



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. 19 OF 2017**

**MARTIN WAFULA WAMUKOTA.....PETITIONER/APPLICANT**

*VERSUS*

**THE SPEAKER**

**COUNTY ASSEMBLY OF TRANS NZOIA.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF TRANS NZOIA.....2<sup>ND</sup> RESPONDENT**

**THE TRANS NZOIA**

**COUNTY ASSEMBLY SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**RULING**

AINEA INDAKWA is the Clerk of the County Assembly of Trans Nzoia while John Barasa is his driver. By a charge sheet dated 28<sup>th</sup> February 2017, the Clerk and driver were together with DAVID KINISU SIFUNA, the Speaker of the County Assembly of Trans Nzoia were charged in the Anti-Corruption Court, Eldoret together with 38 members of the County Assembly of Trans Nzoia with the offence of abuse of office contrary to Section 46 as read with Section 48 (1) of the Anti –Corruption and Economic Crimes Act No. 3 of 2003. For the Speaker and the offence of fraudulent acquisition of public property contrary to Section 45 (1) A as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 against the Clerk and the Driver. They were all released on bond of Kshs.200,000 or cash bail of Kshs.50,000/=.

By letter dated 28<sup>th</sup> February 2017, the Ethics and Anti-Corruption Commission wrote to the Chairman, Trans Nzoia County Assembly requiring him to take administrative action against the Speaker, Clerk and Driver in accordance with Section 62 (1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 pending the outcome of the case.

Pursuant to the said letter, the Speaker of the County Assembly on 13<sup>th</sup> March 2017 wrote letters of suspension to Mr. AINEA O. INDAKWA, the Clerk to the County Assembly and Secretary to the County Assembly Service Board and Mr. JOHN SIMIYU BARASA, Driver.

It is these letters of suspension that are the subject of this petition.

Vide an application dated 17<sup>th</sup> May 2017 filed under certificate of urgency, the Petitioner seeks the following orders: -

- a) A declaration be made and be issued that Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa are entitled to protection under the Constitution of Kenya 2010 and the Fair Administrative Action Act, 2015.
- b) A declaration be made and be issued that the 1<sup>st</sup> respondent over stepped his mandate in purporting to suspend Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa, contrary to the provisions of Articles 41 (1) and Article 47 (1) of the Constitution of Kenya as read with Section 12 (1) (b) of the County Government Act, 2012 an Section 4 (2) and (3) of the Fair Administrative Action Act.
- c) A declaration that the failure by the 3<sup>rd</sup> respondent herein, the County Assembly Service Board of Trans Nzoia County, to suspend Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa meant any other purported suspension by the 1<sup>st</sup> respondent was unlawful;

d) An order of judicial review in the nature of *certiorari* bringing to the court and quashing the decision by the 1<sup>st</sup> respondent to suspend Mr. Ainea Indakwa and John Simiyu Barasa.

e) An order of judicial review in the nature of *mandamus* directing the 3<sup>rd</sup> respondent to lawfully convene and initiate a lawful suspension process of Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa.

f) The 1<sup>st</sup> respondent be condemned to pay damages and compensate Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa for unlawful and/or wrongful suspension.

g) The Honourable court be pleased to issue orders and writs, as the court may deem fit and expedient.

The application is supported by the grounds on the face thereof and affidavit of the petitioner.

In the affidavit, supporting the application the petitioner/applicant deposes that he is a male Kenyan citizen resident of Trans Nzoia County and has a right to institute present proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been violated and/or infringed.

That on or about the 13<sup>th</sup> February 2017, the then holder of the office of the 1<sup>st</sup> respondent, together with 4 other members of the 2<sup>nd</sup> respondent were charged with the offence of abuse of office contrary Section 46 as read with Section 48 (1) of the anticorruption and Economic Crimes Act No. 3 of 2003 in EACC CR. 2 of 2017.

That pursuant to the said charges, the Ethics and Anti-Corruption Commission wrote a letter dated 28<sup>th</sup> February 2017 to the 3<sup>rd</sup> respondent through its then Chairman recommending administrative action according to Section 62 (1) of the office of the 1<sup>st</sup> respondent, Mr. Ainea O. Indakwa and John Simiyu Barasa.

That the said letter dated 28<sup>th</sup> February 2017 from the Office of the Ethics and Anti-Corruption Commission was responded to by said Chairman of the 3<sup>rd</sup> Respondent through a letter dated 13<sup>th</sup> March 2017 in which he indicated that administrative action would be taken against only Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa.

That on the said 13<sup>th</sup> February 2017, the said Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa were issued with suspension letters dated the same day.

That prior to the said issuance of the suspension letters, no meeting by the 3<sup>rd</sup> respondent was held to discuss the letter from the Ethics and Anti-Corruption Commission dated 28<sup>th</sup> February 2017 that passed a resolution to commence administrative action as recommended by the Ethics and Anti-Corruption Commission pursuant to the provisions of Section 62 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The applicant deposes that every person has the right to fair labour practices and the right to administrative action that is lawful and procedurally fair, which rights are anchored on Article 41 (1), 47 (1) and (3) of the Constitution as read with section 4 (2) and (3) of the Fair Administrative Action Act. He further deposes that Sections 4 (2) and (3) of the Fair Administrative Action Act are normative derivative of Article 47 (3) of the Constitution and thus, in interpreting them, they are viewed as being part of the constitution.

He deposes that it is only the 3<sup>rd</sup> respondent herein, who has the mandate to take administrative action, targeted at suspending a public officers working with the 2<sup>nd</sup> respondent in context of the Provisions of Section 62 (1) of the Anti-Corruption and Economic Crimes Act and as provided by Section 12 (7) (b) of the County Government Act, 2012. He deposes that the purported suspension of Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa was contrary to the said express provisions of the Constitution and legislation.

That the Petitioner was not in any way challenging the effect section 62 (1) of the Anti-Corruption and Economic Crimes Act but the suspension process taken to suspend the said Mr. Ainea O. Indakwa and Mr. John Simiyu Barasa.

The application is unopposed. It was argued before me on 27<sup>th</sup> June 2017.

In the oral submissions by counsel for the Petitioner/Applicant he submitted in court that the application dated 18<sup>th</sup> May 2017 is based on the grounds on the face thereof and the supporting affidavit. He submitted that the petitioner is challenging the lawfulness of the suspension, which is based on the provisions of Section 62 (1) of Anti-Corruption and Economic Crimes Act.

He submitted that he petitioner is not challenging the provisions of Section 62. He is asking 'who suspends'. He is saying the body which is supposed to suspend is the 3<sup>rd</sup> respondent.

He submitted that the Board never sat to discuss the matter, that failure of the Service Board to have the matter discussed by the County Assembly Service Board infringes on express provisions of Article 41 (1) and 47 (1) of Constitution as read with Section 12 (7) (b) of the County Government Act 2012. Section 4(2) and (3) of Fair Administrative Action Act.

He submitted that Mr. Ainea and Barasa were never given an opportunity to say why they should not go on suspension. Further they were not subjected to a hearing before they could go on suspension. The 1<sup>st</sup> respondent unilaterally directed that they proceed to suspension.

He submitted that the suspension was unlawful. That until the respondent follows due process pursuant to Section 72 of Anti-Corruption and Economic Crimes Act, they will continue to insist that the suspension is unlawful. He prayed that the application is meritorious and should be allowed as prayed.

## **Determination**

I have considered the pleadings and submissions by the Petitioner/Applicant. The issues for determination in my opinion are first, whether the applicant has *locus standi* to file the application and petition on behalf of the person named in the petition and secondly whether he is entitled to the prayers sought.

Article 22 of the constitution provides for enforcement of rights and fundamental freedoms as follows: -

### **22. Enforcement of Bill of Rights.**

**(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**

**(a) a person acting on behalf of another person who cannot act in their own name;**

**(b) a person acting as a member of, or in the interest of, a group or class of persons;**

**(c) a person acting in the public interest; or**

**(d) an association acting in the interest of one or more of its members.**

For a person to avail himself of the reliefs set out under Article 223 (3), he must satisfy the courts that he has capacity under Article 22 (1) and (2). In the present case, the applicant describes himself as a citizen of Trans Nzoia. He does not state how he is affected by the administrative actions that he seeks to be quashed.

Article 22 is clear that enforcement can only be sought by the person directly affected by the orders or on behalf of persons who cannot come to court on their own.

It has not been demonstrated that the Clerk of the County Assembly of Trans Nzoia and his Driver on whose behalf the application has been made are incapable of acting in their own name or that the applicant has any direct interest in the action that is impugned. It has further not been demonstrated that the application is brought in the public interest or that the suspension of the Clerk and Driver are a matter of public interest to justify the applicant filing the present petition on their behalf. On this ground alone, this application is not sustainable.

Besides the foregoing, Section 62 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 provides for the action to be taken against a public or state officer who has been charged with an offence under the Act. The Section is couched in mandatory terms and does not require a hearing before action is taken. **In other words, the Section is self acting. It states that a person who is charged with corruption or economic crime shall be suspended at half pay, with effect from the date of the charge until the conclusion of the case. The applicant is not denying that the Clerk and his Driver have been charged with a corruption economic crime. He is only challenging the action on the grounds that the person who wrote the letters had no authority to do so as there was no meeting of the County Assembly Service Board sanctioning the action taken.**

The letter from the Ethics and Anti-Corruption Authority is unequivocal. It directs the Chairman of the County Assembly Service Board to take administrative action against the Speaker, Clerk and Driver in accordance with Section 62 of the Act. The only process that the Clerk and Driver were to be subjected to are the criminal proceedings in court and not any other process before the County Assembly Service Board. There was therefore no role for the County Assembly Service Board necessitating a meeting and a resolution of action to be taken against the Clerk and the Driver.

## **Conclusion**

From the foregoing reason, I find that the Applicant has no capacity to bring the present petition, as he has no *locus standi* under Article 22 of the constitution to institute proceedings on behalf of the Clerk and the Driver of the County Assembly of Trans Nzoia.

I further find that the Chairman of the County Assembly Service Board merely effected the instructions of the Ethics and Anti-Corruption Commission contained in the letter dated 28<sup>th</sup> February 2107 to take administrative action against the Clerk and Driver according to Section 62 (i) of the Anti-Corruption and Economic Crimes Act, which Section is self-acting and did not require a resolution of the County Service Board to implement.

For the foregoing reason the application fails and I accordingly dismiss the same.

**DATED AND SIGNED ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 10<sup>TH</sup> DAY OF MAY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**