



**REPUBLIC OF KENYA**

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

**PETITION NO. 32 OF 2019**

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

**HON. GEORGE ONYANGO OLOO..... PETITIONER**

**VERSUS**

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

**KISUMU COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**HON. ELISHA JACK ORARO.....1<sup>ST</sup> INTERESTED PARTY**

**OCS. KISUMU CENTRAL POLICE STATION.....2<sup>ND</sup> INTERESTED PARTY**

**HON. ELIUD OWEN OJUOK.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

1. Cause no. 85 of 2019 County Assembly of Kisumu and another vs George Onyango Oloo was consolidated with Petition 32 of 2019, Hon. George Onyango Oloo vs Kisumu County Assembly and 3 others by consent of the parties entered into before court on 22<sup>nd</sup> October 2019. In terms of the consent, the interlocutory application dated 27<sup>th</sup> September 2019 was dispensed with and the parties agreed to proceed with the merits of the consolidated suit.

**Petition**

2. The petitioner filed the petition on 27<sup>th</sup> September 2019 praying for the following orders that:

(a) A declaration do issue that the removal from office and the blocking of the Petitioner from accessing his office by the County Assembly of Kisumu and their agents was and is illegal, null and void and contrary to Articles 1; 2; 10; 27; 28; 41; 47; 50 and 178(1) of the Constitution of Kenya 2010 as read with the County Governments Act Section 11 the County Assembly Service Act and the Standing orders No. 61(1) and (5) of the County Assembly of Kisumu Standing Orders; the Employment Act of Kenya; and the Fair Administrative Action Act.

(b) An order of compensation do issue pursuant to Article 23 of the Constitution directing the County Assembly of Kisumu to pay damages to George Onyango Oloo, the Petitioner herein, for the violation and contravention of their fundamental rights and freedoms.

(c) An order do issue pursuant to Article 23 of the Constitution reinstating George Onyango Oloo as the Speaker of the County Assembly of Kisumu.

(d) An order do issue pursuant to Article 23 of the Constitution quashing and declaring illegal and unconstitutional the decision contained in the letter dated 19<sup>th</sup> September, 2019 and referenced CAK/VEHICLES/2019/09/03/2; and the resolution by the County Assembly of Kisumu as contained in the Hansard of 18<sup>th</sup> September, 2019 whose effect is the removal of Honourable George Onyango Oloo as the Speaker of the County Assembly of Kisumu.

(e) An order do issue pursuant to Article 23 of the Constitution reinstating all the benefits. Allowances, privileges and entitlements of Hon. George Onyango Oloo as the Speaker of the County Assembly of Kisumu, as were enjoyed by him by virtue of his position as the Speaker of the County Assembly of Kisumu.

(f) The OCS, Kisumu Central Police Station does oversee the implementation of this Court's Orders.

(g) An order do issue restraining the respondents from conducting election for the Office of the Speaker and or gazetting the election of the Speaker pending the hearing and determination of the application.

(h) An order to issue restraining the respondents from conducting election for the office of the Speaker and or gazetting the election of the Speaker pending the hearing and determination of the Petition.

(i) An order do issue restraining the respondents and/or Interested Parties from charging the accounts of the Assembly other than through the Assembly Service Board as duly constituted at the commencement of the Second Assembly pending the hearing and determination of the application.

(j) An order awarding costs of the Petition to the Petitioners.

(k) Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms.

3. The Petition is based on the facts set out in the petition itself and the attachments to the petition marked exhibit "GOO 1 TO 6 at page 1 to 106 of the supporting documents.

4. The nub of the petition is as follows:-

5. On 18<sup>th</sup> September 2019, the County Assembly of Kisumu illegally and unconstitutionally impeached and/or removed the Petitioner from his position as the Speaker of the Kisumu County Assembly in that on 18<sup>th</sup> September 2019, the Petitioner received an email at 1.26 p.m. to appear before the County Assembly pertaining sitting on Wednesday 18th September 2019 at 3 p.m. The Petitioner was required:

***"To defend yourself against allegations labeled against you in accordance with Article 50 of the Constitution and standing order No. 61(5) of Kisumu County Assembly Standing Orders"***

6. A copy of an impeachment motion was attached signed by the member of County Assembly, Kondele ward Honourable Joakim Oketch in which ten (10) allegations are set against the petitioner which may be summarized as follows:

(i) The Speaker has failed to conduct house proceedings in a free, fair objective and impartial manner contrary to Article 73(2) (b) of the constitution.

(ii) The speaker has demonstrated incompetence by flouting standing orders of the house.

(iii) The Speaker has abused his powers by suspending three members of the County Assembly namely Hon. Jactone Ojwang Ogendo; Hon. Joseph Opiyo Olale and Hon. Joakim Oketch Omieno.

(iv) The Speaker has contrary to Section 147 of the Public Finance Management Act No. 18 of 2012 assumed the role of Accounting Officer which remit belongs to the Assembly clerk.

(v) The Speaker has misused public resources by maintaining a group of hired goons in a government office since his election who are paid money from the County Assembly coffers.

(vi) It is in the public domain that the speaker has been charged in the Chief Magistrate's Court at Milimani, Anti-corruption case No. 26 of 2019 over Lake Basin Development Authority and to bring dignity and honour to the office of speaker of the Kisumu County Assembly and public confidence in the integrity of the office as envisaged under Article 73(1) (a) (iii) and (iv) right thing to do for the speaker is to resign from the public office until the investigation is concluded.

7. The Notice of Motion was in terms of *Order 61(1) (2) (3) (4) and (5) and Section 11(1) (2) (3) and (4)* of the County Government Act no. 170 of 2012.

8. The notice of motion was on the same date confirmed and approved for being placed before the Assembly for deliberations.

9. The petitioner alleges violation of *Article 178(2)* of the constitution by removing him and replacing him by an Acting Speaker, the interested party herein.

10. The petitioner states that the removal was in violation of Articles 10, 21, 25, 27, 28, 41, 47, 50 and 232 of the constitution and standing orders 61(1) (5); 154 in the manner described in the petition. In particular, the petitioner alleges violation of his rights to fair hearing; equality and equal protection before the law; fair administrative action; human dignity and fair labour practice. Wherefore the petitioner prays for the reliefs sought

### **Replying Affidavit**

11. The petition is opposed vide the replying affidavit of Elisha Jack Oraro the Acting Speaker of the County Assembly of Kisumu who deposes as follows *inter alia*:

12. That the Petitioner was charged at the Anti-Corruption court in **Milimani CMC Anti-corruption case no. 26/2019 Republic vs George Onyango Oloo and 17 others** in respect of his role as the Chairman of the Board of the Lake Basin Development Authority which position caused the members from whom he derived his mandate to elect, the deponent on 14<sup>th</sup> September 2019 as the Acting speaker in the absence of the petitioner pursuant to Article 178(2) (b) of the constitution as the petitioner clears his name.

13. That this was done pursuant to the leadership and integrity chapter of the constitution and Section 62 of the Anti-corruption and Economic Crimes Act bearing in mind that the offence involved a mega project within Kisumu County. That the office of the speaker would be demeaned were the petitioner to remain in office while he faced the criminal charges facing him.

14. That the speaker runs a budget of about Kshs. 700,000,000 per year which obligation calls for high standard of integrity on the person vested with the said position to safeguard the public interest.

15. That the deponent was aware that Justice Mumbi Ngugi in **Nairobi HC ACEC Crimes Division no. 25 of 2019, citing Madras High Court in R. Ravichadran, vs the additional commissioner of police** held:

*“Allowing a person charged with serious acts of corruption or any other misconduct, involving*

*moral turpitude to discharge his duties and enjoy the fruits of the post would be against a public policy and it would not be in public interest or to maintain a clean and effective administration”*

16. That 29 members of the Assembly filed a petition dated 10<sup>th</sup> September 2019 under Article 178(2) of the constitution and standing order, No. 13(1) of the Assembly standing orders seeking to elect an Acting Speaker, which petition was adopted leading to the generation of a supplementary order paper.

17. That the petitioner having been removed from the office ought to relinquish possession of motor vehicle 42C9039A which is in his possession by virtue of having been elected speaker of the County Assembly of Kisumu, position he has lawfully been relieved of in the interim.

18. That the County Assembly acting under Section 11 of the County Governments Act 2012 and standing order No. 61 of the County Assembly of Kisumu passed a resolution by 42 members constituting more than seventy five percent (75%) of the membership and dated 16<sup>th</sup> September 2019 impeaching the petitioner and thereby terminating the subsisting contract of service between the petitioner and the 2<sup>nd</sup> respondent. That prior to that, the House Business Committee had met on 17<sup>th</sup> September 2019, under the Chairmanship of the deponent, who is Acting Speaker which committee came up with a new schedule running from 18<sup>th</sup> to 25<sup>th</sup> September 2019 where the removal of the speaker was discussed and minuted.

19. That there was nothing untoward or unprocedural in the manner, the impeachment motion was originated, scheduled, tabled, discussed and passed. That the order paper of 17<sup>th</sup> September 2019 at 2.30 p.m. captures the notice of removal of the speaker and the same was slotted for hearing the following day on 18<sup>th</sup> September 2019 at 2.30 p.m. under Standing Order No. 61 (5) of the County Assembly of Kisumu.

20. That all the requisite procedures were followed. The petitioner was duly notified but failed to turn up and the impeachment motion was duly passed by the house in his absence. That receipt of the motion of impeachment is not disputed by the petitioner. That the speaker was at the Assembly at 9.00 am in the morning of 18<sup>th</sup> September 2019 accompanied by hired goons and attempted to force entrance into his former offices at the County Assembly of Kisumu in an exercise that caused commotion and which was widely reported in mass and social media. That the petitioner addressed a press conference where he acknowledged receipt of the notice of motion stating that it was not a proper notice of motion according to the standing orders but promised to come back to the Assembly at 2.30 p.m. That the petitioner was not present at the Assembly at 3 p.m. of 18<sup>th</sup> September 2019, when the motion was debated and passed by 42 members.

21. The respondents filed further affidavit sworn by Kenneth Onyango leader of the majority party, the Orange democratic Movement (ODM) in opposition to the petition. The deponent attested to the regularity of the proceedings that culminated in the removal of the speaker, the petitioner herein and prays that the petition be dismissed with costs.

22. Wherefore the respondents pray the petition be dismissed with costs and the prayers for the release of the official car of the speaker to the respondents and other assets now held unlawfully by the petitioner be granted.

**Determination:**

23. The issues for determination are as follows:

- (a) Whether the removal of the Petitioner from office of speaker of County Assembly of Kisumu by the 2<sup>nd</sup> Respondent was lawful and procedural.
- (b) Whether the petitioner should return the assets belonging to the 2<sup>nd</sup> Respondent including motor vehicle Registration No. 42CGO39A – Toyota Land Cruiser.

(c) Whether the Petitioner is entitled to the reliefs sought.

**Issue (a)**

24. The parties filed written submissions and list of authorities in support of their respective positions and the court recognizes their industry in this respect. Counsel for the petitioner Mr. Muga Apondi assisted by Mr. Maurice Ouma made comprehensive highlights of their written submissions before court whereas Mr. Philip Rodi assisted by Mr. Ongoya delivered spirited oral submissions in rebuttal to those made by Counsel for the Petitioner.

25. The court shall not regurgitate the facts set out in the petition and the replying and further affidavits by the parties but will proceed to determine the issues in dispute without much ado.

26. The petitioner did not join issues with the comprehensive response to the petition set out in the replying affidavit of Elisha Jack Oraro the Acting Speaker of the County Assembly of Kisumu and further Affidavit of Kenneth Onyango Leader of the majority party whose contents traversed the averments by the petitioner in the petition and contradicted in material respects the facts set out in the petition under the title “contravention of the constitution and the law” in paragraphs 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44(a) to (f) and 45 of the petition. The petition itself was not supported by any affidavit sworn by the petitioner except that the notice of motion dated 27<sup>th</sup> September 2019, filed by the petitioner at the same time with the petition, that was subsequently compromised by the parties was supported by supporting affidavit by the petitioner George Onyango Oloo sworn on 27<sup>th</sup> September 2019 in which the petitioner attested to similar facts as those set out in the body of the Petition.

27. It is pertinent to note that neither of the parties has questioned the authenticity of the Hansard record of the proceedings of the County Assembly of Kisumu on the mentioned material dates which sets out the true record of the proceedings in the Assembly which led to the impeachment and removal from office of the petitioner and the appointment of the Acting Speaker, the interested party herein. The facts set out in the hansard are therefore proven facts and the court treats them as such in the context of this judgment.

28. Whereas about ten (10) allegations were made against the Speaker in the Notice of motion that led to his removal, the most critical matter impacting this petition is the allegation made that the petitioner had been charged in the Chief Magistrate’s court at Milimani Anti-Corruption Case no. 20 of 2018 over theft of public funds while he served as the Chairman of Lake Basin Development Authority.

29. It is important to note that this fact has not been denied by the Petitioner. It is therefore a proved fact that the Petitioner faced criminal charges involving allegations of corruption whilst serving a public office within the County of Kisumu. These charges were pending at the time the impeachment proceedings took place between the 10<sup>th</sup> and the 18<sup>th</sup> September 2019.

30. The court finds as a proved fact that the notice of motion for Removal of the Speaker was introduced in the house on 17/9/2019, and was slotted for debate on 18/9/2019 at 2.30 p.m.

31. The court further finds as a proved fact that the motion was debated at 3 p.m. on 18/9/19 on the floor of the County Assembly and a resolution was passed by 42 members of the County Assembly of Kisumu which number constitutes 75% of the membership of the County Assembly to impeach and remove the Petitioner from office.

32. These facts have not been denied by the Petitioner except to state that he was not given opportunity to defend himself in violation of Article 47 and 50 of the Constitution thereby violating his constitutional rights to a fair hearing and fair administrative action consequent upon his right to equal protection by the law and right to human dignity were violated by the resulting unlawful and unconstitutional removal from office.

33. Disputed facts were presented to court as to whether the Petitioner was prevented from accessing the County Assembly Chambers at the time the motion for removal was debated at 2.30 p.m. The Petitioner

alleges that he was blocked by goons outside the county Assembly from accessing the Chambers. The Respondents have deposed that the Petitioner was on 18/9/2019 at the house at 9.00 am accompanied by goons and had caused commotion by attempting to enter his former office, already occupied by the interested party in acting capacity which attempt was repulsed and the Petitioner had left the Assembly premises and held a press conference thereafter in which he promised to attend the plenary session at 2.30 in the afternoon to defend himself.

34. It came to pass that the Petitioner did not attend the plenary session and the motion for removal was presented in his absence effectively removing him from the Office of the speaker.

35. The Petitioner bears the primary onus of proving on a balance of probabilities that he was blocked from attending the plenary session to defend himself it being clear that he had been served with the Notice of Motion to impeach him the day before and was aware that the hearing of the motion would take place on 18/9/2019 at 2.30 p.m.

36. Further, it is incumbent on the Petitioner to prove on a balance of probabilities that the 2<sup>nd</sup> Respondent had no just cause to cause his removal and that the procedure leading to his removal violated the standing orders of the house, the statutory provisions under the County Governments Act, 2012 and the relevant provisions of the Constitution especially Articles 2, 10, 21, 27, 41, 47, 50, 178, 232 and 259 of the Constitution of Kenya 2010 under which the Petition is premised.

37. The court has considered the competing facts of this case *vis a vis* the relevant provisions of the law.

38. In particular the court has considered the threshold of impeachment of a Speaker set out by the Court of Appeal in **Nairobi Appeal No. 18/2016, Nick Githinji Ndichu –vs- County Assembly of Kiambu and 3 others** in which the Court of appeal referred to the Court of Appeal decision in **County Assembly of Kisumu and 2 others –vs- Kisumu county Assembly Service Board and 6 others as follows:-**

***“Standing Order 58 of the 1<sup>st</sup> Respondent’s standing orders which mirrors word for word Section 11 of the County Governments Act requires four conditions to be met before impeaching a County Speaker. First, there must be a formal notice to the Clerk of the County Assembly stating the grounds of removal and signed by at least a third of the members of that County Assembly. Secondly the speaker must be accorded an opportunity to respond; thirdly the proceedings must be presided by a member elected under Section 9(4) of the Act and fourthly, the resolution to remove the speaker must be passed by at least seventy five percent (75%) of the members.”***

The Judges went on to say,

***“There is a reason why the threshold for the removal of the Speaker is that high. The reason was given in the judgment thus;***

***(85) Impeachment or removal from office is a drastic step with serious ramification on the career of an individual. It can easily consign an individual to professional oblivion. That is why Lord Denning cautioned in Selvajaran –vs- Race Relations Board that “the fundamental rule is that, if a person may be subjected to pains and disabilities or be exposed to prosecution or proceedings or to be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. (86) It follows that in impeachment proceedings, due process must be followed to the letter. The impeachment procedural provisions set out in any statute in this case the County Governments Act must be strictly complied with.”***

39. With those observations, the Court of Appeal upheld the decision by Nderi Nduma J. rejecting the petition by the deposed Speaker of County Assembly of Kiambu and concluded;

***“To our mind, there were impeachable indiscretions on the part of the appellant and he cannot be heard to complain that they were minor indiscretions that could have been ignored.”***

40. In the present matter, the conditions precedent to an impeachment of the Speaker were met from an analysis of evidence before the court. A formal Notice to the clerk of the County Assembly stating the grounds of removal and signed by 29 members of the County Assembly were filed and served on the Petitioner via e-mail. The petitioner was invited to attend the hearing of the motion on 18/9/2019 at 2.30 p.m. The proceedings were presided over by a member elected under Section 9(4) of the Act and the resolution to remove the speaker was passed by 42 members of the Assembly constituting at least 75% of the members.

41. The 2<sup>nd</sup> Respondent cannot in the court’s view be faulted on the failure by the Petitioner to attend the impeachment proceedings in the Assembly at 2.30 p.m. on the 18/9/2019. The Petitioner was clearly notified to attend and had spoken about the matter in a public press conference that morning in which he had promised to attend the plenary session to defend himself. It is also a fact that the Petitioner had visited the premises of the Assembly at 9 a.m. in the morning of 18/9/19 accompanied by persons who caused commotion at the Assembly.

42. The court has considered the balance of convenience and found same to be in favour of upholding public interest which is a major consideration in matters of this nature as was held in the case of **Gitirau Peter Munya -v- Dickson Mwenda Kithinji and 2 others (2014)** eKLR where the Supreme Court of Kenya stated that;

***“Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and proportionate magnitudes and priority levels attributable to the relevant causes.”***

43. The Petitioner herein prays for an order of reinstatement to the public Office of Speaker of the County Assembly of Kisumu. This order is in the nature of a permanent mandatory injunction to conserve the public position primarily held by the Petitioner.

44. It is not in dispute, the Petitioner is facing serious criminal charges related to corruption and theft of large public funds whilst holding a former public office as Chairman of Lake Basin Development Authority. The court is conscious that the Petitioner is presumed innocent until proved guilty and ought not to be punished before that criminal case has been heard and determined. However this court is well guided by the decision of Mumbi Ngugi in **Nairobi HC ACEC Crimes Division No. 25 of 2019** (supra) in which the Judge held;

***“Allowing a person charged with serious acts of corruption or any other misconduct involving moral turpitude to discharge his duties and enjoy the fruits of the post, would be against a public policy and it would not be in public interest or to maintain a clean and effective administration.”***

45. I would only add that where there are clear statutory or constitutional provisions guiding how persons facing disciplinary measures whether or not they emanate from criminal court proceedings are to be treated pending determination of the matter, those are to be strictly followed notwithstanding the observations above. In the present case no statutory or constitutional guidelines were placed before me as to how a substantive Speaker of County Assembly is to be handled pending determination of criminal proceedings facing him in a court of law.

46. In the final analysis, the petition is dismissed for lack of merit.

47. The court directs the Petitioner to release forthwith to the 2<sup>nd</sup> Respondent motor vehicle registration no. 42C9039A – Toyota Land Cruiser.

48. The 2<sup>nd</sup> Respondent on the other hand is to pay forthwith any accrued terminal benefits due and

owing to the Petitioner less any liabilities owed by the Petitioner to the 2<sup>nd</sup> Respondent.

49. The court deems it suitable for each of the parties to meet their own costs of the consolidated suit.

**Judgment Dated, Signed and delivered this 10<sup>th</sup> day of December, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Muga Apondi and Maurice Ouma for Petitioner

Philip Rodi, Mr. Ongoya and Mr. Amondi for Respondents and Interested Parties

Osotsi – Court Clerk