



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 465 OF 2018

BETWEEN

DENIS MUSYOKA MUTUL.....CLAIMANT

VERSUS

1. KWALE COUNTY ASSEMBLY SERVICE BOARD

2. KWALE COUNTY ASSEMBLY.....RESPONDENTS

RULING

Pleadings and file history

1. The Claimant is the Clerk of Kwale County Assembly, appointed by the 1st Respondent on 12th August 2013. His appointment was approved by the 2nd Respondent. Pursuant to this appointment, the Claimant was issued a letter of appointment dated 12th August 2013, containing his terms and conditions of service. He states that he served impeccably, as Clerk to the 2nd Respondent and Secretary to the 1st Respondent, for a period of over 4 years.

2. He states on or around 23rd April 2018, the Respondents hatched a well-crafted, illegal and malicious scheme, to suspend the Claimant from office. He was issued a letter of suspension dated 23rd April 2018. The letter did not give any reasons for which a Party can be suspended under the Human Resources Policies Guide. Under this Guide, suspension only follows upon being found guilty of an offence whose disciplinary action is suspension and /or where an Employee has been on interdiction for a period exceeding 6 months. The Claimant was not facing such circumstances.

3. Alternatively, the Claimant states the only other instance where the Claimant would be liable for suspension is under Section 71 of the Public Service Commission Act 2017, if he has been charged with a serious criminal offence.

4. Prior to suspension no charges or statement of facts had been given to the Claimant under Section 23 of the County Assembly Services Act No. 24 of 2017. Suspension was recommended without hearing the Claimant. The Claimant avers the Respondents have acted in breach of the Human Resources Policies Guide, the Substantive Law, and the Constitution of Kenya.

5. He prays for Judgment against the Respondents in the following terms:-

a) Declaration that the Respondents' actions of suspending and threatening to terminate the Claimant's employment, amount to unfair labour practice and infringement of Claimant's constitutional rights.

b) A permanent injunction restraining the Respondents by themselves or through other persons claiming on their behalf from unfairly discriminating against the Claimant on any basis.

c) A permanent injunction do issue restraining the Respondent by itself or through its agents, servants, employees or any other persons acting on their behalf from terminating, altering or reviewing any term of the Claimant's employment.

d) Costs.

e) Interest.

f) Any other relief the Court deems suitable to grant.

6. The Claimant filed with the Statement Claim, an Application for interim measures. The interim measures sought are as follows:-

a) The Application is certified urgent and heard in the absence of the Respondents in the first instance.

b) Pending hearing and determination of the Application, a conservatory order do issue restraining the Respondents, whether by themselves, their agents and or servants from appointing, recruiting and/or employing any person in the position of either Clerk of County Assembly or Secretary of the County Assembly Board, or replacing the Claimant with any such person to be recruited or appointed whether in an acting or substantive capacity.

c) [Same as in [b] above, save pending hearing and determination of the substantive Claim].

d) Pending hearing and determination of the Application, the suspension letter and/or decision dated 23rd April 2018 made by the 1st Respondent be stayed and the Claimant does continue to execute his duties as the Clerk of the Kwale County Assembly.

e) [Same as in [d] above save pending hearing and determination of the Claim].

f) Pending hearing and determination of this Application, the notice to show cause, hearing and disciplinary process in general, initiated by the Respondents be stayed and the Claimant does continue to execute his duties as the Clerk of the Kwale County Assembly.

g) [Same as in [f] above, pending hearing and determination of the Claim].

h) Temporary injunction issues, restraining the Respondents, by themselves or through their agents, servants, employees and any person acting on their behest from terminating, altering or reviewing any term of the Claimant's employment pending hearing in the presence of all the Parties, of the Application.

i) [Same as in [h] above, pending hearing and determination of the Claim].

j) Costs of this Application are provided for.

7. The Claimant appeared in Court on 6th July 2018 in the absence of the other Parties, and was granted in the interim, prayers [a], [b], [d] [f] and [h] whose details are captured at paragraph 6 above. Hearing in the presence of all the Parties was scheduled for 26th July 2018.

8. Following grant of the orders above in the absence of the Respondents, the Respondents came to Court under Certificate of Urgency, with 2 separate Applications, filed on 13th July 2018, seeking to set aside the orders made in favour of the Claimant on 6th July 2018.

9. The Court was of the view that the 2 Applications were in the nature of Response to the Claimant's Application. It was directed that all the Applications be heard on 26th July 2018 as scheduled. The Respondents filed Grounds of Opposition to the Claimant's Application. They also filed Replying Affidavits sworn by Kwale County Assembly Speaker, Sammy Nyamawi Ruwa. The Claimant filed a Replying Affidavit in response to the 2 Applications.

10. The Applications were heard on 31st July 2018, the Claimant having sought more time on 26th July 2018, to respond to the 2 Applications filed by the Respondents.

Claimant's Submissions:-

11. **The Claimant** submits the 2 Applications by the Respondents seeking to set aside interim orders granted to the Claimant in the absence of the Respondents, are misplaced and misconceived. The Claimant made full disclosure to the Court leading to grant of the orders. He was under obligation to disclose and he did so. The Court did not order that the Claimant is reinstated; it only ordered that he continues discharging his role. Relying on High Court decision in ***Okiya Omtatah Okoiti v Commissioner General [2017] e-KLR***, the Claimant submits the order obtained on 6th July 2018 can only be set aside on the basis of misrepresentation, the particulars of which must be exactly stated and allegations established by strict proof.

12. On his Application, the Claimant repeats what is contained in his Pleadings, a summary of which have been captured at the introductory part of this Ruling. Integral to his argument is that his suspension contravened the Human Resources Manual; a Public Officer can only be suspended if charged with a serious criminal offence under the Public Service Commission Act, Section 71; Section 23 of the County Assembly Services Act requires the Respondents to prefer charges against the Claimant; there is no mention of suspension under the provision; there were no charges or statement of facts given to the Claimant before suspension; these were only given to the Claimant 71 days after suspension; and the process of notice to show cause was initiated, only to sanctify illegal suspension. Further, it is submitted for the Claimant that the Respondents passed a motion stripping the Claimant of accounting responsibility. The Respondents seek an order from the Court to have this responsibility taken away from the Claimant, but they have already done so through the County Assembly. The Court would be assisting in furtherance of this illegality if it sanctioned stripping of accounting responsibility from the Claimant. The Claimant was not granted opportunity to respond to the Internal Auditor's Report relied on by the Respondents in suspending him. He was not found culpable in the Report. The Respondents acted as Investigator, Judge and Executioner. Suspension, under Section 23 of the County Assembly Services Act, only follows after a finding of guilt. Who determined Claimant's guilt? The Claimant is not barred from challenging suspension on the ground that he handed over. The Claimant submits he has established a *prima facie* case, sufficient to warrant grant of

interim measures.

Respondent's Submissions:-

13. **The 1st Respondent** submits that the action against the Claimant is predicated on 3 grounds: a Report by the Kwale County Assembly; Findings, Resolutions and Decisions of the Kwale County Assembly Service Board; and Report by Internal Auditor.

14. The County Assembly tabled before the Service Board a damning Report against the Claimant, indicating the Claimant was negligent in discharging his supervisory role. He was accused of mismanagement of resources and abuse of procurement procedures. The Service Board was unanimous that the Claimant failed to produce minutes and misrepresented Board Resolutions to Employees. This was the basis of suspension.

15. The 1st Respondent convened on 17th April 2018, and resolved to suspend the Claimant as shown in the minutes on record. The 1st Respondent has the right to suspend the Claimant under Section 22 of the County Assembly Services Act. It did so through the letter dated 23rd April 2018. This was followed with a letter to show cause dated 29th June 2018. Section 17 of the County Assembly Services Act, defines the functions of the Secretary to the County Assembly Service Board. Viewed against these functions, it is clear why all the allegations were placed at the Claimant's doorstep. There was no malice in the process. The suspension letter contains good and credible grounds justifying the process against the Claimant. The period of suspension was disclosed as no more than 90 days. The Claimant was advised a proper enquiry would follow. The letter, to show cause why, cites the law it is based on, gives a brief statement of facts and informs the Claimant about his right to be heard. The process was initiated properly and is anchored on the law.

16. The Human Resources Policies Guide relied on by the Claimant is a Draft. It has not been adopted by the Assembly. The copy exhibited by the Claimant is indicated to be a Draft.

17. The 1st Respondent lastly submits that the Claimant has changed position since first appearance in Court. He places reliance on County Public Service Human Resource Manual after realizing the Human Resources Policies Guide is a mere Draft. The Manual applies to the County Executive, not to Employees of the County Assembly. The Claimant is an Employee of the County Assembly, not the County Executive. The Public Service Commission Act does not apply to the Claimant. His employment is regulated by the County Assembly Services Act. He questions the Motion of the County Assembly, but has not initiated contempt proceedings against the Respondents. Section 17 of the County Governments Act No. 17 of 2012 extends parliamentary immunities and privileges to County Assemblies. Their proceedings cannot be questioned in Court. The 1st Respondent adopts ***Supreme Court of Kenya Petition Number 32 of 2014, between Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another [2017] e-KLR*** on parliamentary immunities and privileges.

18. **The 2nd Respondent** associates itself fully with the Submissions made by the 1st Respondent. Even before the letter of suspension issued, the Claimant had been informed in November 2017, about issues raised by Members of County Assembly against him. He was asked to respond to those issues. He did not. He was well aware of the issues against him, even before the letter of suspension issued.

19. The Claimant acted on the letter of suspension. He handed over to the Deputy Clerk as shown in the Handing-Over Report dated 23rd April 2018. He did not challenge suspension. He accepted it and handed over. He cannot be allowed to challenge suspension after he handed over.

20. After handing over, Claimant's Integrated Financial Management [IFMIS] user rights were assigned to the Deputy Clerk, Fatuma Hassan Mwalupa.

21. It was after he received the letter to show cause, why he should not face disciplinary proceedings, that the Claimant rushed to Court. He has not responded to the charges presented to him. The letter of suspension merely instigated disciplinary process. The Employer, as held in ***Alfred Nyungu Kimungui v Bomas of Kenya [2013] e-KLR***, retains the managerial prerogative to discipline Employees. The Claimant has been advised in the letter to show cause, on his right to be heard in the company of Counsel. He has already handed over to his Deputy, and the removal of the accounting function from him, is neither here nor there.

The Court Finds:-

21. The Claimant is the Clerk to Kwale County Assembly, having been appointed and approved as such, under Section 13 of the County Governments Act, on 12th August 2013. He received a letter of suspension from the County Assembly Service Board Chairman, who is also the County Assembly Speaker, dated 23rd April 2018.

22. The letter makes various allegations against the Claimant, upon which suspension is founded. Among these are, are that, sometime in November 2017, Members of the County Assembly wrote the County Assembly Service Board complaining that the Claimant was involved in active politics, abuse of office, incompetence, and favouritism. The Claimant was required by the Board to make a Report. The Claimant ignored this instruction. It is also alleged that the Claimant irregularly initiated and / or authorized payments for questionable projects. The Claimant was suspended for a period not exceeding 90 days, effective from 23rd April 2018, in line with Section 22 of the County Assembly Services Act.

23. On the same date, the Claimant handed over to his Deputy Clerk, Fatuma Mwalupa. There is a Handing-Over Report dated 23rd April 2018, whereof the Claimant states:-

“I Dennis Mutui [Clerk] do hereby hand over to Fatuma Mwalupa my designated office and below items, following my suspension by the County Assembly Service Board today the 23rd April 2018....”

The Report is signed by the Claimant, his Deputy and a Witness.

24. The following day, on 24th April 2018, Claimant's user rights under Integrated Financial Management System of the National Treasury, were assigned to the Deputy Clerk. There is evidence that through a letter to the Deputy Clerk from the County Executive Member responsible for Finance and Economic Planning, the Deputy Clerk was designated as the Accounting Officer under Section 148 [4] of the Public Finance Management Act 2012.

25. On 29th June 2018, within the period of 90 days of suspension given under the letter of suspension, the Claimant was issued a Notice to Show Cause Why Removal Proceedings as County Clerk, should not be commenced. The Notice is detailed, and specific that the intended action against the Claimant is premised on Section 23 of the County Assembly Services Act 2017. This law is quoted verbatim in the Notice.

26. There are 6 charges against the Claimant, accompanying the Notice, each supported by a Statement of Facts.

27. Rather than respond to these charges within 7 days, as advised in the Notice, the Claimant came to Court on 6th July 2018 and obtained the interim Orders, preventing the Respondents from moving ahead with the process under Section 23 of the County Assembly Services Act.

28. Suspension of an Employee is lawful, if it is founded of contractual authority, or is underpinned by statute, as held by the Industrial Court [E&LRC] in **Shedd Dennies Simotwo v Speaker Narok County Assembly 2015[e-KLR]**. Section 22 of the County Assembly Services Act authorizes the County Assembly Service Board, to suspend or remove the Clerk from Office. There is no requirement that the Clerk is given a hearing before suspension. Hearing is only required, under Section 23, once the process of removal is commenced. Suspension contemplated under Section 22, is not suspension in form of a penalty, after a disciplinary hearing; it is suspension in the form of an administrative measure. The Claimant is merely being asked to step aside, to enable investigations and the process of removal, to go on without his possible interference. He has not been adjudged guilty and suspended as punishment for any employment offence. There is no requirement that he is heard before being placed on administrative suspension.

29. The Court agrees with the submission made by the 1st Respondent that the Claimant is an Employee of the County Assembly Service Board, not an Employee of the County Public Service Board, or the Public Service Commission of Kenya. Consequently, in challenging his suspension, he cannot rely of the provisions of the Public Service Commission Act 2017 or the County Public Service Human Resource Manual. The Public Service Commission is principally an agent of the National Government, recruiting, employing and managing Public Servants on behalf of the National Government. It has disciplinary control over Public Servants working for the National Government. The County Public Service Board is established under Section 57 of the County Governments Act No. 17 of 2012, pursuant to Article 235 of the Constitution. This is analogous to the Public Service Commission at the national level. The Claimant is an Employee of the County Assembly Service Board, which at the national level would be comparable to the Parliamentary Service Commission.

30. He appears not to draw the line between the laws and regulations governing employment at national and devolved levels. Even within the devolved unit, he does not appreciate the separate arms, and borrows employment regulations from the Executive to apply to his contract of employment, while his contract lies fully, within the law and regulations applicable the County Assembly Service. The County Public Service Human Resources Manual, and the Public Service Commission Act do not apply to the Claimant's contract.

31. Inexplicably, the Claimant relies on Human Resources Policies Guide, which is in draft form. This document cannot be read into the Claimant's contract in its raw form. It has not been shown to have been adopted by the Kwale County Assembly Service Board. It is not mentioned in the Claimant's contract of employment. The draft document is well written, has very beautiful labour values and principles, but unfortunately is of no probative value in the proceedings before this Court. It clearly has the annotation 'Draft,' embossed on it.

32. The Respondents have shown they were not barred by the law, from debating their Assembly Clerk, even as the Clerk took out proceedings in Court against them. The Supreme Court in **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2017] e-KLR**, held that each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate. The Supreme Court held further that each arm of the Government has an obligation to recognize the independence of other arms of Government, and that Courts of law are the proper judge of compliance with constitutional edict for all public agencies, a role the Courts should exercise with restraint, limiting themselves to intervention in requisite instances.

33. The Motion by Hon. Anthony Yama introduced amendment to an already existing report, of the Committee on Public Investments and Accounts, by inserting new recommendations that the Assembly did not have confidence in the Claimant, and that the Claimant is relieved of his role as the Accounting Officer.

34. The Court does not think this Motion is material to the issue in dispute. Suspension and removal of the Clerk under Section 22 and 23 of the County Assembly Services Act is not made through a Member's Motion. The Assembly could debate the Motion as much as it wished, but suspension and removal would only be valid if carried out in accordance with Section 22 and 23 of the Act. The Court did not bar the Kwale County Assembly from debating the Claimant. Section 10 of the County Assemblies Powers and Privileges Act No. 6 of 2017, states that no proceedings or decision of a County Assembly, or the Committee of Powers and Privileges, acting in accordance with the Act, shall be questioned in any Court. The Motion by Hon. Anthony Yama, whatever its worth, cannot therefore be challenged in Court by the Claimant.

35. Lastly the Court is not satisfied that Claimant has shown a *prima facie* case, with probability of success. The remedies sought in the Claim, as indicated at paragraph 5 of this Ruling do not appear to have support, in the evidential material placed before the Court by the Claimant. He has not shown that he has been, or is about to be subjected to unfair labour practices. Everything done so far by the Respondents with regard to the process of suspension and removal of the Claimant has been done strictly according to the law. There is no evidence of unfair discrimination. It would be unusual for any Court to order an Employer, through an order of perpetual injunction, not to vary or terminate an Employee's contract. Termination of the contract of employment is integral to the concept of freedom of contract, and is an indispensable aspect of employment and labour relations. The Employment Act 2007 provides for both variation and termination of

contracts of employment. The Claimant's contract is expressed to be terminable. The County Assembly Services Act provides for removal of the Clerk. A perpetual injunction as sought by the Claimant would be against the law and contract to which the Claimant is subject. No Employee is a permanent fixture at the workplace. A perpetual injunction, barring the removal of the Claimant from Office, would turn the Claimant, into a lifelong Kwale County Assembly Clerk. The Claimant has not shown he has a *prima facie* case against the Respondents, to warrant grant of the orders sought.

IT IS ORDERED:-

- a) The Application filed by the Claimant on 6th July 2018 is rejected with costs to the Respondents.***
- b) It is not necessary in the circumstances, to give orders on the 2 Applications filed by the Respondents.***

Dated and delivered at Mombasa this 25th day of September, 2018.

James Rika

Judge