



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 38 OF 2017

(Before Hon. Justice Mathews N. Nduma)

1. ENG. NASHON WILSON OGUYA

2. BETTY ASUNA

3. CS HESBON HONGO

4. JACKSON ODENY OYOO

5. MOSES ODINGO

6. SALLY VIOLET ONYANGO

7. EMILLY OLAGO (MEMBERS KISUMU

COUNTY PUBLIC SERVICE BOARD)PETITIONERS

VERSUS

COUNTY ASSEMBLY OF KISUMURESPONDENT

R U L I N G

1. The Respondents have raised a preliminary objection to the effect that this court has no jurisdiction to hear and determine this petition on two grounds being that there is no employer employee relationship between the petitioner, and the Respondent, County Assembly of Kisumu and that no court has jurisdiction to interfere with proceedings of the County Assembly, but, may get seized of the matter once the process has been finalized and a decision taken.

2. The Petitioners have made an application to amend the petition to join the County Government of Kisumu, the Governor of Kisumu County, and the Acting County Secretary as the 2nd, 3rd, 4th respondents respectively.

3. The Petitioners further seek the Respondents be cited for contempt of court for failure to comply with the interim orders of the court order issued on 9th October, 2017 and extended on 1st November, 2017.

4. The impugned action is that an adhoc committee of the County Assembly notwithstanding service with the order of the court with a penal notice on 9th October 2017, which order was extended on 1st November 2017 proceeded to inquire into the conduct of sitting members of the Kisumu County Public

Service Board between 9th to 10th October 2017, prepared a report dated 4th December, 2017 and presented the report to the County Assembly for adoption on the same date.

5. That the County Assembly upon receipt of the adhoc committee's report recommended the termination of the services of the six-petitioners and that new members of the Kisumu County Public Service Board be appointed forthwith.

6. The County Assembly communicated their decision to the intended 2nd, 3rd and 4th Respondents who have since written a letter dated 7th December 2017 and sent the same to the six (6) petitioners communicating their decision to remove the petitioners from Kisumu County Public Service Board.

7. The intended 4th Respondent, the Acting County Secretary, wrote and signed the impugned letters of removal notwithstanding that he is illegally in office and his appointment has not been legalized by the Board.

8. That at all material times, the Respondents were aware of the court order restraining them from removing the petitioners from office. That the adhoc committee violated the rules of natural justice in respect of the petitioners because it gave the petitioners, no notice to show cause and no opportunity to be heard. That the conduct of the County Assembly was contemptuous of the court order and the court in addition to declaring their decision unlawful null and void ought to find the Respondents guilty of contempt of court order.

9. That the interim order be confirmed pending the hearing and determination of the petition since the applicants have satisfied the requirements for granting interim injunction in that they have established a prima facie case of unlawful conduct, have demonstrated that they would suffer irreparable harm if the interim order is not granted and that the balance of convenience favours the confirmation of the injunction.

Opposition

10. The application for injunction is opposed together with the application to cite the Respondent for contempt of court. These applications will remain alive if the court finds that it has jurisdiction to hear and determine this matter in the first place.

Jurisdiction

11. The Respondents, submit that in terms of Article 117 of the constitution as read with section 12 of the National Assembly (Powers and privileges) Act as read with section 17 of the County Government Act, no court has jurisdiction to question the validity of the proceedings and decisions of the County Assembly or the committee of privileges acting in accordance with National Assembly (Powers and Privileges) Act.

12. For these reasons, the court is urged to find that it has no jurisdiction to entertain this petition and down its tools forthwith.

13. The Respondents further submitted that, the amendment sought by the Petitioners to join 2nd 3rd and 4th Respondents is actuated by the realization on the part of the petitioners that the court has no jurisdiction over decisions of the County Assembly, and hence seek to join the Executive in the matter to acquire jurisdiction after the objection was raised. The court is urged to reject the joinder as an abuse of the court process and decline jurisdiction to entertain the suit.

Contempt

14. The Respondents deny that they were in contempt of court orders between 9th October and 5th December, 2017. The Respondent submits that the Respondent received the adhoc committee report on 6th December 2017, debated and adopted the report on the same date. That as at that time the orders of the

court issued on 9th October, 2017 had not been extended on 5th December, 2017. The adopted report was forwarded to the employer on 7th December, 2017 who proceeded to issue letters of removal.

15. The Respondent relied on section 107, of the evidence Act, Cap 80 Laws of Kenya for the proposition that –

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists”

16. Furthermore the Respondent cites section 108 of the Act which provides –

“ the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

17. The Respondent submits that the applicants have failed to prove that the Respondent was in willful contempt of a court order and the application must be dismissed therefore.

18. The Respondent denies that the court on 1st November 2017, indefinitely extended the interim orders. The applicants failed to apply for extension of the interim orders on 5th December, 2017 and so the same had lapsed.

19. The Respondent cited the cases of **Eldoret ELC No.878/2012 Musa Kipkorir & 3 others v Kimutai Sitienei & Another [2014] eKLR** and **Eldoret H.C. Civil Case No. 106/2009 Solomon Kinoti & Another v Attorney General [2011] eKLR** for the proposition that interim orders must be specifically extended otherwise they lapse and cease to be valid for any meaningful enforcement.

20. In the later case, justice J.R Karanja observed –

“It is instructive to note that when the preliminary objections and the application on 16th June, 2009 were adjourned to the 28th September 2009, the interim orders in place and valid at the time were not extended. Neither was there an order by the court for the existing status quo to be maintained. Therefore, by the time the matter came up for further hearing on the 28th or 29th September 2009, the interim orders issued on 18th June 2009 had already lapsed and ceased to be valid for any meaningful enforcement.”

21. The Respondent urges the court to adopt this reasoning in rejecting the application for contempt by the applicant. On 5th December, 2017, the orders of the court were not extended, had lapsed and were incapable of enforcement. The court is urged to further find that there is no evidence that the adhoc committee and therefore the Respondent defied the court order between 9th October and 5th December, 2017.

Determination

22. The issues for determination are as follows:-

- (i) Has the court got jurisdiction to entertain this matter.
- (ii) If the answer to (i) above is in the affirmative, is the Respondent in contempt of court.
- (iii) Should the amendment to include further respondents be allowed.

Issue I

23. The court relies on the case of **Nick Githinji Ndichu and another [2014] eKLR** cited with approval

in **County Assembly of Kisumu & 2 others v Kisumu county Assembly Service Board & 6 others [2015] eKLR** that there exists an employment relationship between the members of the Kisumu County Public Service Board and the County Government of Kisumu, which includes the County Assembly of Kisumu. In addition the petitioners raise matters of rights and fundamental freedoms under Articles 1, 2, 19, 20, 21, 22, 23, 43, 47, 48, 50, 185 and 251 of the constitution of Kenya 2010.

24. The issues raised arose from the Petitioners' employment relationship with the County Government of Kisumu and in particular recommendations for their removal by the Respondent.

25. Going by the decision of **Court of Appeal in Judicial Service Commission v Gladys Boss Shollei and another Civil Appeal No. 50 of 2014 [2014] eKLR** of page 15, thus –

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms whatsoever arising from the relationships defined in Section 12 of the Industrial Court Act, 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.”

26. This Court has jurisdiction over this matter and the preliminary objection is dismissed.

Issue II

27. The applicants have failed to discharge the onus of proof placed on them under sections 107, 108, 109 and 112 of the Evidence Act, Cap 80 of Laws of Kenya. There is no evidence on a balance of probabilities that between the 9th October, 2017 and 5th December, 2017, the Respondent was in willful disobedience of the order of the court issued on 9th October, 2017 and extended on 1st November, 2017.

28. There order was not extended by the court on 5th December, 2017 due to a failure by the person holding brief for the Advocates for the petitioners to apply for extension of the court order. That being the case, as at the 6th and 7th December, 2017 when the adhoc committee of the Respondent sat, prepared a report, and presented it for adoption by the County Assembly, there was no order capable of enforcement.

29. This notwithstanding the petitioners are still in employment after the court issued further orders on 11th December, 2017 stopping recruitment of new public service board members pending the hearing and determination of the applications dated 11th December, 2017. The Respondents have contended that the orders of the court to maintain status quo were obeyed and the petitioners are in office and serving in their capacity as members of the Kisumu County Public Service Board. There is no vacuum in place therefore and the court confirms the interim orders until the petition is heard and determined.

Issue III

30. With regard to the application to amend the petition to include The County Government of Kisumu as the 2nd Respondent, The Governor of Kisumu County 3rd Respondent and The Kisumu County Secretary as the 4th Respondent, the application was not opposed by way of a replying affidavit and the application is granted and the Draft Amended Petition filed on 23rd January, 2018 be deemed duly filed, upon payment of requisite fees.

31. In the final analysis, the court makes the following orders:-

- (i) The Preliminary Objection by the Respondent on the Jurisdiction of the court is dismissed.
- (ii) The application to find the Respondents guilty of contempt has no merit and is dismissed.

(iii) The application to amend the petition to join The County Government of Kisumu, as 2nd Respondent, The Governor of Kisumu County as 3rd Respondent and The Kisumu County Secretary as 4th Respondent, and further amendments contained in the draft Amended Petition filed on 23rd January, 2018 is granted, and the Draft Amended Petition is deemed as duly filed upon payment of requisite fees.

(iv) The Interim orders issued by the court on 11th December, 2018 and extended on 22nd February, 2018 are confirmed and duly extended until the petition is heard and determined.

Dated and Signed in Kisumu this 22nd day of February, 2018

Mathews N. Nduma

Judge

Appearances

M/s. Assuma and Mr. Odeny for Petitioners

Mr. M. J. Okumu with S. M. Onyango for Respondents

Chrispo – Court Clerk