**REPUBLIC OF KENYA**

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

**CLAIM NO. 93 OF 2018**

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

**NOAH ASANGA OKAYA.....................................CLAIMANT/APPLICANT**

**VERSUS**

**COUNTY ASSEMBLY OF VIHIGA...............................1ST RESPONDENT**

**THE GOVERNOR VIHIGA COUNTY..........................2ND RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD VIHIGA....INTERESTED PARTY**

**RULING**

1. The application dated 4th April 2018 seeks 1st and 2nd respondents be restrained from suspending or dismissing the claimant pending the hearing of the suit. The claimant is the chief of staff in the office of the 2nd respondent and appointed by County Public Service Board, the interested party.

2. The Application is supported on grounds that pursuant to an Assembly Motion dated 7th March 2018, the claimant was suspended from duty and an *adhoc* committee failed to investigate the claimant's conduct.

3. That the claimant was not given notice of such a motion nor was he heard prior to the purported suspension.

4. That the motion was actuated by malice, self-interest and improper motive. That the 1st respondent acted *ultravires* its powers and contravened *Article 2, 3, 41, 47, 50 and 236 of the constitution of Kenya 2010 and Sections 3 and 4 of the Fair Administrative Action Act 2015.*

5. The respondent opposes the application placing reliance on the threshold set out by the Supreme Court in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji and two others (2014) eKLR and in Martin Nyaga Wambora vs. Speaker of the County Assembly of Embu and 3 others Petition (2014) eKLR,*** wherein the Court held as follows:

Wambora Case

> **(59) 'In determining whether or not to grant Conservatory Orders, several principles have been established by the Courts. The first is that:…..'[an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution'**
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> **(60) To those erudite words I would only highlight the importance of demonstration of 'real danger'. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial action or redress by the court. Thus an allegedly threatened violation that is remote and unlikely will not attract the court's attention.'**
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> **(61) 'The second principle, which naturally follows the first, is whether if a conservatory order is not granted, the matter will be rendered nugatory.'**

Gatirau Munya Case

> **(86)'……….Conservatory 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 merits of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes'.**

6. The 1st Respondent submits that the claimant was appointed by the 2nd respondent as the Chief Officer. That under the *County Governments Act, 2012,* the 2nd respondent has no power to create the office of Chief Officer.

7. That only the County Public Service Board has authority Under *Section 59 of the County Governments' Act 2012 as read with Article 235 of the Constitution* to create offices in the County Public Service.

8. That under *Section 62 (2) of the Act,* approval of the County Assembly must be sought and obtained by the County Public Service Board prior to the purported establishment of any office of the County Public Service.

9. That no such approval was sought nor any was obtained in respect of the office held by the claimant. In any event no such approval could have been obtained since the office was unlawfully created by the 2nd respondent and not by the interested party.

10. That no competitive process was put in place to appoint the claimant in terms of *Article 73(2) (a) and 232 (1) (g) of the constitution as read with Section 65 (f) and 61 of the Act*.

11. That the application lacks sound basis and it be dismissed. The 2nd respondent was struck off the record upon unopposed application.

**Determination**

12. Upon a careful analysis of the competing facts and legal arguments placed by the parties before court, the court is satisfied that the threshold set in the Wambora and Munya cases (supra) has not been met by the claimant/applicant. To the contrary, the validity of the office in dispute has been seriously challenged by the respondent and valid legal and Constitutional issues arise on the matter.

13. Furthermore, the application was filed upon suspension of the claimant from office and the requirements of a mandatory injunction to reverse that position have not been met by the claimant/applicant.

14. The application lacks merit and is dismissed. Costs in the cause.

**Ruling Dated, Signed and delivered this 2nd day of May, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Lumallas for Applicant/Claimant

M/S Waudo & Company Advocates for 1st Respondent

Chrispo – Court Clerk