4th respondents that they no longer had instructions and wished to be given time to file an application to cease acting. Mr. Achura for the 3rd, 5th and 6th respondents informed the court that the 3rd, 5th and 6th respondents did not wish to file any written submissions.

11. On 6th July 2018, M/S Aron for 1st, 2nd and 4th respondents informed court that they had obtained instructions to continue acting for the 1st, 2nd and 4th respondents. M/S Aron undertook to file submissions within 7 days. The submissions were filed on 23rd July 2017. Judgment date was granted for 6th December 2018.

12. In short, the parties did not call any witnesses to adduce evidence in support of their respective cases and solely rely on the pleadings; list of documents and written submissions. The court notes that, unlike in a petition, there is no evidence on affidavit that has been relied upon by either party in support of their respective cases.

Determination

13. The issues for determination are:-

(i) Whether the claimant was lawfully and fairly removed from office of Clerk of the Kisumu County Assembly.

(ii) Whether the claimant is entitled to the reliefs sought.

Issue i

14. The gravamen of the claimant's case is that the Chairperson of the Kisumu County Assembly Service Board has no authority to remove the claimant from the office of clerk to the Kisumu County Assembly.

15. That the decision made on 1st December 2016 and/or 14th June 2017 and communicated by letter dated 14th July 2017 be declared null and void.

16. It is important to note that the suit was first filed by the claimant on 20th December 2016 and the statement of claim was amended on 2nd August 2017.

17. The claimant purports to have served out his suspension and is statutorily entitled to resume duties as the 6 months period of his suspension has lapsed with no allegation of any misconduct proved against him.

18. That the County Assembly has by its proceedings of 13th December 2016, confirmed that the Claimant is the rightful occupant of the office of the Clerk.

19. That the County Assembly Service Board as constituted on 5th June 2017 lacked quorum and could not have conducted lawful activities.
20. That the claim be upheld as prayed.
21. The respondents have submitted that the claimant served as Clerk to the County Assembly of Kisumu up to and including 14th July 2017, when he was dismissed from service of the County Assembly by the 2nd Respondent, the County Assembly Service Board.
22. The claimant had earlier been suspended on 1st December 2016.
23. That the reliefs sought by the claimant herein have been overtaken by events specifically prayers c, e, g, h and j and any orders issued in that respect would be in vain. The claimant ceased to be an employee of the respondent on 14th July 2017 when he was summarily dismissed and therefore cannot be paid salary and allowance for work not done.
24. That the 3rd respondent replaced the claimant and has been performing the functions of the office. The fourth respondent assumed functions of that office and left it and the prayers sought have been overtaken by events.
25. Bank signatories were changed back in December 2016 and the issue is therefore moot.
26. The County Assembly Service Board, the 2nd respondent has the mandate, subject to due process to remove the claimant as the clerk of the County Assembly.
27. The claimant was answerable to the 2nd respondent and failed in his duties and was therefore lawfully and fairly removed from office by way of summary dismissal in terms of Section 44 (4) (g) of the Employment Act 2007.
28. The court had earlier ruled that the suspension of the claimant on 1st December 2016 was procedural and temporary injunction sought by the claimant was refused. Claimant was admonished by the court for drawing cause No. 367 of 2016, after failing to get interim orders and filed the present suit without disclosing the history of the matter.
29. The claimant failed to attend disciplinary proceedings to have his case heard. *In John Mose Amiga versus Dominion Vegetables Ltd Industrial Cause No. 77 of 2012. Justice Rika held:*

“The court has held in the past that where an employee portrays a belligerent attitude on being confronted with accusations of having committed an employment offence, such an employee makes it impossible to hold a civil disciplinary hearing. Amiga walked out angrily on his employer, and did not submit himself to the disciplinary process.”

30. *In Jared Aimba versus Fina Bank Ltd Industrial cause no. 525 (N) of 2009 per ... Kosgei, J. is also on point.* The court held where an employee had failed to attend a disciplinary hearing as follows:

“In the case the claimant consciously waived his legal right to a pre-dismissal inquiry by refusing to attend the inquiry. His conduct made it impossible for the respondent to hold the inquiry”.

31. The circumstances of this case are similar. The claimant did not attend the disciplinary hearing and cannot be heard to say that his right to a fair hearing and fair administrative action under *Article 50 and 47 of the constitution* were violated.
32. After all under *Articles 235 (1) of the constitution*, the County Assembly Public Service Board was responsible for the appointment and exercising disciplinary control over and removing persons holding or acting in County Offices. The statutory provisions in the County Governments Act complement this provision.
33. There is no merit in the claimant's assertion that his suspension and therefore dismissal were revoked by the County Assembly. The Assembly has no such mandate. This is the docket of the County Assembly, Public Service Board.
34. Consequently, the entire suit lacks merit and is dismissed with costs.

Judgment Dated, Signed and delivered this 7th day of March, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Siganga for the Claimant

M/S Aron for the 1st, 2nd and 4th respondents.

Mr. Amondi for the 3rd and 5th respondents

Chrispo – Court Clerk