



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 33 OF 2018

(AS CONSOLIDATED WITH PETITION NO. 35 OF 2018)

(Before Hon. Justice Mathews N. Nduma)

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COUNTY ASSEMBLY SERVICE ACT NO.24 OF 2017

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

BETWEEN

DANIEL OGINDA ORINA.....1ST PETITIONER/APPLICANT

VERSUS

THE SPEAKER COUNTY

ASSEMBLY NYAMIRA COUNTY.....1ST RESPONDENT

THE COUNTY ASSEMBLY

SERVICE BOARD NYAMIRA COUNTY.....2ND RESPONDENT

THE NYAMIRA COUNTY ASSEMBLY.....3RD RESPONDENT

RULING

1. Applications dated 9th April, 2018 in Petition 35/18, and Application dated 3rd April, 2018 in Petition No. 33/18 by one Vincent Mariita Omao and Daniel Oginga Orina respectively against the speaker of County Assembly, Nyamira County & others were consolidated and heard together. Both were certified urgent but no interim orders were granted.

2. The applications related to the suspension of the two officers pending disciplinary process purportedly by the County Assembly Public Service Board in terms of Section 22 of the County Assembly Service Act.

3. The Applicants in both applications seek to injunct disciplinary action and suspension of Daniel Oginga Orina as the Clerk to the County Assembly and the Applicant in Petition 35 is a member of the Public who has brought similar application to injunct the disciplinary process and suspension of the clerk. The two therefore deal with same subject matters.

Facts not in dispute

4. On 29th March, 2018 the 1st and 2nd Respondent issued Mr. Daniel Oginga Orina, Clerk to the County Assembly of Nyamira, a letter of suspension on grounds set out in the letter to wit –

a) Non remittance of 12.5 million gratuity of the former MCAs for the financial year 2016, 2017 to LAPFUND causing the former MCAs not to receive their benefits to date.

- b) Failure to remit 1.4 million voluntary contribution to LAPFUND by MCAs for the month of March, 2016.
- c) Failure to officially communicate on redeployment of three staff members who were attached to former speaker's home.
- d) Amending the minutes of the Board of 20th June, 2017 on recruitment of cleaners without consent of the Board.
- e) Granting top up to car mortgage to former MCAs and speaker against regulations.
- f) Granting self a car loan of Kshs.2 Million without any policy regulating staff loans.

5. Suspension was for three (3) months. Clerk was to respond to the allegations as per section 23(1)(c) of the County Assembly service Act, 2017 within one month.
6. The Respondents were to follow procedure laid out under section 23 of the Act. Clerk was to hand over to the Deputy Clerk by 30th March, 2018.
7. The letter of suspension is signed by the Chairman, County Assembly Service Board Hon. Moffat Teya.
8. The Petition and Application was filed on 3rd April, 2018.
9. The Application is opposed vide a Replying Affidavit by the Respondent sworn by the Chairman of the County Assembly Service Board sworn on 30th April, 2018.
10. The Chairman deposes that the Clerk is the Secretary of the Assembly Service Board and the accounting officer of the County Assembly as per section 12(4) of the County Government Act No.17 of 2012.
11. That the Clerk is charged with the aforesaid offences, was therefore lawfully placed under suspension on ½ pay.
12. The Applicant has submitted to the process commenced on 29th March, 2018 and this suit is premature. The petition and application be struck off pending conclusion of the process.
13. The Applicant had up to 30th April, 2018 to respond to the charges. That he is placed on 90 days suspension which is reasonable to navigate the process. That there is an Acting person in place to avoid any lacuna meanwhile. The application be dismissed with costs.

Determination

14. The law on grant of injunctions is well known in Kenya and East Africa as well laid out in the cases of **Mrao vs First American Bank of Kenya Limited & 2 others 2003 KLR, pages 125 – 139; Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others, (2014) eKLR and Giella v Cassman Brown Limited.**
15. In **Gatirau Peter Munya case supra**, the supreme court held –
- “Conservatory order” bear a more decided public law connotation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory Orders therefore are not unlike interlocutory injunctions linked to such private party issues as “prospects of irreparable harm” occurring during the pendency of a case; or high probability of success in the supplicant’s case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and propriety levels attributable to the relevant causes.”*
16. We have considered carefully the petition, the applications before court and the supporting affidavits and list of documents filed.
17. The court is satisfied that a proper disciplinary process by the correct authority being the County Assembly Public Service Board, Nyamira County against its own secretary and the Clerk of the County Assembly, the applicant is pending.
18. The court has considered the case preferred against the clerk, proportionate magnitudes in the matter weighing constitutional values and public interest of the matter and is of the considered view without dwelling into issues in dispute that the application is premature and the applicant should await the outcome of the disciplinary process underway. The Law and public interest demand issues of impropriety be examined thoroughly within the confines of the law while protecting the rights of the person under investigation and the constitution of Kenya, 2010.
19. For these reasons, the two applications are dismissed with costs in the cause.

Dated and Signed in Kisumu this 20th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Odumbe for Applicant in Petition 35 of 2018

Mr. Ochoki for the Applicant in Petition 33 of 2018

Mose Nyambega for Respondents

Chrispo – Court Clerk