



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 4 OF 2018

(Before Hon. Justice Mathews N. Nduma)

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 1, 10, 41, 174, 179(1)
OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 59 OF THE COUNTY GOVERNMENTS ACT 2012

BETWEEN

KISUMU COUNTY PUBLIC SERVICE BOARD.....1ST PETITIONER

COUNTY GOVERNMENT OF KISUMU.....2ND PETITIONER

AND

Eng. NASHON W.O. OGUYA.....1ST RESPONDENT

BETTY ASUNAH.....2ND RESPONDENT

MOSES ONDIEK ODINGO.....3RD RESPONDENT

JACKSON ODENY OYOO.....4TH RESPONDENT

VIOLET SALLY ONYANGO.....5TH RESPONDENT

EMILY OLAGO.....6TH RESPONDENT

J U D G M E N T

1. A Preliminary Notice arises in this petition to wit;

Whether the 1st and 2nd Petitioners are suited to sue the Respondents. The 1st Petitioner is the Kisumu County Public Service Board. The 2nd Petitioner is the County Government of Kisumu. The Respondents are members of the 1st Petitioner.

2. The issue that arises is whether members of the 1st Petitioner can be isolated from the 1st Petitioner and be sued separately from the 1st Petitioner.

3. In **Hussein Roba Boru Vs County Government of Isiolo ELRC at Nyeri Petition No. 2 of 2016** the Court held inter alia;

“As a body corporate the members, are the true blocks of the board; they are the mind, body, heart and spirit of the board.”

4. Secondly, the Petitioner does not disclose any reasonable cause of action and/or constitutional breach. The members of this board acted within their mandate to sit and ask its Secretary to show cause why he should not be disciplined for abdicating his duties, going against Board Directors and acting outside Board Authority.

5. The Petitioners seek the following orders against the Respondents:-

- a. A declaration that the Respondents conduct amounted to a serious violation of Article 1, 10, 174, 179(1) and Chapter 6 of the Constitution as read with Section 59 of the County Government Act, 2017.
- b. A declaration that the Respondents actions in the course of their duty amounted to gross misconduct.
- c. A declaration that the Respondents performance demonstrates incompetence for their respective tasks.
- d. An order to call the letter dated 25th January 2018 for purposes of quashing.
- e. That an order be and is hereby issued quashing any decisions purportedly arrived at by the Respondents without involving and in the absence of the Secretary to the Board.

6. The Petitioner set out on the particulars of Constitutional and Statutory breaches by the Respondents' in the petition under Paragraph 8(a) to (j).

7. In short this is a consent between the suspended secretary to the Kisumu County Public Service Board, backed by the Executive Government of Kisumu Versus all the members of the Kisumu County Public Service Board disguised as a Constitutional Petition to assert rights of the 1st Petitioner, the Kisumu County Public Service Board.

8. The Constitution of Kenya 2010 provides under Article 176(1) as follows:-

“176(1). There shall be a County Government for each County consisting of a County Assembly and a County Executive.”

9. The County Government Act No. 17 of 2012, enacted pursuant to this provision establishing, the County Public Service Board in Section 57 as follows:-

1. There is established a County Public Service Board in each County which shall be –

a) a body corporate with perpetual succession and a seal;

and

b) capable of suing and being sued in its corporate name.

58(1) The County Public Service Board shall comprise ((a), (b),

(c)

Section 59 provides

“Functions and powers of a County Public Service Board

(I) The functions of the County Public Service Board shall be, on behalf of the County Government, to –“

10. The Act then sets out under Sub-section (a) & (j) functions of the Board in Mandatory terms.

11. Though the County Public Service Board is to be treated as an autonomous and independent body similar to ‘a constitutional commission under Article 251(1) of the Constitution; the Board is part and parcel of the County Government. The Board is given wide ranging powers under the Act to be exercised in a transparent and accountable manner on behalf of the County Government.

12. Furthermore the County Governments Act, Under Section 77 provides

“Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer may appeal to the Public Service Commission against the decision.”

13. Under Section 86, the Act, provides for delegation by County Public Service Board, in writing any of its functions to any one or more of its members and the County Secretary, County Chief Officer, Sub-County or ward administrator, village administrator, City or Municipal Managers and town administrators.”

14. From the foregoing positions, it is abundantly clear that the County Public Service Board is separate and distinct from its members and the Secretary and that it can sue or be sued as a corporate body separate from its members.

15. However, decision to sue by the County Public Board must be a corporate decision made by the board, sitting in a duly and properly constituted meeting and the decision so made is duly signed by the Chairman on behalf of the Board and communicated, where necessary to intended persons, including the County Government.

16. The 1st Petitioner may only sue its members if there is a proper decision made by the Board, authorizing such action. In other words, part of the members lawfully sitting having met the requisite quorum, and with the Secretary present must make such a decision on behalf of the Board to sue.

17. No such decision of the Board made signed and sealed has been presented to this court. Accordingly it is the court's decision that the 1st Petitioner lack locus standi to sue all its members except the Secretary in this matter. Equally, the County Government of Kisumu lack status to impugn and impeach, decisions made by the 1st Petitioner through its members, otherwise than is provided in the County Government Act, and the Constitution of Kenya 2010.

18. To this extent, the suit by the County Public Service Board against six (6) of its members is incompetent and non suited. Equally, the County Government of Kisumu, if aggrieved, by a decision or decisions of the Board, made by its members, cannot purport to have those decisions reversed or nullified by suing, members of the Board, separately from the Board itself. There is no provision in the County Government Act, which authorizes such recourse by the 2nd Respondent.

19. Section 58(5) provides the procedure by aggrieved persons for removal of members for reasons provided Under Article 251(1) of the Constitution of Kenya 2010. Any other round about way of disabling the County Public Service Board or its members will not do.

20. Accordingly, the final judgment of the Court is that, this petition by the County Public Service Board against its members and by the County Government of Kisumu, jointly seeking to nullify decisions made by the Board Members on behalf of the Board is incompetent and non suited and is dismissed with costs against the 2nd Petitioner.

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

Mathews N. Nduma

Judge

Appearances

Amondi & Company Advocate for the Petitioners

D.A. Oluoch & Company Advocate for the Respondents

Chrispo: Court Clerk