



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CONSTITUTIONAL REFERENCE NO. 1 OF 2018**

**IN THE MATTER OF: BREACH OF THE CONSTITUTION OF KENYA AND ESPECIALLY ARTICLES 1(1)(B), 1(4)(B), 2, 3, 10, 19, 20, 21, 22, 23, 28, 47, 50, 73, 75, 77, 174, 185 AND 197 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTION 7, 9, 12, 13 AND 14 OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF: ARTICLES 2, 3, 4, 7, 13, AND 19 OF THE AFRICAN PEOPLES RIGHTS AND OTHER PROVISIONS THEREOF**

**AND**

**IN THE MATTER OF: SECTIONS 18 AND 30 OF THE COUNTY ASSEMBLY SERVICES ACT**

**BETWEEN**

**SALESIO MUTUMA THURANIRA.....PETITIONER**

**VERSUS**

**STEPHEN KABERIA ARIMBA**

**THE SPEAKER COUNTY ASSEMBLY OF MERU.....1<sup>ST</sup> RESPONDENT**

**JUSTUS KIAMBI ARITHI**

**THE CLERK COUNTY ASSEMBLY OF MERU.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF MERU.....3<sup>RD</sup> RESPONDENT**

**COUNTY ASSEMBLY OF MERU SERVICE BOARD....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petition is instituted by the Petitioner on his own behalf and in the interests of the residents and citizens of Meru County and the Republic of Kenya in general against the Respondents for blatantly breaching the provisions of Articles 27 and 28 of the Constitution, Sections 7, 9, 12, 13 and 14 of the County Governments Act, Sections 18 and 30 of the County Assembly Act and the Public Service (Values and Principles) Act. The Petitioner asserts that the 2<sup>nd</sup> Respondent attained the mandatory retirement age way back in 2015 but had his term of employment illegally, unlawfully and unprocedurally extended in the year 2016. The Petitioner averred that the Respondents in cahoots and in connivance illegally, unlawfully and unconscionably extended the 2<sup>nd</sup> Respondent's tenure as the Clerk of the County Assembly of Meru in flagrant breach of the law. The Petitioner averred that the 2<sup>nd</sup> Respondent is not qualified to hold the said position since the 2<sup>nd</sup> Respondent does not meet the requirements stipulated under Section 13 of the County Governments Act as the 2<sup>nd</sup> Respondent does not hold a degree from a university recognized in Kenya or its equivalent. The Petitioner averred that the 2<sup>nd</sup> Respondent had long surpassed the retirement age of 60 years at the time his tenure as the Clerk of the Assembly was being extended and that the extension was in breach of Section 18 of the County Assembly Services Act. It is asserted that the extension was not open, transparent, or through a competitive process as required in law. The Petitioner asserts the extension was literally by handpicking since there was no advertisement for the said position nor

were other interested parties invited for the recruitment. The Petitioner averred that the extension of the 2<sup>nd</sup> Respondent's tenure was in violation of Section 30 of the County Assembly Services Act as the provision expressly states that an employee of a county assembly shall retire upon attaining the age of 60 years. The Petitioner asserts that there is no room for extension of the tenure of employment and on achieving the age of 60 years the 2<sup>nd</sup> Respondent should have retired mandatorily. The Petitioner averred that the unilateral extension 2<sup>nd</sup> Respondent's term of employment was unfair and did not entail what is expected when appointing or promoting a public officer as enshrined in Section 10 of Public Service (Values and Principles) Act. The Petitioner averred that the 2<sup>nd</sup> Respondent breached Article 75 (1) of the Constitution by compromising the public interest in favour of his personal interest which amounted to breach of the law and that as such the purported extension is illegal, null and void *ab initio*. The Petitioner averred that courtesy of the said extension of the 2<sup>nd</sup> Respondent's term, the 2<sup>nd</sup> Respondent continues to draw a salary and other emoluments and privileges to the detriment of the public coffers and the continued occupation of office as clerk of the County Assembly of Meru is a hindrance to good governance, is an abuse of office and the epitome of impunity. The Petitioner averred that the 1<sup>st</sup> Respondent has equally played a major role in the machinations, flagrant breach of the law and generally acting against national values and principles of good governance and should similarly be held liable. The Petitioner thus prayed for a declaration that the purported extension of the 2<sup>nd</sup> Respondent's employment from 28<sup>th</sup> April 2018 to 27<sup>th</sup> October 2019 is unlawful, illegal and contravenes the provisions of the Constitution, the County Government's Act, the County Assembly Services Act and the Public Service (Values and Principles) Act; a declaration that the 2<sup>nd</sup> Respondent is illegally in office as the clerk of the County Assembly of Meru; an order surcharging the 2<sup>nd</sup> Respondent to refund all the salaries, emoluments, and other benefits obtained courtesy of his position as the clerk of the County Assembly of Meru from 28<sup>th</sup> April 2018; an order declaring the Respondents' decision to extend the employment term of the 2<sup>nd</sup> Respondent as unlawful, illegal and null and void *ab initio*; and any other order that the court may deem just and equitable in the circumstances to grant. The Petitioner also sought costs of the suit.

2. In opposition to the Petition, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn by himself and on behalf of the other Respondents. He deponed that he has been serving as a clerk of the County Assembly of Meru since the year 2013 and that he was supposed to retire upon reaching 60 years of age on 27<sup>th</sup> October 2016 as shown in the notice of retirement that was issued to him. He deponed that he however made an application for extension of the term of contract for a further one and half years effective 27<sup>th</sup> October 2016. He asserts that the 4<sup>th</sup> Respondent made some observations including whether he had the requisite qualifications and were satisfied. He deponed that his retirement date was close to the end of the tenure of the 3<sup>rd</sup> Respondent and that it would have been unfavorable to its continuity and that there were some key projects he had initiated that had to be completed. He deponed that it was on this basis that the 4<sup>th</sup> Respondent extended his contract for one and half years to 26<sup>th</sup> April 2018 as evidenced by the minutes of the County Public Service Board meeting held on 13<sup>th</sup> May 2016. He deponed that on 23<sup>rd</sup> May 2017 made a further application for extension of the contract from one and half years to four years so that it could end on 26<sup>th</sup> October 2020. He deponed that he received a letter on 15<sup>th</sup> June 2017 from the 1<sup>st</sup> Respondent informing him that the 4<sup>th</sup> Respondent had recommended that his application be allowed extending the contract to 26<sup>th</sup> October 2019. He deponed that the 3<sup>rd</sup> Respondent also approved the said recommendation and that the applications were legally valid, transparent and procedural as they were approved by both the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the proposals for extension were publicly debated by the 3<sup>rd</sup> Respondent and passed. He deponed that he was qualified and that the Petitioner failed to substantiate the allegations of lack of qualifications of the 2<sup>nd</sup> Respondent. He deponed that the burden of proof lies on the Petitioner to do so. He deponed that the Petitioner deliberately avoided Section 80(2) of the Public Service Commission Act, which allows for extension of contract after retirement age which threshold was met while engaging the 2<sup>nd</sup> Respondent for the services. The 2<sup>nd</sup> Respondent deponed that the Petitioner has failed to appreciate that the contract between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent was negotiated and signed before the County Assembly Services Act was enacted and that the said Act came into force in July 2017 hence it does not outlaw contractual employment beyond 60 years and it does not have any retrogressive application. The 2<sup>nd</sup> Respondent deponed that the Petitioner and his counsel developed bad blood against the whole institution of County Assembly of Meru since they lost their candidature for the position of the speaker of the County Assembly of Meru and vowed to teach the management of the institution a lesson and that they had therefore brought several petitions against the County Assembly of Meru in the last one year and that proves that the current petition is out of malice and is aimed at achieving selfish interests. The 2<sup>nd</sup> Respondent deponed that it is in public interest that he be allowed to serve the term of the contract until it's expiry as any termination before then would be contrary to his legitimate expectation and also would render the contract more expensive to satisfy as the 3<sup>rd</sup> Respondent would have to pay for the remaining term of the contract at the expense of tax payers as Article 236 of the Constitution prohibits dismissal of a public officer without due process of the law. The 2<sup>nd</sup> Respondent deponed that the Respondents have always followed the law and more specifically the provisions under the bill of rights throughout the process of recruiting, retaining and terminating of employees and therefore it is unfortunate and suspicious that the Petitioner is raising the issue beyond two years after the extension of the contract while the information has been in public domain. The 2<sup>nd</sup> Respondent finally deponed that it would be in the best interests of justice that the Petition be dismissed as it is misguided, malicious and discloses no viable cause of action.

3. This petition was canvassed by way of submissions and the Petitioner's submissions tried to answer three questions.

- i. Whether the 2<sup>nd</sup> Respondent met the basic requirements as required by Section 13 of the County Governments Act,
- ii. Whether the 2<sup>nd</sup> Respondent's employment tenure was illegally extended,
- iii. Whether the mandatory retirement age of 60 for a civil servant can be extended.

The Petitioner submitted that Section 13(ii) of the County Governments Act gives the mandatory requirements that one has to meet to be appointed a clerk of the County Assembly. Those requirements include being a citizen of Kenya, must hold a degree from a university recognized in Kenya or equivalent, must have at least five years relevant professional experience and must meet the requirements of leadership and integrity set out in Chapter Six of the Constitution. If one misses one of the qualifications in Section 13 (ii), then he or she does not qualify to be appointed to the position of the clerk to the County Assembly. The petitioner submitted that the 2<sup>nd</sup> Respondent does not hold a degree from a university recognized in Kenya or equivalent, and that if at all the 2<sup>nd</sup> Respondent did then he could have annexed and exhibited the same to his replying affidavit or filed it as part of the documents that he wished to rely on. The Petitioner submitted that it was amply clear that the 2<sup>nd</sup> Respondent did not qualify to hold the position of the clerk of the County Assembly from the year 2013 when he

was initially appointed and hence the court should declare his appointment a nullity *ab initio*. The Petitioner relied on the Supreme Court decision in the case of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2019] eKLR** in his rebuttal of the 2<sup>nd</sup> Respondent's allegation that the burden of proof that the 2<sup>nd</sup> Respondent did not have a degree shifted to the Petitioner. It was submitted that the court pronounced itself as follows "I do not think that the use of the term "forgery" connotes a criminal or quasi criminal intent requiring proof beyond reasonable doubt. It was an ordinary challenge of the authenticity of the appellant's said certificate which, as is the law in electoral disputes, required proof to a standard higher than that of a balance of probabilities but below beyond reasonable doubt. The Petitioner submitted that the 2<sup>nd</sup> Respondent is a civil servant courtesy of the Constitution and the County Government Act and that Section 18 of the County Assembly Services Act provides for the criteria of appointment of the clerk of the county assembly. It was submitted that however, from the pleadings on record the process even though mandatory was not followed during the two extensions of the 2<sup>nd</sup> Respondent's tenure after he attained the retirement age. The Petitioner submitted that this in effect makes the two extensions irregular and illegal. It was submitted that it is obvious from the 2<sup>nd</sup> Respondent's replying affidavit that he was handpicked since the process was not open, transparent and competitive. The Petitioner submitted that Section 30 of the County Assembly Service Act has no room for extension of retirement age for an employee to a county assembly who has attained the mandatory retirement age of 60 years. He relied on the case of **Siro Andrew Leo Obaga v Judicial Service Commission [2017] eKLR**. The Petitioner submitted that the unilateral extension of the 2<sup>nd</sup> Respondent's tenure flies on the face of Section 10 of the Public Service (Values and Principles) Act since it was unfair and did not comply with what was expected when appointing or promoting a public officer under the said section. The Petitioner submitted that the two extensions of the 2<sup>nd</sup> Respondent's tenure was illegal, null and void *ab initio* and further submitted that Section 80 (2) of the Public Service Commission Act does not apply to the 2<sup>nd</sup> Respondent who is a state officer. He cited Article 234(3) of the Constitution which states that the functions and powers of the Public Service Commission do not apply to state officers such as the clerk of the County Assembly who is a state officer as envisaged under Article 260 of the Constitution. The Petitioner submitted that the 2<sup>nd</sup> Respondent's reasons for the extension were to clear his outstanding loans and that this shows that the extension was for his own selfish benefit. The Petitioner submitted that the 2<sup>nd</sup> Respondent also sat as a secretary in the meetings that discussed his extension which was brazen and unethical. The Petitioner submitted that based on that fact the court should find the said extension illegal, unlawful and unconstitutional and allow the petition as prayed.

4. The Respondents submitted that the following issues were for determination

- i. Whether the Petition meets the threshold for constitutional petitions
- ii. Whether the 4<sup>th</sup> Respondent acted within the law in extending the contract of service of the 2<sup>nd</sup> Respondent
- iii. Whether the court should interfere with the statutory authority and scope of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, and lastly
- iv. Whether the reliefs sought should be granted.

5. The Respondents submitted that the Petition does not meet the threshold as it does not *prima facie* satisfy the conditions necessary for a constitution petition to be successful and that the claims made are not constitutional in nature but are alleged breach of statutory provisions for which there are other avenues for redress, the petition is brought too late in the day and as such it would be an academic exercise for the Court to delve into its merits. The Respondents relying on the case of **Anarita Karimi Njeru v R (No.1) [1979] KLR 154**, submitted that the Petitioner failed to plead in a precise manner the constitutional provisions said to have been violated, the manner of infringement and the jurisdictional basis for it. Similarly, no evidence was supplied to this court showing breach of each of the stated clauses, and the Petitioner's submissions are devoid of any concrete representation on the said breach worth the intervention of this court. The Respondents submitted that this suit should have been brought in the necessary mode as a civil suit as there are no constitutional issues in it for determination. The Respondents relied on the case of **Godfrey Paul Okutoyi v Habil Olaka [2015] eKLR** where the court held that "what I find is a general pleading on breach of a statutory provision capable of redress in a normal suit and not through a constitutional petition." The Respondents also relied on the case of **Mohamed Abdi Mohamud v Abdulahi Mohamad & 3 Others [2019] eKLR** and submitted that the Petitioner should have raised the issue of the alleged lack of a degree with the 4<sup>th</sup> Respondent and if the same failed to be addressed, then he should have raised it through judicial review as the Supreme Court found at paragraph 78 of the said judgment. The Respondents submitted that the Petitioner approached this honorable court too late in the day since whatever orders that this court may make on the substantive questions raised will have been overtaken by events by the time such orders will be made as the 2<sup>nd</sup> Respondent is expected to commence the mandatory leave pending expiry of his tenure on 26<sup>th</sup> October 2019 as per the County Assembly Services Act. The Respondents relied on the case of **Olive Mugenda Mwiwaki & Another v Okiya Omtata Okoiti & 4 Others [2016] eKLR** where it was held that "in our view, this ground of appeal has been overtaken by events and this Court cannot act in vain in making a determination on the same. The Respondents placed reliance on the case of **Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others [2016] eKLR** which was on similar grounds. The Respondents submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents within the provisions of Section 18 of the County Assembly Services Act and Section 10 of the County Government Acts and followed the necessary steps and acted within the law in extending the 2<sup>nd</sup> Respondents term of employment. The Respondents submitted that at the time of the said extension there was no express provision in the County Government Act that prohibited the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from extending the 2<sup>nd</sup> Respondent's contract of employment. The Respondents submitted that Section 22 and 23 of the County Assembly Services Board Act provides for the procedure for removal of a clerk from office and that bypassing that procedure and filing this case the Petitioner is interfering with the statutory mandate of the Respondents and this court should not entertain this Petition as it is premature, defective and without any standing in law. It was submitted that furthermore, the Petitioner's allegations are not substantiated and the 2<sup>nd</sup> Respondent maintains that he met all the requirements for the said position. The Respondents submitted that the documentation relating to the 2<sup>nd</sup> Respondent's qualifications are a public record available for viewing at the relevant County Offices and should have been freely and easily accessed by the Petitioner at any time and that it is therefore improper for the Petitioner to try and shift the burden of proof to the Respondents. The Respondents relied on the case of **Mbuthia Macharia v Annah Mutua Ndwiga & Another [2017] eKLR** where the court observed that it is mandatory for the alleging party to prove their allegations before the burden can shift. The Respondents submitted that the County Government Act does not prescribe the mandatory retirement age of a County Public Officer and that the provisions for the retirement age of 60 years is found in in the County Assembly Services Act which came into force in 2017 long after the extension had been given. The Respondents cited the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another [2012] eKLR** and submitted that the said Act cannot apply retrospectively as the 2<sup>nd</sup> Respondent was already in office when the Act commenced. The Respondents submitted that however, if the court

finds that the 2<sup>nd</sup> Respondent ought to have retired at the age of 60, then it should be guided by Section 80 of the Public Service Commission Act and the decision in **Okiya Omtatah v Kenya Revenue Authority Board of Directors & Another** (*supra*) where the court observed that *the employing agency has authority to extend ones terms of service beyond 60 years provided such extension is contained in a fixed term contract*. The Respondents submitted that the Petitioner failed to prove that the 2<sup>nd</sup> Respondent's performance has in any way been impaired by age as age has not been an impediment to the effective conduct of the 2<sup>nd</sup> Respondent's duties during the duration of his contract. The Respondents submitted that the Petitioner should not be granted prayers for reasons of age as that is discriminative. The Respondents submit that the Petitioner failed to provide any evidence that the 2<sup>nd</sup> Respondent violated Section 10 of the Public Service (Values and Principles) Act as the extension was done openly and in a transparent manner. The Respondents submitted that it would be against public policy to surcharge the 2<sup>nd</sup> Respondent for the time served after he turned 60 years, as he has been performing his duties for which he is entitled to remuneration.

6. The Petitioner replied to the Respondent's submissions and submitted that whether the 2<sup>nd</sup> Respondent is due to retire or not, the extensions given to him were illegal and the Petitioner could challenge the same at any time even after the 2<sup>nd</sup> Respondent's retirement and so the Petitioner is indeed within the time frame to do so. He further submitted that Section 22 of the County Assembly Services Act does not envisage a situation for removal of a clerk who lacks the requisite qualifications and whose employment contract has been illegally extended and that it was the 4<sup>th</sup> Respondent that had extended the 2<sup>nd</sup> Respondent's contract, hence it would not be possible for the same to sit on appeal or deliberate its own decision. The Petitioner submitted that the 4<sup>th</sup> Respondent lacks jurisdiction to deal with issues before this court. It was submitted that Section 22 is additionally not couched in mandatory terms hence it does not oust the jurisdiction of the court. The Petitioner submitted that the 2<sup>nd</sup> Respondent by sitting in the meetings that deliberated his extension as a secretary means that he was the complainant, the prosecutor as well as the judge an event that should have no place in this country and democratic space. It was urged that the Petition be allowed as prayed.

7. The Petitioner has challenged the extension of the 2<sup>nd</sup> Respondent's tenure as clerk of the County Assembly of Meru. It was argued that the extensions made were illegal and not fit in the democratic space that is hard won in Kenya. Article 232(1)(g) of the Constitution provides that the values and principles of public service include fair competition and merit as the basis of appointments and promotions. Section 5(1) (g) of the County Assembly Services Act, 2017 provides that the County Assembly Public Service shall uphold *inter alia* the inspiration of public confidence in and respect for the county assembly. Section 65(1) of the County Governments Act, 2012 provides that in selecting candidates for appointment, the County Public Service Board shall consider the standards, values and principles set out in Articles 10, 27(4), 56(c) and 232(1) of the Constitution and the need for open and transparent recruitment of public servants *inter alia*. In addition, Section 80 of the Act provides that the mandatory retirement age for a county public officer generally or for any category of public officers, shall be prescribed by policy of the national government. The age of retirement of public officers is 60 years. It is not disputed that the 2<sup>nd</sup> Respondent has attained the age of 60 years and has had his tenure extended twice in circumstances that have triggered this Petition. The deliberations of the 4<sup>th</sup> Respondent whereat the 2<sup>nd</sup> Respondent's tenure was extended are not exhibited. Whereas there would be ground to challenge the continued holding of office by the 2<sup>nd</sup> Respondent, the Petitioner has failed to provide the proof of the incompetence of the 2<sup>nd</sup> Respondent, to wit, the absence of a degree from a recognized institution. The upshot of the foregoing is that the Petition is not merited and is dismissed with costs to the Respondents.

It is so ordered.

**Dated and delivered at Nyeri this 30<sup>th</sup> day of July 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**