



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO. 6 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF: ARTICLES 1(3), 2, 3, 10, 19, 22, 23, 36, 41, 47, 50, 162, 165, 176, 200, 230, AND 258 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE MANDATE OF THE SALARIES AND REMUNERATION COMMISSION AS SET OUT UNDER
ARTICLE 230 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: SECTIONS 13 AND 14 OF THE SALARIES AND RUMENRATION ACT

AND

IN THE MATTER OF: SECTIONS 12, 13 & 14 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF: THE PARLIAMENTARY SERVICE COMMISSION ACT

BETWEEN

KAMAU AIDI.....1ST PETITIONER

EDWARD LUBENDI.....2ND PETITIONER

SALIM JUMA.....3RD PETITIONER

DENIS MUSYOKA MUTUI.....4TH PETITIONER

MKARE JEFWA.....5TH PETITIONER

MOHAMMD DUBE.....6TH PETITIONER

MBOCHE WANYOIKE.....7TH PETITIONER

MICHAEL NGALA.....8TH PETITIONER

MAHMOUD SANTUR.....9TH PETITIONER

OSMAN MOHAMMED.....	10 TH PETITIONER
AHMED SURROW.....	11 TH PETITIONER
MOHAMOUD KAMAYA.....	12 TH PETITIONER
SALAD BORU.....	13 TH PETITIONER
J. K ARITHI.....	14 TH PETITIONER
MARTIN K. KARIUKI.....	15 TH PETITIONER
JIM KAUMA.....	16 TH PETITIONER
ELIJAH MUTAMBUKI.....	17 TH PETITIONER
FELIX MBIUKI.....	18 TH PETITIONER
PURITY KAMURUCHI.....	19 TH PETITIONER
JENARD MWIGGEH.....	20 TH PETITIONER
CHRIS KINYANJUI.....	21 ST PETITIONER
MUTIE JOHN.....	22 ND PETITIONER
LINUS MIINYAN.....	23 RD PETITIONER
JULIUS ARIWAMOI.....	24 TH PETITIONER
PATRICK LESHORE.....	25 TH PETITIONER
AINEA INDAKWA.....	26 TH PETITIONER
RICHARD CHEPKONGA.....	27 TH PETITIONER
JANE MUTAL.....	28 TH PETITIONER
BERNABA KOSGEI.....	29 TH PETITIONER
JOSEPH KOECH.....	30 TH PETITIONER
JASPER MUTUIRI.....	31 ST PETITIONER
JOSEPH MALINDA.....	32 ND PETITIONER
SHEDD SIMOTWO.....	33 RD PETITIONER
DANIEL KONYANGO.....	34 TH PETITIONER
JOSEPH KOECH.....	30 TH PETITIONER
JASPER MUTUIRI.....	31 ST PETITIONER
JOSEPH MALINDA.....	32 ND PETITIONER
SHEDD SIMOTWO.....	33 RD PETITIONER
DANIEL KONYANGO.....	34 TH PETITIONER

MARTIN EPUS.....	35 TH PETITIONER
ISAAC KITUR.....	36 TH PETITIONER
PATRICK KAMWESSAR.....	37 TH PETITIONER
AMBAKA KILINGA.....	38 TH PETITIONER
JOHN MOSONGO.....	39 TH PETITIONER
ALLA MABUKA.....	40 TH PETITIONER
ISAAC FELIX OLWERO.....	41 ST PETITIONER
PHILIP OTIENO.....	42 ND PETITIONER
BOB OTIENO.....	43 RD PETITIONER
TOM ONYANGO.....	44 TH PETITIONER
JAMES NYAOGA.....	45 TH PETITIONER
DANIEL ORINA.....	46 TH PETITIONER
JACOB NGWELE.....	47 TH PETITIONER
THE SOCIETY OF CLERKS AT THE TABLE (SOCCAT)...	48 TH PETITIONER

VERSUS

SALARIES AND REMUNERATION COMMISSION (SRC).....RESPONDENT

JUDGMENT

1. The Petition seeks in the main for determination as to whether the administrative action and fair remuneration provided for under Articles 47 and 41 of the Constitution has been abridged by a decision done without due regard to already existing grading structure approved, adopted and applied. It also sought to have a determination as to whether in exercise of its functions under the Constitution the Respondent can undertake job evaluation in respect of public officers and return a report that downgrades and lower certain cadres of public officers. The Petitioners also sought to have the determination as to whether the Respondent had breached Article 50 of the Constitution by undertaking the evaluation exercise and returning results without giving the Petitioners an opportunity to be heard, and whether the Respondent breached Article 230 (5) of the Constitution on the need to ensure transparency and fairness in job evaluation without fully involving the Petitioners. The Petitioners sought various declarations against the Respondent. The Petitioners filed affidavits in support of the Petition and attached documents evidencing the determination of the interagency technical committee comprising of representatives of the Ministry of Devolution and Planning, Directorate of Public Service Management, Parliamentary Service Commission, Public Service Commission, SRC and the Transitional Authority as well as the Society of Clerks at the Table (SOCCAT). The Respondent filed affidavits in opposition as well as documents in support of the grading system adopted.

2. The parties opted to have the Petition determined on the basis of documents filed and submissions of parties.

3. Mr. Sigei for the Petitioners submitted that the Petitioners seek to assert non-compliance on the Respondent's evaluation of the Petitioners job. It was contrary to fair labour practice and in particular, the failure to have the participation of the Petitioners in the job evaluation ran counter to the premise of fair labour practice. He asserted that there was blatant failure to consider the objections raised by Petitioners on the job description that was used to evaluate them which led to the ultimate downgrading of the Petitioners placing them in a lower grade and a lower job group thus leading to economic loss. He stated that the earlier process was flawed for want of proper process and involvement of the Petitioners and that failure to fully involve the Petitioners and thus the lower grading affected not only their morale in their jobs but also their remuneration. The remuneration included allowances and other benefits the Petitioners are entitled to which further led to contravention of Section 138(1)(a) & (c) of the County Government Act 2012, in the sense that the resultant grading would deny the Petitioners the entitlement in terms of allowances they were earning. He submitted that Section 138 provides that no employee can be evaluated with a resultant outcome that he earns less or his benefits diminished. He stated that the Respondent had previously issued circulars which placed the Petitioners at job group E3 which had benefits in allowances equivalent to those earned by job group SE7 in the resultant job evaluation exercise. They were first placed in part D and later in E1 which is lower than E3 and the resultant benefits are therefore lower than what they previously enjoyed. He submitted that the law does not envisage an outcome that diminishes the remuneration of the employees. He relied on the case of Kenya Union of Nurses v The Chair SRC [2015] eKLR at page is 36 paragraph 52 of the decision and urged the court to make a finding similar to that decision. Article 47 of Constitution entitles a party to fair administrative action. The evaluation exercise is part of that administrative exercise. The Petitioners were in the ultimate process denied participation in the final evaluation. The Respondent as a matter of fact told the Petitioners that they were not to be involved in the final process and the

consultant was the only one to do the job evaluation. The Petitioners raised those concerns in the letter requesting involvement of the Petitioners and the response from the Respondent was that the job holders are not involved in the evaluation process. After denial of the said participation and despite coming to court and having various meetings, the setting up of a technical committee which came up with raised job description for Petitioners, the Respondent went ahead with the evaluation with the consultant without involvement of the Petitioners and only communicated the outcome in the letters of 13th December 2017. The letter gave the result downgrading the Petitioners at grade E1. He submitted that the system of Grading known as Patterson was stated to be scientific and confirmed by Respondent. It is said not to have any human intervention. The Petitioners on their part read mischief and justifiably so, on the denial of involvement in the last stage of the evaluation where this scientific system of grading without human interference was concluding the evaluation exercise. No explanation at all was given as to why they were not to be involved in that stage. He submitted that the failure to involve them at this stage led to glaring shortcoming on the evaluation process. The process included serious assumptions on their role and position and the right job description had data which was not fed in the system. He submitted that it led to the assumption that the Clerk of County Assembly is a subordinate position in the County Assembly and led to a wrong assumption that the County Clerk is a department in the County Government. It led to wrong assumption that Clerk of County Assembly does not make decisions and that he reports to Speaker of the County Assembly as well as the County Public Service Board. The position of Clerk is assumed to be delegated authority from Speaker of County Assembly which is not the case. A clerk of County Assembly is CEO of the County Assembly and the roles performed by the office of the Clerk are provided for in various statutes. It was submitted that as CEO he does not report to the Speaker as the Respondent wrongly evaluated. He/she does not report to the County Public Service Board and more importantly, to illustrate he does not report to the two entities. He submitted that the role given under Section 13 of the County Government Act, Section 17 of the County Assembly Services Act 2017 and Section 140(4) Public Service Management Act, Section 44 of Public Procurement and Disposal Act, Section 68, 147, 149, of Public Procurement and Disposal Act and the Public Procurement Regulations and Public Financial Management Regulations donate power to the Petitioners Clerks of County Assembly. He submitted that the Clerk does not report to anyone but is answerable to the statute, he is answerable to the law. He argued that the Clerk gives expert advice to the County Assembly, as CEO, approves procurement contracts, signs financial statement and takes responsibility, manages and ensures police execution, as Chief Administrative Officer of the County Assembly. Those are roles of the CEO. He submitted that the Clerk does not report to Speaker in these managerial roles given by statute. They are not technical, mid-level but top. He submitted that the CEO is placed in wrong job group and these roles require higher placing – E3 which if the Petitioners were allowed to participate fully they could have been placed in the appropriate job group E3 not E1. He submitted that the Respondents were privy to requirement to involve the Petitioners all along as confirmed in correspondence exchanged. This early recognition of the involvement and subsequent denial of involvement raised the Petitioners suspicion of the inequity of the grading. He submitted that they earn less and the allowances they were earning will diminish if the current grading system is adopted. He submitted that the Respondents have stated the Petitioners were involved and acknowledge there were objections in the original job description. In paragraph 18 of Replying Affidavit, the Respondent states the Petitioners were properly graded in job group D. In paragraph 26 they acknowledge the Petitioners were placed in job group E3 and were earning the dues for the job group. He submitted that the assertion that this was facilitative is a fallacy as the job assignment was done and a CEO is a CEO and there is no better way of defending it. The Petitioners should be at E1 not E3. He stated that the process conducted was void and the return to grade E1 is void for failing to comply with the law. He submitted that the Petitioners should be allowed to participate in the job evaluation where the job description is entered in the system and the Respondent should comply with the procedure and the Petitioners will accept whatever the outcome.

4. Mr. Wafula for the Respondent submitted that the issues for determination are as follows:-

- 1) Whether the Respondent abided by the Fair Administrative Act and Article 47 and 41 of the Constitution,
- 2) Whether there was already an existing grading structure which had been advised on by the Respondent and if so, whether there was any deductions of the Petitioners' earning as a result,
- 3) Whether the Respondent has the power to undertake job evaluation,
- 4) Whether the Respondent gave the Petitioners a fair hearing; and
- 5) Whether it considered transparency and fairness on the job evaluation process,
- 6) Whether the Respondent's evaluation contravened Article 174, 176 of the Constitution and
- 7) Whether the orders sought can issue.

5. He submitted that the Constitution under Article 47 provides for fair Administrative Action and the Fair Administration Act was enacted to give effect to Article 47. In *Gibb Africa Ltd v KRA* [2017] eKLR the court stated it is settled law that Public bodies no matter how well intentioned may only do what the law empowers them to do. Article 230(4)(6) of the Constitution gives the Respondent power to advise County governments. It follows that for court to find the Respondent action was not founded on law the Petitioner has to prove the action was indeed illegal. He submitted that the Respondent has a Constitutional mandate to fulfil and ensure compliance by the values and principles of Public Service as explained in Article 232 of Constitution and protect the sovereignty of the people as set out in Article 249 of the Constitution. He submitted there has no violation of the Petitioners' right to fair administrative action. He relied on the petition of *Geoffrey Oduor Sijeny v Kenyatta University* [2018] eKLR where the court held that for a person to allege that fair administrative action has not been upheld, they must prove illegality, unreasonableness or procedural unfairness. He argued that the Petitioners have not shown the job evaluation was not reasonable, efficient, lawful or procedurally fair. He stated that following the court order on 28th March 2017, there was re-evaluation of the Petitioners, was done and they were graded at E1 and they are still not satisfied. He stated that the Petitioners wish to be graded at E3 the same level as Speaker of the County Government without any further changes of their job descriptions. He argued that this will of course entail burdens on Kenyan tax payers. He submitted that Article 41 involves fair labour practice and that the Petitioners' right to fair remuneration have not been violated. He stated that the Petitioners are not earning less but are at par with all County Officers of similar cadre. Secondly, the issue as to whether there was a grading structure in existence and whether it was advised on by Respondent, he argued that there was no downgrading whatsoever. He submitted the suit is a blatant attempt to override the expertise mandate of the Respondent by creating job and position that will jeopardise the entire grading system of the County Government. As to whether the Respondent has power to undertake job evaluation is answered by Article 230(4) and (5) of the Constitution. He drew attention of court to

annexure MN1 of the replying Affidavit and the case of TSC v KNUT & Others [2015] eKLR where the Court of Appeal held the Salaries and Remuneration Commission has constitutional burden to carry out job evaluation of all public servants. As to whether there was transparency and fairness in job evaluation process he submitted that in any process, there will always be those who want more. He urged the court to consider the public expense and process that the baseless allegation of lack of transparency and hearing will cause. He stated that there is also the issue of whether the advice contravened the provisions of Article 176 and 174 of Constitution. He stated that we have the composition of County Assembly in Article 176 and 174 setting out the objectives of devolution. He argued that these are baseless claims the Petitioners have not proved. It is trite law he who alleges must prove - see Section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya. Lastly, he submitted that the order sought should not issue. He argued that the Petitioners' declaratory orders sought in Petition, the Respondent has not misdirected itself as it has taken into account the revamped job evaluation which the Petitioners set and he further submitted that the court cannot usurp the Respondent's mandate and grant such an order.

6. He stated that it is the Respondent that has the necessary expertise to clarify the Petitioners job. He referred to paragraph 34 of Annexure MN13 which is the job description which is the revised job description. He pointed out that the Respondent had availed analysis of the previous job description and the revised one which is evidence there was more information which necessitated grading from D to E1. He argued that any change from E1 to E3 will require new information. He stated that the Respondent asserts the Petitioners fully participated as per the reports before court and that they participated fully. The counsel for the Respondent submitted the statement is untrue that all CEO's are placed at E and that in any event the Petitioner is in Grade E having submitted a revised job description. He submitted that the Respondent has not carried out any evaluation of the Petitioners' job prior to this. The advice on MN9 is for general Government circulars for facilitative allowances in particular *per diem* and they were not pursuant to any job evaluation. He submitted that there is no loss of remuneration or downgrading subsequent to the job evaluation and on the stay sought on the implementation of the job evaluation and grading of Petitioners, he submitted the Petitioners have not met the legal threshold for grant of permanent injunction. A permanent injunction can only be granted if there is proof the job evaluation threatens the entire job evaluation in public sector. The law serves the public interest and it is not in the public interest to stop the implementation of the job evaluation report whose results have been implemented in State Corporations, Civil Service, State Officers, Independent Commissions and the Teachers Service. He drew the court to Section 23 of County Assemblies where County Clerk carries out his duties under the direction of Speaker, Section 13(5) of County Assemblies Act where remuneration of County Clerk is to be determined by County Public Service Board on advise of SRC and failing to add public participation should not lead to usurping the role of constitutionally mandated bodies carrying out their mandates. He submitted that the Petitioners participated fully and now they want to be there when the data is been input by the computer. He submitted that the allegation that data was not complete or properly computed is not proved and he thus urged the Petition be dismissed with costs to Respondent, uphold the Respondent's constitutional mandate and protect the sovereignty of people of Kenya.

7. The Petition is a challenge to what is perceived as the overreach of the SRC in setting the salaries for Clerks of the County Assemblies. From the pleadings and the submissions of parties, it is clear there was an initial grading during the tenure of the Transition Authority leading to a grading of County Clerks in band E3 which was equivalent to job group S-T in the Civil Service and the salaries were paid according to this grading structure. The Petitioners took umbrage with the Respondent's release of a report in November 2016 named Job Evaluation Results for the Public Sector and it is the resultant grading that has impinged on the earnings of the 1st to 47th Petitioners leading to their recourse to court. From the Patterson banding that was touted by both parties, it seems the job the 1-47th Petitioners perform falls within band D and these 47 Petitioners challenge the grading on the basis that they take strategic decisions and tactical decisions. The clerks assert they are

- i. the administrative heads of the county assemblies,
- ii. accounting officers pursuant to Section 148(4) of the Public Finance Management Act
- iii. authorised officer of the County Assemble pursuant to Section 13(4) of the County Government Act 2012
- iv. chief executive officer and secretary to the County Assembly Service Board pursuant to Section 12(4) and Section 13(3) of the County Government Act as read with Section 12(4) and Section 13 of the Parliamentary Service Act
- v. the responsible officer for all policy and organisational matters relating to the County Assembly
- vi. chief advisor to the Speaker of the County Assembly in the exercise of powers and functions while presiding over the house
- vii. administration of the County Assembly car loan and mortgage fund schemes pursuant to Section 116(2) and Section 148(4) of the Public Finance Management Act 2012.

The first 47 Petitioners assert that the job evaluation by the Respondent reduced their positions to subordinate positions and erroneously banded them at a position not commensurate with their roles assuming that the County Assembly is not an arm and agent of the County Government and that it has no job descriptions befitting the definition of top executives and senior specialists like heads of institutions and the clerks. The Respondent asserts that the Clerks were permitted to participate and gave their input which led to the banding and job evaluation made. The Respondent asserts that the constitutional mandate it exercises cannot be usurped by anyone. The Petitioners challenge the error of banding and assert that they should be in the proper band E. Constitutional bodies such as the Respondent are bound to undertake their duties following the dictates of the Constitution and key of which is fairness and application of the law. The constitutional licence the SRC enjoys is not one to act wantonly and where there is breach of the principles and the law, Courts will not hesitate to step in and correct the error. That is not by any means usurping the constitutional mandate of the Salaries and Remuneration Commission. Overreach is itself unconstitutional and outside the mandate of the Respondent.

8. The County Government structure is a microcosm of the National Government. The County Assembly in character mirror the National Assembly. The Clerk of the County Assembly is not a middle level management but in the band of senior specialists and top executives. They fit in the band E of the Patterson Banding and not D. As CEO's of the Assembly they cannot be deemed to be in a subordinate position. On the declarations sought that the Salaries and Remuneration Commission erred in banding the Clerk of the County Assembly in band B

and D of the Patterson classification instead of B and E3. The job evaluation accorded opportunity to the Petitioners to contribute and their involvement was as required since they would not be expected to key in or be present during the keying in of the specifications. The declaration that the classification at class D while other accounting officers and CEOs are placed at E is discriminatory and must be varied forthwith is granted as is the declaration that the downgrading and loss of remuneration is unlawful. There be a permanent stay of the implementation of the Job Evaluation for the Public Sector in as far as it relates to the Clerks of the County Assembly and the grading structure of the 1st to 47th Petitioners. As regards costs, the Respondent is a public body executing a constitutional mandate. The fact that it fell in error may have been a misstep for which an order for costs would be an additional blow. In the premises I will order that each party bears their own costs for the Petition and the motion. In the final analysis I make the following orders:-

(a) A declaration do issue that the Salaries and Remuneration Commission erred in banding the Clerks of the County Assembly in band B and D of the Patterson classification instead of B and E3.

(b) A declaration do issue that the job evaluation accorded opportunity to the Petitioners to contribute and their involvement was as required.

(c) A declaration do issue that the classification at class D while other accounting officers and CEOs are placed at E is discriminatory and must be varied forthwith

(d) A declaration do issue that the downgrading and loss of remuneration of the 1st to 47th Petitioners is unlawful.

(e) That there be a permanent stay of the implementation of the Job Evaluation for the Public Sector in as far as it relates to the Clerks of the County Assembly and the grading structure of the 1st to 47th Petitioners.

(f) Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 4th day of June 2018

Nzioki wa Makau

JUDGE