



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT KISUMU

PETITION NUMBER 67 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 1,2,3,10[2][C] 19,20,21,22,23,27,28,47,50,73,& 32

AND;

IN THE MATTER OF: VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND;

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT 2012

AND;

**IN THE MATTER OF: THE CONSTITUTION OF KENYA [PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS]
PRACTICE AND PROCEDURE RULES 2013**

AND;

**IN THE MATTER OF: THE CHALLENGE OF THE UNLAWFUL DISMISSAL OF THE EPETITIONER FROM THE
EMPLOYMENT OF THE RESPONDENTS;**

BETWEEN

HON. ELIZABETH AYOO.....PETITIONER

VERSUS

1. HOMABAY COUNTY ASSEMBLY SERVICE BOARD

2. HOMABAY COUNTY ASSEMBLY.....RESPONDENTS

RULING

1. The Petitioner filed an Application under Certificate of Urgency, on 2nd November 2018. She states she is the Speaker of the Homabay County Assembly.
2. She was invited through a letter dated 29th October 2018 from the Respondents, which letter was served upon the Petitioner on 31st October 2018, to appear on the floor of the County Assembly on 1st November 2018, to answer certain allegations leveled against her.
3. The motion was debated by the County Assembly on 1st November 2018, without giving the Petitioner adequate time to respond to the accusations made against her.
4. It was resolved by 38 out of a total number of 60 Members of the County Assembly, that the Petitioner is removed from Office. This represented 65% of Members which is less than 75% required under Section 11 of the County Governments Act, and under Standing Orders number 58[1] of Homabay County Assembly.

5. The Petitioner was not granted reasonable opportunity to be heard under Article 50 of the Constitution, Section 11 [4] of the County Governments Act and Standing Order numbers 58 [4] and 63 of the Homabay County Assembly. She avers she was not removed lawfully and fairly.

6. She prays the Court to issue the following provisional measures against the Respondents and/ or other persons acting at the behest of the Respondents, pending the hearing of the Application *inter partes*, and pending hearing of the Petition:-

- a) An order of mandamus, pending hearing and determination of the Application, reinstating the Petitioner to the position of Speaker, Homabay County Assembly.
- b) Pending hearing and determination of the Application, a conservatory order is issued, prohibiting the Respondents from appointing any new nominee for approval by the Homabay County Assembly, whether in a temporary or an acting capacity.
- c) Same order as in [b] above, pending hearing and determination of the Petition.
- d) Pending hearing and determination of the Application, a conservatory order is issued prohibiting the Respondents from interfering with the execution of the Petitioner of her duties as the Homabay County Assembly Speaker, or otherwise howsoever debating, deliberating upon or removing from Office the Petitioner as the Speaker of the Homabay County Assembly.
- e) Same order as in [d] above pending hearing and determination of the Petition.
- f) An order of injunction is issued pending hearing and determination of the Application, staying any subsequent decision to impeach the Petitioner as the Speaker, of Homabay County Assembly by the 2nd Respondent.
- g) Same order as in [f], pending hearing and determination of the Petition.
- h) Pending hearing and determination of the Application, an order is issued prohibiting the Respondents from interfering with the remuneration and privileges of the Petitioner.
- i) Same order as in [h] above, pending hearing and determination of the Petition.
- j) Pending hearing and determination of the Application, an order is issued directing the OCS Homabay Police Station to provide security to the Petitioner inside County Assembly Chambers.
- k) Same order as in [j] pending hearing and determination of the Petition.

7. The Application is based on Grounds outlined in the Application, and on an Affidavit sworn by the Petitioner on 2nd November 2018.

8. It was heard *ex parte*, on 5th November 2018.

9. She states she was assaulted and injured, by Members of the County Assembly on 16th October 2018, in the course of discharging her role. She reported assault to the Police and was issued P3 Form. She was served with a notice by the Acting Clerk on 31st October 2018, indicating intention to move a motion for her removal as Speaker. She was to appear before the Assembly the following day, 1st November 2018. She did not have sufficient notice to respond. She nonetheless wrote to the Acting Clerk, informing the Acting Clerk that the Petitioner was unwell as a result of serious injuries sustained during her assault on 16th October 2018. The motion was debated and voted upon on 1st November 2018. 21 Members swore Affidavits stating they did not participate in the proceedings leading to the removal of the Speaker. The Petitioner submits she was entitled to appear before the relevant Committee of the House seized with the matter, and entitled too, to legal representation. These procedural rights were denied to the Claimant. She is apprehensive unless the orders sought are granted, she will suffer immense prejudice.

The Court Finds:-

10. The Petitioner is, or was until her purported removal by Homabay County Assembly, the Speaker of Homabay County Assembly. For some reasons which are not clear at this stage, she disagreed with some Members and was, before the removal motion, on 16th October 2018, assaulted and injured, by a section of her County Assembly Colleagues.

11. She was still nursing her injuries on 31st October 2018, when she received a notice from Acting Clerk dated 29th October 2018, notifying her of the removal motion, and asking her to attend the County Assembly on 1st November 2018, to respond to allegations made against her.

12. As expected, she was not able to attend removal proceedings on 1st November 2018. The County Assembly went ahead, debated and resolved the Petitioner is removed as Speaker, Homabay County Assembly.

13. The Court is satisfied that the Petitioner has shown at this stage, that her purported removal is not in accordance with the Constitution of Kenya, the County Governments Act 2012, the Employment Act 2007 and Homabay County Assembly Standing Orders.

14. She has demonstrated her Petition has a likelihood of success on merits and irreparable harm may be occasioned to her, and to good

governance and democracy, if the provisional orders are not granted.

15. The operations of the County Assembly would be hampered if the actions of the County Assembly against the Petitioner are left to stand. This is not merely an action based on an individual contract of employment. It involves the ability of a devolved unit to function, and the rights of Citizens living in that unit, to receive service from their County Assembly. Without the Speaker, or without a proper removal and replacement of the Speaker, the entire County of Homabay will have suffered democratic deficit. The Employment and Labour Relations Court does not ordinarily reinstate Employees on *ex parte* Applications, but the Speaker of County Assembly is more than just any other Employee. The Speaker is central to the functioning of the County Government.

16. The *Supreme Court of Kenya in Justus Kariuki Mate v. Martin Nyaga Wambora [2017] e-KLR* held that while Courts must refrain from directing other organs of the Government on how to exercise their mandates, the Courts are the proper Judge of compliance with constitutional edict for all public agencies. Proceedings of County Assemblies, while protected under the County Assemblies Powers and Privileges Act No. 6 of 2017, can be questioned before the Courts, where County Assemblies opt to go about their proceedings contrary to the Law, the Constitution and rudimentary Rules of Natural Justice. There is no reason for honourable Members, to resort to axes and gibbets, and other undemocratic practices, in conduct of the affairs of the County Assembly.

IT IS ORDERED:

[a] The Petitioner is reinstated to her position as the Speaker of Homabay County Assembly, pending hearing and determination of the Application inter partes. The Respondents shall not in any way interfere with the Petitioner's terms and conditions of service as the Speaker of Homabay County Assembly, pending hearing and determination of the Application inter partes.

[b] The Respondents are restrained by themselves or any persons acting on their behalf, from interfering with the Petitioner's execution of her duties as the Speaker, Homabay County Assembly, pending hearing and determination of the Application inter partes.

[c] The OCS Homabay Police Station is ordered to provide security to the Petitioner in discharging her role as Speaker of the Homabay County Assembly pending hearing and determination of the Application inter partes.

[d] The Respondents are hereby restrained from appointing any other person as Speaker of the Homabay County Assembly, pending hearing and determination of the Application.

[e] The Application and the Petition shall be served upon the Respondents forthwith.

[f] The Respondents shall file their Replying Affidavits and/or Grounds of Opposition to the Notice of Motion and to the Petition, within a total of 14 days from the date of service.

[g] The matter shall be mentioned before the Hon. Justice Nderi Nduma, Employment and Labour Relations Court Kisumu, on 4th December 2018 for further orders.

Dated and delivered at Kisumu this 5th day of November 2018

James Rika

Judge