



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

1. COUNTY ASSEMBLY OF KISUMU

2. COUNTY GOVERNMENT OF KISUMU

3. THE GOVERNOR OF KISUMU COUNTY

4. THE KISUMU COUNTY SECRETARYRESPONDENTS

JUDGMENT

1. The Petitioners who are members of the Kisumu County Public Service Board have moved this court claiming that their constitutional rights under articles 1, 2, 19, 20, 21, 22, 23, 27 (1), (2), (4) and (5), 28, 41(1) and (2), 43, 47, 48, 50, 185, 236 and 251 of the Constitution of Kenya is being violated by the Respondents.

2. The Petitioners in the petition state that there is an attempt by the Respondents to have them unlawfully removed from office before expiry of their term. If this is to take place it will be a violation of the Constitution and the provisions of section 58(5) of the County Government Act and section 45 of the Employment Act.

3. The Respondents in response have not denied that they have all the intentions of removing the Petitioners. They argue that the mechanism that they have adopted for the removal is the lawful one.

Facts of the Petition

4. The 1st Respondent County Assembly of Kisumu invited members of the Public vide daily newspapers on 6th and 7th October respectively to provide information to them regarding any breach of office, gross misconduct and incompetence concerning the petitioners in discharge of their duties as members of the Kisumu County Public Service Board.

5. Members of the Public were invited to appear in person before the 1st Respondents adhoc committee on the 9th and 12th October, 2017 at the Royal City Hotel, Kisumu. The Petitioners got letters to appear before the adhoc committee as witnesses and not accused persons.

6. There was no mention of any petition by a member of the public seeking removal of the Petitioners.
7. The 1st Respondent appeared to be soliciting for information from the Public about the Petitioners.
8. In the Replying Affidavit of the 1st Respondent sworn by Ben Oloo Opiyo and filed on 19th October, 2017, 1st Respondent deposed that it had received a petition and a complaint dated 2nd October 2017 from a member of the public by the name Sospeter Obungu Owich. The petition is in the letter head of the 1st Respondent. The Petitioner state that it must have therefore originated from the 1st Respondent and not a member of the public.
9. On 9th October 2017, the court issued an interim injunction restraining the Respondents from proceeding with the alleged adhoc committee proceedings. However the adhoc committee proceeded as scheduled and issued a report dated 4th December, 2017. The report does not refer to the Petition by Sospeter Obungu Owich, but relies on complaints made to the adhoc committee between 9th and 10th October 2017 at Royal City Hotel. Complainants mentioned in the report do not include the said Sospeter Obungu.
10. It is the Petitioners case that there existed no genuine petitioner upon which the 1st Respondent was moved to act against the Petitioners.
11. In their submissions the Petitioners state that members of County Public Service Board may only be removed pursuant to Article 251(1) of the constitution of Kenya 2010 which provides –

Removal from office

251(1) A member of a commission (other than an **ex officio** member), or the holder of an independent office, may be removed from office only for –

- (a) serious violation of this constitution or any other law, including a contravention of Chapter six;
- (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
- (c) physical or mental incapacity to perform the functions of office;
- (d) incompetence; or
- (e) bankruptcy.

12. It is clear therefore that a member may only be removed on the guidelines set out for removal of constitutional and independent office holders and by a vote of not less than 75% of all members of the County Assembly under section 58(5) (b) of the County Government Act as was stated in **Mundia Njeru Gateria v Embu County Government and 3 others [2015]eKLR**.

13. In **Hussein Roba Boru v County Government of Isiolo & 2 others [2015] eKLR**, Justice Byram Ongaya had this to say –

“The person desirous that the Chairperson is removed from office must satisfy the substance and the procedure by first alleging the details of the grounds that satisfy any of those enumerated in the constitution and secondly, submitting the appropriate petition to the county assembly for the assembly's consideration and resolution.”

14. It is the Petitioners case that there was no petition before the assembly in terms of Article 251(1) of the constitution.

15. That no such petition was considered by the assembly to merit removal of the Petitioners. No such petition was served on the Petitioners to give them opportunity to defend themselves.

16. The Respondents were in gross violation of Article 47(1) of the constitution of Kenya which provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that the Petitioners had in terms of Article 47(2) a right to be given written reasons for the intended action.

17. Furthermore, Article 236 of the constitution provides that a public officer shall not be victimized or discriminated against for having performed the functions of office in accordance with the constitution or any other law or be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of Law.

18. In **Trishul Vijay Chohan v Mitch Menezes & 3 others (Being sued respectively as Chairman, Vice Chairman, Secretary and treasurer of the management committee of Nyanza Club (2018) eKLR** had this to say –

“Fair hearing under Article 47 would entail the right to a prior and adequate notice before any adverse action is taken or decision is made. Besides, there is also the resulting right to be afforded an opportunity to be heard.”

19. For these and other reasons, the petitioners pray that the petition be allowed with costs especially and in addition, there is no evidence that 75% quorum was attained by the Assembly, when it discussed the report of the adhoc committee on 6th December 2017. The Hansard

does not disclose whether at all voting took place and whether 75% vote threshold was met. Therefore in absence of any evidence of voting exercise and threshold section 58(5) of the County Government Act was violated.

20. The decision communicated to the Petitioners to remove them from offices by the 2nd Respondent, clerk of the assembly is contrary to law, null and void and the court should find so, with an order as to costs.

Response

21. In its response and written submissions, the County Assembly of Kisumu, the 1st Respondent states that the procedure for removal of office of Petitioners done on 6th December, 2017 was procedural and within the constitutional mandate, the County Government Act under section 58(5), the County of Assembly of Kisumu standing orders under section 196 and 197 as evidenced by annex CAK '1'.

22. That the hansard on record attached to the submissions illustrates the entire internal process followed from the receipt of the petition to when the petition was laid on the Table of the County Assembly through the clerk, the speaker and the leader of majority marked CAK '2'.

23. That the Petitioners rights were never violated. The Petitioners were invited to the hearing, to defend themselves but they deliberately neglected the notice to attend and to present themselves to be heard. The notice is marked CAK '3'.

24. The 1st Respondent attaches a copy of the standard newspaper dated Saturday, the 7th October 2017, and a certified copy of summons dated 9th October, 2017 as proof that the 1st Respondent took necessary measures to ensure that the Petitioners were part of the hearing slated for 11th October, 2017. See CAK '4'.

25. That the 1st Respondent complied with provisions under Article 251(1) of the constitution of Kenya 2010 and the County Government Act Section 58(5). That the Petition lacks merit and it be dismissed with costs.

26. That the court ruled it had jurisdiction over this matter and that there was no contempt of court by the Respondents in its ruling dated 22nd February, 2018. That the 2nd, 3rd & 4th Respondents were joined to these proceedings in that ruling.

27. That Judicial Review is concerned with the procedure followed and not the merit on the finding. That the petition was premature and the judicial review prayers would only be available if they waited until the process was completed. That in conclusion the 1st Respondent in performing its duty, procedurally, did not violate both the rights and freedoms of the Petitioners under the constitution nor the dictates of natural justice. That allegations of victimization, witch hunt, bias and discrimination are without basis.

28. That the decision of ELRC, at Nyeri in Petition No. 116 of 2013, **Mundia Njeru Gateria v Embu County Government** was adhered to in the present matter with regard to observance of Article 251(1) of the Constitution and Section 58(5)(b) of the County Government Act.

29. That the petition be dismissed with costs.

Response by 2nd, 3rd and 4th Respondents

30. In their replying affidavit and written submissions in opposition to the amended petition, the 2nd, 3rd and 4th Respondents reiterate the submissions made by the 1st Respondent on matters of fact and Law and in particular with regard to observance of section 58(5) of the County Government Act, and Article 251(1)(a) to (e) of the constitution.

31. The Respondents further rely on section 51(1) of the interpretation and General Provisions Act, Cap 2 of the Laws of Kenya which provides:-

“Section 51(1). Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke appointment, constitution or establishment of, or dissolve a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty; and to reappoint, reconstitute or re-establish it.”

32. The Respondents therefore emphasize that the appointing authority equally had the duty to remove from office any public officer as long as the Law for such removal being followed.

33. The 3rd Respondent, the Governor of Kisumu County therefore properly and lawfully instructed the 4th Respondent Kisumu County Secretary to write letters communicating his decision in implementing the resolution of the 1st Respondent to remove the petitioners from office and was merely performing his Legal functions as provided for in the Law. This position is well supported by the court in **Mundia Case (supra)** as per Abuodha J. delivered on 19th December, 2013.

34. The 2nd, 3rd and 4th Respondents pray that the petition against them be dismissed with costs.

Determination

35. Section 58(5) of the County Government Act, provides –

“Members of the Board may be removed from officer on grounds set out for the removal of members of a constitutional commission under article 251(1) of the constitution; and by a vote of not less than 75% of all the members of the County Assembly.”

36. Article 251 (1) provides –

“A member of a commission (Other than an **ex officio** member), or the holder of an independent office, may be removed from office only for –

- a. Serious violation of this constitution or any other law, including a contravention of chapter six,
- b. Gross misconduct, whether in the performance of the members or office holders functions or otherwise;
- c. Physical or mental incapacity to perform the functions of office;
- d. Incompetence or
- e. Bankruptcy.

37. On the question of procedural fairness, justice Abuodha in Mundia case found –

“No evidence was exhibited either by the petitioner or any of the Respondents that the purported removal was in accordance with section 58(5)(b) which provides that such removal shall be conducted by not less than 75% of the members of the County Assembly. The court will therefore *delve no further*.”

38. In present case the 1st Respondent filed a replying affidavit to the petition sworn by Ben Oloo Opiyo, the interin clerk of the County Assembly of Kisumu on 19th October, 2017 in which he states vide paragraph 10 that the County Assembly of Kisumu received a petition and or complaint dated 2nd October, 2017 from one Sospeter Obungu Owich, a member of public and the same was served on him as the clerk. That he passed the petition to the speaker of the County Assembly who approved it and forwarded it to the House Business Committee.

39. That the House Business Committee had the matter slotted for debate at plenary and discussion took place on 5th October, 2017 and was resolved that the leader of majority was to commit the matter for discussion before the whole house.

40. Pursuant to that an adhoc committee of the house was formed to investigate the matter and the committee was approved on 5th October, 2017. The formation of the committee was notified to the public and paid advertisement placed on the daily newspapers notifying the public accordingly.

41. The Petitioners were served individually with the charges they faced.

42. The deponent did not provide any further information in the 50 paragraph replying affidavit how the process of removal of the petitioners proceeded to its conclusion.

43. The other rebuttal of the petition was in the Replying Affidavit of Hon Onyango Oloo, the Speaker of the County Assembly of Kisumu to the Notice of Motion Application filed on 11th December, 2017, seeking to have the Respondents committed to jail for contempt of court orders.

44. In the affidavit sworn on 15th December, 2017, the Hon. Speaker does not take the matter any further on the procedure followed to remove the Petitioners.

45. Instead, the speaker reiterated and adopted all and singular the averments set out in the Replying affidavit of Benson Opiyo.

46. Indeed, the Speaker was referring to the Replying Affidavit by Benson Opiyo in response to the Notice of Motion Application filed on 18th December, 2017. The Affidavit was sworn on 15th December, 2017. This affidavit did not at all address the procedure followed at the assembly in removing the Petitioners from office.

47. The Petitioners in their elaborate Petition narrate the breach of procedure, the statute and the constitution by the 1st Respondent in purporting to remove them from office.

48. They state that they were condemned unheard by the 1st Respondent who was the complainant, investigator and judge in the cause.

49. They allege in particular the provisions of section 58(5) and Article 251 of the constitution inter alia were violated by the 1st Respondent and other Respondents who participated in the implementation of the unlawful decision of the Assembly. They allege victimization, witch

hunt, bias and discrimination.

50. They seek a declaration that Articles 50 and 251 of the constitution were violated by the Respondents and have ably supported their claims in petitioners' supporting affidavit by Eng. Nashon Wilson Oyuga the Chairman of the Kisumu Public Service Board in which is demonstrated the manner of appointment of the Petitioners and the manner in which they were ambushed by the 1st Respondent and unlawfully, removed from office.

51. The Petitioners continue in office courtesy of the interim orders issued and enforced by the court. Under paragraph 23, and 26 of the supporting affidavit the deponent demonstrated the procedure and laws that the 1st Respondent was bound to follow and that, the provisions were blatantly violated to the loss and detriment of the Petitioners.

52. It is the court's conclusion that there is no iota of evidence before court that demonstrates on a balance of probabilities that the 1st Respondent observed the provisions of section 58(5) of the County Government Act, read with Article 251 of the Constitution of Kenya in purporting to remove the Petitioners from office.

53. On the requirements of a fair hearing, the court concurs with the elucidation by the Court of Appeal in the matter of **County Assembly of Kisumu and 2 Others v Kisumu County Assembly Service Board and 6 others [2015] eKLR** as follows –

“Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice is not a privilege to be graciously accorded by courts or any quasi – judicial body to parties before them. As is clear from Articles 47 and 50 of our constitution, it is a constitutional imperative.”

54. This court agrees with the petitioners that they were not properly notified and given sufficient opportunity to defend themselves before the adhoc committee and on the floor of the County Assembly before the Adverse decision was made against them. The Respondents failed the test of procedural fairness in this regard.

55. The court reiterates the observation by the court of appeal as follows:-

“Impeachment or removal from office is a drastic step with serious ramifications with regard to the decision on the career of an individual. It can easily consign an individual to professional oblivion 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 Government Act, must be strictly complied with.”

56. Sadly, this was not the case in the present matter. The Respondents failed in adhering to procedural fairness to the loss and detriment of the Petitioners.

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

i. A declaration that the action of the 1st Respondent, either through its ad hoc committee or any other person acting under her, in proceeding to collect/receive information from the public in total disregard of the order of the court issued on 9th October, 2017 and extended indefinitely on 1st November, 2017 or at all was/is null and void ab initio.

ii. A declaration that the action of the 1st Respondent in adoption the ad hoc committee's report, prepared and obtained in total disregard of the court order was/is null and void ab initio.

iii. A declaration that the action of the 2nd, 3rd and 4th Respondents in purporting to act on the 1st Respondent's recommendation obtained in total disregard of the court order issued on 9th October, 2017 and extended indefinitely on 1st November, 2017, thereby issuing the petitioners with various letter of removal from office, dated 7th December 2017, is not only illegal and biased, but also void.

iv. A declaration that the action of the 2nd, 3rd and 4th Respondents by themselves or employee or officer acting under instruction of the 2nd Respondent of withholding, deducting or continuing to deduct or to withhold any of the petitioners' salaries and/or allowances due, earned or which ought to have been earned or any portion of the approved budget following the letters of 7th December, 2017 is illegal.

v. A declaration that any action by the 2nd, 3rd and 4th Respondents in advertising, short listing, selecting, appointing or in any way purporting to replace the petitioners as members of the Kisumu County Public Service Board following their various letters to the petitioners dated 7th December, 2017 is illegal and void.

vi. A declaration that any action by the 2nd, 3rd and 4th Respondents, or anyone acting under their instructions in taking over the physical offices and/or carrying out any of the duties of the petitioners as spelt out under section 59 of the County Governments Act, more particularly advertising, shortlisting, selecting, appointing, recruiting, disciplining any county public officer/servant is illegal and for which the 3rd and 4th Respondents are jointly and severally liable for such action.

vii. An order of judicial review in the nature of a certiorari to remove into the Employment & Labour Relations Court and quash

both the report of the ad hoc committee of the 1st Respondent dated 4th December 2017, investigating the conduct of the petitioners as members of the Kisumu County Public Service Board and subsequently its adoption by the 1st Respondent on 6th December 2017 in their sitting of that day.

viii. An order of judicial review in the nature of a certiorari to remove into the Employment & Labour Relations Court and quash the various letters issued to the petitioners dated 7th December 2017, purporting to remove the petitioners as members of the Kisumu County Public Service Board.

ix. All salaries, allowances, claims and/or budget due, earned, payable or ought to have been earned or become payable as at or from December, 2017 be paid from date due, withheld, deducted, payable together with interest till payment in full.

58. With regard to the decision by the court to refuse stay of proceedings pending appeal of the ruling by the court delivered on 22nd February 2018, the application lacked merit, in that the petition had overwhelming merit and the proceedings for stay were but a delay tactic on the part of the Applicants on a matter of great public interest that warranted expedient hearing and determination.

Judgement Dated, Signed and Delivered in Kisumu this 31st day of July, 2018

Mathews N. Nduma

Judge

Appearances

Bruce Odeny for Petitioners

M. J. Okumu for 1st Respondent

Otieno, Yogo Ojuro & Co. for 2nd, 3rd & 4th Respondents

Chrispo – Court Clerk