



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 375 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**GLADYS NGERE.....CLAIMANT**

**-Versus-**

**MIGORI COUNTY ASSAMBLY.....RESPONDENT**

**RULING**

The Applicant/Claimant is a member of Migori County Assembly Service Board having been appointed on 7th June 2013 under section 12(3) of the County Government Act in the capacity of a resident of the county with knowledge in public affairs. On 27th October 2015 the County assembly passed a resolution that all members then serving on the County Assembly Public Service Board should step aside for a period of 60 days to pave way for investigations by Kenya National Audit Office and the Ethics and Anti-Corruption Commission. Pursuant to the Resolution the Claimant together with all the other Members of the County Assembly Service Board stepped aside.

It is the applicant's case that she was cleared by the police on allegations of signing cheques on grounds that her signature was forged. It is further her case that there has been no resolution of the County Assembly extending the 60 days within which investigations were to be carried out. The Claimant further avers that her name is not mentioned in the Migori County Assembly Internal Audit Forensic Report for the Period Ended 30th June 2015.

The claim herein was filed on 19th December 2016 seeking the following remedies-

- a. A declaration that her continued suspension is unjustified, unlawful, unfair, wrongful and illegal;
- b. A declaration that the continued withholding of the Claimant's allowances is unjustified, unlawful, unfair, wrongful and illegal;
- c. an order of injunction restraining the Respondents by themselves, their employees, servants and or agents from termination the employment of the Claimant;
- d. An order do issue for reinstatement of the Claimant's employment or in the ALTERNATIVE
- e. An order directing the Respondent to pay the Claimant her allowances for October, 2015 to 2017 when her term comes to an end being Kshs. 3,888,000 plus damages for unfair termination plus interest at Court rates;
- f. In addition, that costs be borne by the Respondent.

In her application before me for determination filed under certificate of urgency on 25th January 2017 the Claimant prays for the following orders-

1. THAT the County Assembly of Migori is being run illegally as the County Assembly board is not properly constituted as required by law.
2. THAT the Respondent have not issued the Claimant with a dismissal letter or any letter lifting the suspension making her life riddled with uncertainties and her employment is in limbo.
3. THAT the Respondent cleared the Claimants name but have refused to let her resume work and is now apprehensive that her employment will be terminated.
4. THAT the Claimant is facing extreme hardship and injustice as she is a widow with children to fend for and is diabetic with no other source of income.

In the grounds in support of the application the claimant states that she was invited and appeared before the Service Board on 29th June 2016 and cleared her name but has not been reinstated to date.

The Respondent filed both grounds of opposition and Replying Affidavit of TOM OPERE ONYANGO, the Interim County Assembly Clerk in opposition to the application. It is the Respondent's position that the Claimant is still a member of the County Assembly Service Board and there has been no attempt to remove her. The Respondent states that the Claimant is liable and subject to investigation by virtue of her position as member of the County Assembly Service Board at which funds have been lost as documented in the County Assembly Departmental Committee Report.

In the Replying Affidavit of Tom Opere Onyango, he states that following the resolution of the County Assembly that the members of the County Assembly Service Board step aside for investigations into financial improprieties by the Board, letters were written to the Office of Auditor General, Kenya National Audit Office and the Ethics and Anti-Corruption Commission to carry out investigations and that the said bodies are still carrying out investigations.

Mr. Tom Opere Onyango states in the replying affidavit that besides collective responsibility the Claimant is alleged to have been irregularly paid Kshs. 300,000 on 6th December 2014 as part payment of a claim she made for Kshs. 1,550,000 as alleged arrears for accommodation, airtime and transport from November 2013 to November 2014. He states that the County Assembly has power to appoint and revoke appointment of a member of the County Assembly Service Board pursuant to section 12(3)(d) of the County Government Act. He states that the position of the Claimant is held at the pleasure of the County Assembly subject only to the provisions of section 12(5)(b) of the County Government Act.

Mr. Onyango states in the affidavit that the Claimant is not the only person who was asked to step aside, that all the other members of the County Assembly service Board have not been cleared of the allegations against them and she must not be treated differentially. He states that the Claimant does not have any valid or justifiable grounds to warrant the lifting of her suspension.

### **Submissions for Claimant**

At the hearing of the application Mr. Mwamu for the Claimant submitted that since stepping aside on 27th October 2016 and appearing before the Board on 29th June 2016 there has not been any decision of the County Assembly extending the 60 days suspension. He submitted that under Article 47 of the constitution there must be fair hearing. He submitted that the suspension is illegal, that there is no proof that documents were sent to any investigative body and the Claimant has not been informed of any investigations. He submitted the term of the Claimant is coming to an end in August 2017, that she was appointed on gender basis and that currently the Assembly is operating illegally without gender balance.

Mr. Mwamu submitted that the Claimant has been ailing and has attached medical documents to her affidavit as proof thereof. He submitted that the documents attached to the Replying affidavit do not

disclose culpability of the Claimant and that the Respondent has abused its powers by subjecting the applicant to indefinite suspension, that the court must arrest the situation and arrest the abuse by granting the prayers sought by the Claimant.

### **Submissions for Respondent**

Ms Arony for the Respondent submitted that the respondent opposes the application. She submitted that the Respondent relied on the grounds of opposition and replying affidavit of Tom Opere Onyango. She submitted that the prayers sought by the Claimant are not merited and cannot be granted at this stage by way of the application. Ms. Arony submitted that as captured in the Replying Affidavit one of the reasons for suspension of the Claimant was that she claimed some irregular and unlawful payment of Kshs. 300,000 which she was not supposed to be claiming, that she relied on SRC circular for Public Service Board to claim for amounts which she was paid yet the circular does not relate to County Assembly Service Board. She submitted that the matter was forwarded to relevant public bodies to conduct investigations after the County Public Investments and Accounts Committee had submitted a report which was adopted by the County assembly.

Ms. Arony submitted that recalling the Claimant before she is cleared of allegations against her would be a disaster and the Respondent would have difficulty receiving her back. She submits that the applicant has not submitted any evidence that she was cleared by the police as alleged in her affidavit.

Ms. Arony further submitted that the Claimant was not a salaried employee and is not entitled to the payments sought in her application. She further submitted that there were no pending payments owed to the Claimant as alleged in her application. She submitted that the Claimant was suspended with others who have not been recalled and if the orders she prays for are granted she would be treated differentially from the others who stepped aside with her and the court would be going against the Constitution.

Ms. Arony prayed that the application be dismissed.

### **Determination**

I have carefully considered the application and affidavits in support thereof as well as the grounds of oppositions and replying affidavit. I have further perused the documents submitted by the parties in support of their respective positions.

The first issue for determination is whether the continued suspension of the Claimant is unlawful or unfair.

Under section 12 of the county Government Act the term of office of the Claimant ends upon revocation of her appointment or upon her replacement after the term of the current assembly comes to an end. None of the above has occurred and as such she remains a member of the County Assembly Service Board.

The only grounds cited by the Respondent for asking the Claimant to step aside and continuing to keep the Claimant under suspension is that she was adversely mentioned in the Report of the County Public Investments and Accounts Committee and that the matter was referred to the Office of Auditor General, Kenya National Audit Office and the Ethics and Anti-Corruption Commission for investigation. As correctly pointed out by Counsel for the Applicant no letter has been submitted by the Respondent to prove that any letter was written to any investigative body to investigate the Claimant and the others who were asked to step aside with her. There is therefore no evidence that her case is under investigation by any investigative body. Further, even if the matter was under investigation the Claimant is entitled to expeditious administrative action as Provided in Article 47 of the Constitution as follows-

#### ***Fair administrative action.***

***47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

*(3) Parliament shall enact legislation to give effect to the rights Consumer rights.*

*(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*

*(b) promote efficient administration.*

The Respondent further did not deny that the Claimant was invited to appear before the County Assembly Service Board on 29th June 2016 and that no determination has been made in respect of her case since then. If it is true that the matter was referred to the Office of Auditor General, Kenya National Audit Office and the Ethics and Anti-Corruption Commission for investigation why did the Respondent invite the Claimant to appear before it on the same issue?

The Claimant further raised the fact that the County Assembly passed a resolution for the members of the County Assembly Service Board to step aside for 60 days and there is no resolution extending the period beyond the 60 days. The Respondent did not as much as mention the issue in the grounds of opposition, the replying affidavit or the submissions in court. The only conclusion that can be drawn from such silence is that there was no such extension.

From the foregoing I find no justification for the indefinite suspension of the applicant from carrying on the functions of the office to which she was rightfully appointed. What the Respondent has against the Claimant is only allegations that it has not been able to prove since 27th October 2015 when the Claimant was asked to step aside for 60 days to give room for investigations.

One of the guiding principles of our legal system is that justice shall not be delayed. This is provided in the Constitution severally, including Articles 47 and 159 which provides that-

***Fair Administrative Action***

*47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

***Judicial Authority***

*159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

*(a) justice shall be done to all, irrespective of status;*

*(b) justice shall not be delayed;*

The foregoing is echoed in the principles governing this court at section 3(1) of the Employment and Labour Relations Court Act which provides that

*The principle objective of this Act is to enable the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.*

The Court will therefore not sit back and watch helplessly as the Claimant is frustrated by the Respondent's refusal, failure or inability to bring this matter to a close some two years after she was asked to step aside to facilitate investigations which as far as the evidence before the court can attest to, have not been started.

For the foregoing reasons I find that the indefinite suspension of the Claimant from performing the

functions of her office is unfair and unlawful. I therefore make the following orders-

- 1. I declare that the indefinite suspension of the Claimant from performing her duties is unfair and unlawful;**
- 2. I order that the Claimant be immediately allowed to resume duty as member of Migori County Assembly Service Board;**
- 3. The costs of this application shall be in the cause.**

**For the avoidance of doubt this order does not in any way interfere with any investigations currently ongoing with respect to the members of the County Assembly Service Board but no new investigations which have not been commenced with respect to the Report of the Report of the County Public Investment and Accounts Committee Report for the period ended 30th June 2015 shall be commenced against the Claimant after this ruling as that would constitute double jeopardy.**

**Dated and delivered in Kisumu this 4TH day of MAY 2017**

**MAUREEN ONYANGO**

**JUDGE**