



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 32 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

THOMSON KERONGO.....1ST PETITIONER

PATRICK AMINGA SIRO 2ND PETITIONER

RIGENA HUMAN RIGHTS WATCHDOG ORGANIZATION.... 3RD PETITIONER

-Versus-

JAMES OMARIBA NYAOGA 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

KISII COUNTY ASSEMBLY SERVICE BOARD.....1ST INTERESTED PARTY

KISII COUNTY ASSEMBLY2ND INTERESTED PARTY

JUDGMENT

The 1st and 2nd Petitioners are members of the 3rd Petitioner, an organisation registered under section 10 of the Non-Governmental Organisation Coordination Act. The 1st Petitioner is the Chairman of the 3rd Petitioner. The Petitioners have filed this petition against **James Omariba Nyaoga**, the 1st Respondent who is the Clerk of the County Assembly, Kisii County and the **Ethics and Anti-Corruption Commission**, the 2nd Respondent, a constitutional commission established under **Article 79 of the Constitution of Kenya 2010** as read with **section 3(1) of the Anti-Corruption and Economic Crimes Act, 2003** and the **Ethics and Ant-Corruption Commission Act, 2011**, with the mandate to investigate corruption and related matters either on its own motion or upon receipt of a complaint.

In the Petition dated and filed on 4th September 2017 the Petitioners allege that the 1st Respondent is in office unconstitutionally as he was sent on compulsory leave by letter dated 5th July 2017 and the compulsory leave has not been lifted. It is further alleged that the 1st Respondent is not fit to hold public office as he is under investigation for misappropriation of public funds. They aver that the 1st Respondent is further in contempt of court orders and guilty of writing derogatory and demeaning letters. It is the Petitioners case that the 1st Respondent is not qualified to hold office as Clerk to the County Assembly, Kisii County on grounds of:

- i) entering into fraudulent tenders and contract with contravenes Article 227 of the new

Constitution of Kenya;

ii) being the accounting officer to the Kisii County has mismanaged the public funds by taking sitting allowances against Section 149 (1) and (2) a of the public finance management Act, 2012 and Article 201 (a)) of the Kenya Constitution 2010 calls for prudent and responsible use of public resources.

iii) has failed to remit to remit tax on sitting allowances that was not deducted at the source as directed by the auditor general of financial years 2013/2014 and 2014/2015 which is against Section 37 of the income tax act laws of Kenya.

iv) being the accounting officer has deliberately failed to institute recoveries for double payment for mileage allowances as recommended by the Auditor General.

v) being the accounting officer to Kisii County Assembly is found of mismanaging the public funds by taking sitting allowances of Kshs.8,000/= (eight thousand) per sitting which is against the circular of SRC vide Reef. No. SRC/TS/GOVT/3/16 and SRC/TS/CGOVT/3/61 (85) that review remuneration and benefits for clerks of county assemblies.

vi) lives in a government house and is not excluded from but is subject to government policy on housing for public officer and his continued occupation of the premises while at the same time earning his house allowance is a direct charge on tax payers' money and contravention of SRC advice vide circular REF. No. SRC/TX/CGOVT/3/61/ dated 18th December 2013 and letter Ref No. SRC/TS/CG/145/61 (2) _ dated 6th June 2017 addressed to the speaker Kissi County assembly.

vii) Security is in docket of National Government function the 1st respondent has been authorizing payments from the county assembly's public funds for the services provided by the assigning security officer, fully aware that no provisions for such expenditure was authorized by either county assembly and/or SRC recommendation of cash which against Gazette Notice N. 2885 of 1st March 2013.

viii) the 1st respondent is guilty of gross abuse of office and misuse of public resource more particularly he has maintained exclusive use of the County Assembly's motor vehicle, registration number KBY 924C while claiming that it is pool vehicle which is a against SRC recommendations and all directives.

ix) that the action by the 1st respondent are therefore ultra vires and contrary to good governance and public service policy.

x) that the 1st respondent is in contravention of the constitution and therefore ought to be restrained by an order of injunction from occupying the office.

xi) that by virtue of the issues surrounding the 1st respondent his unlawful occupation of office shall cause an expense on the taxpayers.

xii) that it will serve best intentions of Kisii County and the taxpayers at large, that the 1st respondent ought to step aside until the suspension is either lifted or set aside by the court.

The Petitioners aver that the 2nd Respondent has remained reluctant or deliberately refused to institute contemplated investigations against the 1st Respondent necessitating its joinder to the petition.

The Petitioners further aver that the 1st Respondent was found unfit to hold public office and was suspended from office by Kisii County Assembly Service Board in 2015, a fact that was confirmed by the Court whose decision the 1st Respondent has not appealed. It is further the averment of the Petitioners

that the 1st Respondent was never sworn into office.

The Petition is anchored on Articles **176(1), 200, 201, and 227 of the Constitution of Kenya 2010, section 24 of the Leadership and Integrity Act, section 149 of the Public Finance Management Act and section 37 of Income Tax Act.**

The Petitioners pray for the following remedies-

- (a) Declaration be issued to the effect that the petitioners are entitled to protection under the Constitution of the Kenya 2010.
- (b) Declaration that the 1st Respondent is not fit to hold any public office.
- (c) A declaration that the duties, functions and activities conducted by the 1st Respondent during the time he was suspended was illegal, irregular and null and void.
- (d) An order of injunction restraining the 1st Respondent from discharging the duties of the Clerk at Kisii County Assembly.
- (e) An order of certiorari quashing all the duties, functions so far discharged by the 1st Respondent during the time he was under suspension.
- (f) An order of declaration that the 1st Respondent be surcharged for misappropriation of public funds.
- (g) Costs of the petition.

1st Respondent's Reply

The 1st Respondent filed a Replying Affidavit sworn on 18th September 2017 in which he deposes as follows:

He was deployed as an interim Clerk of the Kisii County Assembly by the Transition Authority on secondment by letter dated 25th February 2013. He was appointed as a substantive Clerk of the County Assembly on 24th April 2013 by the County Assembly Service Board subject to approval by the County Assembly, which approval was given on 29th April 2013 by unanimous vote.

The 1st Respondent states that his relationship with the then Speaker of the County Assembly one **Samwel Kerosi Ondieki**, was frosty and tumultuous and resulted in the Speaker declaring the position of Clerk to the County Assembly vacant, a matter that was resolved when the 1st Respondent moved to court through **Kisumu Industrial Court Petition No. 88 of 2014** which was decided in his favour both at the Employment and Labour Relations Court and in the Appeal lodged by the Speaker in the Court of Appeal vide **Kisumu Civil Appeal No. 51 of 2014**. It is the 1st Respondents position that the two decisions confirmed him as the substantive Clerk to the County Assembly of Kisii and the contention by the Petitioners that he was never sworn in does not lie.

The 1st Respondent further deposes that the said former Speaker of the County Assembly of Kisii further caused him to be sent on compulsory leave together with the Director of Finance one **Joseph Maranga Amenia**, an action that they unsuccessfully challenged in court through **Kisumu ELRC Petition No. 12 and 18 of 2015** but which was resolved when the two of them were cleared and their suspension lifted by the County Assembly Service Board which reinstated them.

The 1st Respondent further deposes that on 5th July 2017 the said Speaker again authored a letter handed

to him on 17th July 2017 sending him on compulsory leave. He deposes that the issue of his compulsory leave was deliberated upon by the County Assembly Service Board at its meeting held on the same day whereupon a decision was made to reinstate him. It is the 1st Respondent's contention that on the basis of the foregoing he is lawfully in office and has continued to discharge the mandate and functions of the office and that the allegations by the Petitioners that his occupation of the office is illegal is without basis. He further deposes that the **County Assembly Service Act, 2017** assented to by the President in July 2017 provides for and stipulates the process relating to the discipline of inter alia, the clerk of the County Assembly, which process has not been complied with in his case.

The 1st Respondent further deposes that the petition herein does not allude to or particularise the provisions of the Constitution alleged to have been breached or abrogated, is misconceived and premature, does not disclose any reasonable cause of action and is an abuse of court process. The 1st Respondent further deposes that the petitioners have not disclosed any known or imaginable loss they will or are likely to suffer and that the petition is calculated to achieve and perpetuate mischief. He prays that the petition be dismissed with costs.

2nd Respondent's Reply

The 2nd Respondent filed a replying affidavit of AHMED OSMAN sworn on 25th September 2017 in which he deposes that he is an investigator with the 2nd Respondent and received reports of alleged receipt of illegal and irregular allowances by officials of the County Assembly of Kisii, abuse of office, entering into fraudulent contract with APA Insurance for County Assembly Staff Medical cover and alleged practices of nepotism against the 1st Respondent in the year 2016 and again early and mid-2017. He deposes that the Commission has already launched investigations and therefore the basis of court intervention has not been established.

Interested Parties Reply

The Kisii County Assembly Service Board and the Kisii County Assembly applied to be and were enjoined as Interested Parties to the petition vide their application dated 2nd October 2017. In their Replying Affidavit sworn by **Daniel Mbaka Omwoyo**, the Deputy Clerk of the County Assembly of Kisii, sworn and filed on 7th November 2017 he largely repeats the averments in the replying affidavit of the 1st Respondent. I do not find it necessary or prudent to set out the depositions therein.

Submissions

In view of the urgency in this matter the parties agreed that the petition be disposed of by way of written submissions. The Petitioners filed their submissions on 6th November 2017, the 2nd Respondent on 8th November 2017 and the Interested Party on 9th November 2017. The 1st Respondent relied on submissions filed earlier on 3rd October 2017 in respect of his preliminary objection which he indicated addressed all the issues in the petition.

Petitioners' submissions

The Petitioners submit that it is an uncontested fact that the 1st Respondent who is the Clerk and Accounting Officer of Kisii County Assembly was sent on compulsory leave by the Speaker of the Assembly to pave way for investigations and recovery of tax payers' money, that the Speaker acted in his capacity as chairman of the County Assembly Service Board to facilitate the implementation of resolutions of the Board. That instead of complying the 1st Respondent wrote a derogatory and demeaning letter to the Chairman declining to proceed on compulsory leave and in addition incited the staff of the County Assembly to protest the same. It is submitted that the 1st Respondent further coerced and or compromised two former members of the County Assembly Service Board both of whom are implicated in investigations by the 2nd Respondent to unprocedurally cancel the compulsory leave of the

1st Respondent through a meeting convened without authority of the Chairman of the Board.

It is submitted that among the grounds for sending the 1st Respondent on compulsory leave was an advisory of the Salaries and Remuneration Commission (SRC) that he was not entitled to sitting allowances which he had drawn in the sum of Kshs. 12 Million that was queried by the Auditor General in the 2013/2014 and 2014/2015 Financial Years. The Report was adopted by the County Assembly on 16th June 2017 in the exercise of its oversight role under section 8 of the County Assembly Act. It is submitted that such coercion amounts to abuse of office and is punishable by law.

It is submitted that under section 147 and 149 of the Public Finance Management Act, 2012, section 24 of the Leadership and Integrity Act, 2012 and Articles 201 and 226 of the Constitution the 1st Respondent is under responsibility to ensure proper and prudent management of public funds. It is further submitted that he has consistently failed to regularly submit to the County Assembly reports on implementation of its budget contrary to section 147(h) of the Public Finance Management Act, 2012 and to submit reports envisaged under section 19(2) of the Public Finance Management (County Governments) Regulations, 2015. It is submitted that this is a well-orchestrated scheme by the 1st Respondent to sidestep the constitutional burden and legal requirements of transparency and accountability in contravention of Article 10 and 232 of the Constitution and to avoid public scrutiny, financial probity and malfeasance or misappropriation of public funds.

It is further submitted by the Petitioners that the 1st Respondent had previously been sent on compulsory leave which the court declined to stop in **ELRC Petition No. 12 and 18 of 2015** and the matter is still being investigated by the 2nd Respondent who has not cleared him to date as admitted in the 2nd Respondent's Replying Affidavit dated 4th September 2017. It is submitted that in the 2015 compulsory leave as in the July, 2017 compulsory leave, the 1st Respondent compromised the members of the County Assembly Service Board to reinstate him unprocedurally and mobilised and/or incited members of the County Assembly to intimidate the Speaker who is also the Chairman of the Board through threats of impeachment.

It is submitted that since the 1st Respondent did not challenge the letter sending him on compulsory leave in 2015, the letter still valid stands until he is cleared by the 2nd Respondent or other relevant body. It is submitted that the continued discharge of public duties by the 1st Respondent is against public policy and interest as has been confirmed in cases that the Petitioners have cited in the List of Authorities dated 4th October 2017 being-

1. Eric Cheruiyot –vs– Boundaries Commission and 3 Others Employment and Labour Relations at Kericho Petition No. 1 of 2017 (reported)
2. Okiya Omtatah Okoiti –vs– President of Kenya and 4 others Employment and Labour Relations at Nairobi Petition No. 19 of 2016 (reported)
3. Ms. Priscilla Nyokabi Kanyua –vs– Attorney General and Another High Court at Nairobi Petition No. 1 of 2010 (reported)
4. James Omariba Nyaoga and Another –vs– The Speaker of Kisii County Assembly and 2 Others Employment and Labour Relations Petition No. 18 of 2015 (reported)
5. Mumo Matemo –vs – Trusted Society of Human Rights Alliance and 5 Others Civil Application No. 29/2014 Supreme Court of Kenya (reported)
6. Attorney General of the Republic of Kenya –vs – Independent Medical Legal Unit In the East African Court of Justice at Arusha (Reported)
7. Hon. Samwel Angasa –vs– The Speaker of Kisii County Assembly and 4 Others

Employment and Labour Relations at Kisumu Petitioner No. 271 of 2014 (reported)

8. Northern Nomacid Disabled Persons Organization –vs – County Government of Garissa and Another

Petitioner No. 4 of 2013 (reported)

9. United Stes International university –vs – Attorney General Petitioner No. 170 of 2012 (reported)

10. Nancy Mwangi T/Worthlin Marketers –vs – Airtel Networks (K) Limited Civil Suit No. 275/2013 (reported)

11. D. T. Dobie and Company Kenya) Limited –vs - Joseph Mbaria Muchina and Another (1980) (Reported)

12. Preliminary Objections (contesting jurisdiction) by Olamide Owolegbon (Reported)

The Petitioners submitted that the County Assembly of Kisii is under obligation to recover the public funds misappropriated by the 1st Respondent according to letters dated 18th April and 6th June 2017 from SRC but cannot do so due to the conflict of interest. The petitioners further submitted that the County Assembly Service Act came into force after commencement of the disciplinary case against the 1st Respondent and has therefore not been breached as the law does not operate retrospectively. It is further the Petitioners submission that section 22 of the County Assembly Service Act provides for suspension and removal of the Clerk from office but does not shield the clerk from interlocutory action such as administrative or compulsory leave. It is further submitted that the Act is made pursuant to section 12 of the County Governments Act and does not negate the provisions thereof, that the provisions of section 76(2) of County Governments Act remain intact and applicable in circumstances not covered by section 22 of the County Assembly Service Act.

It is the position of the Petitioners that the petition discloses reasonable cause of action and that by virtue of Article 22 and 23 of the Constitution they have demonstrated that the provisions of the Constitution have been violated, that the petition is not an abuse of court process, the petitioners having demonstrated that there have been violations of Articles 10, 201, 227 and 232 as well as section 149 of Public Finance Management Act. They submit that they have further demonstrated violation of advisories and recommendations of various state organs. The petitioners submit that they have a duty to protect misappropriation of public funds meant for the people of Kisii County where they are subjects, for which the 1st Respondent is culpable.

It is further the submission of the Petitioners that the 1st Respondent is not entitled to sitting allowance as he is not a member of the County Assembly Service Board under section 12(3) of the County Governments Act but only offers secretariat services to the Board as pronounced in section 12(4) of the Act in his capacity as employee of the Board and public servant whose remuneration is set by SRC.

It is also the submission of the Petitioners that any action taken by the 1st Respondent after he was sent on compulsory leave is irregular, null and void and should be quashed by the court.

The Petitioners submit that every public body, entity or agency of the Government obligated through the Constitution or statute to perform or undertake any functions must do so in a manner that safeguards public interest and in the interest of justice. The Petitioners submit that the court has the inherent power to give directions and if necessary to direct the 2nd Respondent to conclude investigations within stipulated terms in the interest of justice and that the court should not entertain dereliction of duty on the part of a public entity that indefinitely leaves the interest of justice and the public in limbo.

It is the submission of the Petitioners that they have proved that the 1st Respondent has failed to meet the

threshold for serving in a public office and that the court ought to enforce the Constitution by allowing the petition and dismissing the defences of the 1st Respondent in his affidavits.

1st Respondent's Submissions

As I have already observed herein above the 1st Respondent relied on his submissions filed in respect of the preliminary objection which I determined earlier. For the record I have reproduced a summary of those submissions as set out in the ruling, although most of the issues raised in the submissions have already been dealt with in the ruling.

In the submissions filed on behalf of the 1st Respondent it is urged that this court has no jurisdiction to determine the petition herein as the issues raised in the petition do not concern an employment relationship or a labour relations dispute. In support of its contention the 1st Respondent has relied on **Article 162(2) of the Constitution, section 12 on Employment and Labour Relations Court Act and section 7 of the County Governments Court Act**. The 1st Respondent further relies on the case of **The Owners of Motor Vessel 'Lillian S' v Caltex Oil Limited (1989) KLR** in which the Court of Appeal stated that:

“Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of Proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without Jurisdiction.

“...Jurisdiction flows from the law and the recipient court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself Jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intention of Parliament, where the wording of the legislation is clear and there is no ambiguity”

The 2nd ground of objection is that the petition is res judicata. It is submitted for the 1st Respondent that the same issue of the 1st Respondent being in office unlawfully and illegally was raised in **KISUMU ELRC PETITION NO. 88 OF 2014** and was determined on 23rd May 2014. The Respondent referred to annex “JON4” of Replying Affidavit of the 1st Respondent. It is a decree in **Industrial Court at Kisumu Petition No. 88 of 2014** in a case between **James Omariba Nyaoga (Petitioner) v The Speaker of Kisii County Assembly 2 Others**. The 1st Respondent herein was the petitioner in the suit. In the decree James Omariba Nyaoga was confirmed as Clerk to the County Assembly of Kisii. The decision was confirmed by the Court of Appeal. The 1st Respondent relied on the decision in the case of **Daniel Kirui & Another v Monica W. Macharia & Another, Civil Appeal No. 261 of 2002 (Unreported)** where the court held that-

“Besides, as rightly pointed out by Mr. Karanja for the Appellants, under Section 7(4) of the Civil Procedure Act, Res-Judicata affects even those matters which should have but were not made part of the claim in the earlier suit are deemed to have been substantially and directly in issue of such suit. If the issue of trust was raised, then the Respondent should not be heard to say, the issue was not canvassed. The failure to canvass the issue could only be blamed on the Claimant and not the Defendant

The 3rd ground of preliminary objection is that the Petitioner has no locus standi under Article 22 and 258 of the Constitution. It is the 1st Respondent averment that the 3rd Petitioner is not registered under the Non-Governmental Co-Ordination Act as no registration certificate was exhibited as proof of registration. The 1st Respondent relied on the decision in the case of **Law Society of Kenya v Commissioner of Lands & 2 Others (2001) KLR**

The Fourth ground of preliminary objection is that the matters raised in this suit have similarly been placed before the 2nd Respondent. The 1st Respondent submits that the petitioners/applicants are asking

the court to undertake investigations, prosecution and adjudication in the same cause.

The 5th ground of preliminary objection is that the petition herein is an abuse of court process as the Petitioners/Applicants are aware of the existence of constitutional agencies, in this case the 2nd Respondent, which is mandated to undertake investigations and take necessary action on matters such as those raised by the Petitioners against the 1st Respondent.

Submissions of the 2nd Respondent

The 2nd Respondent filed its submissions on 8th November 2017. It submits that its legal mandate is to investigate corruption related matters and ensure enforcement of Chapter Six of the Constitution through enforcement of the Leadership and Integrity Act as derived in provisions of Article 79 of the Constitution, the Anti-Corruption and Economic Crimes Act, 2003 and the Ethics and Anti-Corruption Commission Act 2011. It submits that it is also mandated to investigate corruption related matters upon receipt of a complaint or on its own motion.

The 2nd Respondent admits receiving complaints against the 1st Respondent ranging from abuse of office, entering into fraudulent contract with APA Insurance Company for the County Assembly Medical Cover and alleged practices of nepotism. It states that the complaints were received in 2016 and 2017 launched investigations and launched investigations which are ongoing. It is submitted that under section 25 of the Anti-Corruption and Economic Crimes Act, 2003 it is mandated to investigate reports of alleged corruption or give reasons for not investigating them and that in the present case it has not given reasons for not investigating the complaints against the 1st Respondent thus demonstrating its commitment to investigate the said complaints.

The 2nd Respondent submits that the role of the Court in Criminal Investigations is limited to ensuring that investigative bodies such as the 2nd Respondent discharge their duties according to the law and that supervising the day-to-day investigations as contemplated by the petitioners is not a function of the court.

The 2nd Respondent submits that there are no prayers in the petition sought against it to necessitate it being enjoined in this petition and it is therefore an unnecessary party in the petition. It states that under section 35(1) of the Anti-Corruption and Economic Crimes Act, 2003 it is enjoined to report to the Attorney General on the results of investigation. That currently that report is made to the Director of Public Prosecutions (DPP). It submits that its report of the investigations will therefore be made to the DPP and not to this court and that necessary action will be taken by the DPP as the investigations are of a criminal nature.

The 2nd Respondent prays that the petition against it be dismissed.

1st and 2nd Interested Parties' Submissions

The Interested Parties filed joint submissions on 9th November 2017.

The interested parties submit that the court has jurisdiction to handle the issue of integrity of the 1st Respondent only in so far as the 2nd Respondent has abdicated its responsibility and the extent of the court's intervention should be to require the 2nd Respondent to exercise its mandate as vested by law. The Interested Parties rely on the decision in the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** in which the Court of Appeal held that where there is a proper procedure for the redress of any grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly adhered to. It submits that Article 79 of the Constitution sets out the procedure for enforcement of Chapter Six thereof and that the Ethics and Anti-Corruption Commission Act, 2011 and the Leadership and Integrity Act, 2012 contemplated under Articles 79 and 80 are already in place. They submit that the court cannot therefore inquire whether or not the 1st Respondent is fit to hold public office.

It is further the interested Parties submission that the allegations of impropriety contained in the Petition having not been investigated remain just mere allegations and further that under section 43 of the **Leadership and Integrity Act, 2012** the 2nd Respondent is to recommend to either the Attorney General or DPP to institute either civil or criminal proceedings.

The Interested Parties further submit that Chapter Six of the Constitution apply to state officers and not public officers and that it does not therefore apply to the 1st Respondent who is a public officer and against whom Chapter Six applies only by virtue of section 52 of the **Leadership and Integrity Act, 2012**. They argue that it is not by virtue of the Constitution but by virtue of the Act that Chapter Six applies to the 1st Respondent and the petition is therefore devoid of merit.

The Interested Parties rely on the case of **Benson Riitho Mureithi v J. W Wakhungu & 2 Others [2014] eKLR** in which the Court held that:

“The court has found that no inquiry was made with regard to the suitability of the Interested party under the Constitution, a responsibility that fell on the 1st respondent under the provisions of the Water Act as read with Section 7 of the 6th Schedule to the Constitution. The responsibility still remains to make that inquiry. It is a responsibility that the Court does not deem proper to assume, but should require its proper exercise by the office vested with the authority to exercise it – the 1st respondent.”

And in quoting from the case of **International Centre for Policy and Conflict –vs– Hon. Uhuru Muigai Kenyatta and Others**, the court stated that:

“The court should not descend into that arena of inquiry. Its proper role is to ensure that the inquiry is undertaken to the acceptable standards set by the Constitution. This is what distinguishes the present petitions from the one in the Trusted Society of Human Rights Alliance Case (supra). In the Trusted Society case some form of inquiry had been undertaken, and the court found that despite the said inquiry, there were still unresolved questions about the integrity of the candidate in question. There is no evidence before us of any such inquiry having been undertaken in respect of the 3rd and 4th respondent’s integrity by the relevant instructions established by statute....”

On the Petitioners prayer that the duties, activities and functions of the 1st Respondent conducted after he was sent on compulsory leave are void the Interested Parties submit that the compulsory leave was unilateral and was reversed by the Kisii County Assembly Service Board by letter dated 17th July 2017, the very day that Speaker wrote the letter sending the 1st Respondent on leave. It is further their submissions that the disciplinary process of the County Assembly Service is regulated by Section 22 of the County Assembly Service Act which provides as follows-

Suspension or removal of the Clerk

The Board may suspend or remove from office, the Clerk for –

- (a) Inability to perform the functions of the office, whether arising from infirmity of body or mind;*
- (b) Gross misconduct or misbehaviour;*
- (c) Incompetence;*
- (d) Bankruptcy;*
- (e) Violation of the provisions of the constitution, including Chapter Six of the Constitution;*
- (f) Violation of the provisions of this Act.*

The Interested Parties submit that if there exists evidence of improper conduct by persons holding the office of the clerk of the county assembly the proper procedure for conducting disciplinary proceedings is to suspend the officer during the pendency of investigations. They submit that there is no provision for compulsory leave in the law regulating county assembly service, or in the letter of appointment of the 1st respondent and that the former speaker of Kisii County Assembly acted unlawfully in imposing what is called 'compulsory leave' upon the 1st Respondent.

They further submit that section 22 of the County Assembly Service Act which is the primary law on disciplinary process against a holder of the office of the clerk of the county assembly provides for the suspension of a clerk by the County Assembly Service Board which must endeavour to reach decisions by consensus and where consensus cannot be achieved, by a majority of all the members present at the meeting as provided under the 2nd Schedule to the County Assembly Services Act. They submit that the law frowns upon unilateral actions by individual members of the Board. They submit that the letter dated 5th July 2017 by the former speaker, in his capacity as the chair of the County Public Service Board purporting to send the 1st respondent on compulsory leave is a unilateral action by a member of the board that does not amount to a decision of the Board and expressly offends the mandatory provisions of the 2nd Schedule to the County Assembly Service Act. They submit that by their memo dated 17th July 2017 addressed to the former speaker of the Kisii county assembly, the members of the county assembly service board disprove the actions of the former Kisii county assembly noting that the same had not been discussed or approved by the board. That to that extent the compulsory leave, being a decision of an individual and not the board is null and void.

The Interested Parties further submit that the Petitioners have not satisfied the threshold for grants of an order of injunction, that the orders sought are premature and have the effect of constructively terminating the employment of the 1st respondent. They submit that the order of injunction sought in the petition is ambitious, ambiguous and uncertain taking into consideration the fact that the Interested Parties as the employers of the 1st respondent have not complained about the performance of the 1st respondent. That the Interested Parties are desirous to having the 1st respondent continue acting as Clerk of Kisii County Assembly.

The Interested Parties submit that the petitioners have not demonstrated that they stand to suffer irreparable harm, that this court being an Employment and Labour Relations Court is tasked with balancing the rights of the employee as against the employer and an order of injunction cannot therefore be granted in the circumstances because there exists no employer/employee relationship between the petitioners and the 1st respondent. They submit that the balance of convenience in this case favours the 1st respondent as he stands to suffer irreparably should an order of injunction issue.

On the allegation that the 1st respondent has never been sworn in the Interested Parties submit that this is not a valid reason as an appointment letter was issued to him by the 1st Interested Party. They relied on the observations of Nduma J. in **Nick Githinji Ndichu v Clerk Kiambu County Assembly and Another** that *"An employer/employee relationship exists when there is a "contract of service" as defined by Section 2 of the Employment Act, 2007. The law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service "whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time... for wages or a salary."*

The Interested Parties submit that granting an order of injunction sought by the Petitioners would grind the operations of Kisii County Assembly to a completely for the following reasons-

- (i) The absence of the clerk from the assembly has caused confusion and dis function in the assembly especially during plenary debates. Legally under the County Assemblies Service Act, the clerk is charged with rendering expert advice to the speaker and members of the county assembly. He is supposed to sit in the plenary at all times to advice the speaker on procedural issues during debates.

(ii) The assembly is grappling with formation of committees. This is an area that requires knowledge of parliamentary practice, traditions and conventions and the application of standing orders. Budget allocation of committees requires the presence of the Clerk as the accounting officer under the law.

(iii) The clerk is the chief executive officer, accounting officer, authorised officer and head of administration. The said roles suffer without the substantive holder of the office of clerk.

(iv) The County Assembly Service Board was constituted after August, 8th elections, it is new. It has new membership. The clerk is the only officer who could induct the board on their operations and procedures. The absence of the substantive holder has affected the operations of the Board.

(v) As secretary to the Board, the clerk is charged with the responsibility to prepare and submit programs to the board for discussions and approval. This has not been done and the new board is literally stranded. The county assembly needs to function.

They urged the Honourable Court to dismiss the Petitioner's petition dated 4th September 2017 with costs.

Determination

I have considered the pleadings and submissions of the parties and the authorities cited. The issues for determination are therefore the following-

1. Whether the speaker as chairman of the county assembly service board has authority to send the clerk on compulsory leave;
2. Whether the members of the county assembly service board can overturn the decision of the chairman;
3. Whether the County Assembly Service Act, 2017 was breached by the speaker/chairman of county assembly service board;
4. Whether the petitioners have established a prima facie case against the Respondents;
5. Whether the petitioners are entitled to the orders sought;
6. Who bears the costs.

1. Whether the speaker as chairman of the county assembly service board has authority to send the clerk on compulsory leave

The trigger of this petition is the letter dated 5th July 2017 from the Speaker of the County Assembly, Kisii County, to the 1st Petitioner requiring him to go on compulsory leave to facilitate investigations into the allegations against him as set out in the letter. In the letter the Speaker makes reference to ongoing investigations by the 2nd Respondent, the report of County Assembly Ad-hoc Committee on Recoveries of Overpayments and failure of the 1st Respondent to comply with lawful orders from the Speaker. The letter is written by the Speaker in his capacity as Chairman of the County Assembly Service Board.

Did/does the Speaker have authority and mandate to send the 1st Respondent on compulsory leave?

Section 76(6) of the County Governments Act upon which the Speaker's action was predicated provides as follows-

- (6) *Nothing in subsection (5) shall be interpreted as prohibiting or restricting the power of the*

county government or the concerned county chief officer or other lawful authority to interdict or suspend or take any interlocutory decision against the public officer.

My understanding of the section is that an authorised officer acting under lawful authority can take interlocutory action against an officer working under his supervision before substantive action is taken at a formal meeting to deliberate on the matter. This was the substance of this Court's decision in **Kisumu ELRC Petition No. 18 of 2015** which incidentally related to sending on compulsory leave of the 1st Respondent herein by the same Speaker of Kisii County Assembly. This is because convening meetings of disciplinary bodies can take time and circumstances may arise when immediate action is necessary to address certain situations.

The Interested Parties have argued that there is no law providing for compulsory leave and it is therefore illegal. I do not agree with them. My considered opinion in respect thereto would be that there is no law prohibiting an employer from sending an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure. Compulsory leave has the effect of only removing an employee from the workplace temporarily without interfering with his terms of service. An action is only illegal if it is prohibited by law. Not all lawful matters are prescribed by law. On the contrary it is only that which is prohibited by law that is illegal or unlawful.

For these reasons I find that the speaker, as Chairman of the County Assembly Service Board, had authority to send the 1st Respondent on compulsory leave pending the convening of a formal meeting of the Board to deliberate on appropriate action to be taken against him.

2. Whether nullification of the letter of compulsory leave by the members of the county assembly service board was valid

The County Assembly Service Board undertakes its business through formally constituted meetings. In the present case two members of the County Assembly Service Board met and nullified the letter of the Chairman sending the 1st Respondent on compulsory leave on the very day that the letter was written. Unlike the Chairman who is in office permanently, the other members can only act in a formally convened meeting called by either the Chairman or the Secretary. How and when did these members meet to discuss the nullification of the decision of their chairman? What was the quorum of the meeting? Who convened the meeting? What was the agenda of the meeting?

Since no minutes have been presented to court to prove that there was a properly convened meeting at which the Chairman's letter to the 1st Respondent was discussed and a resolution passed by the Board, I find that the nullification of the letter of the chairman was unlawful because there was no lawful authorised or regular meeting to discuss the issue.

3. Whether the County Assembly Service Act, 2017 was breached by the speaker/chairman of county assembly service board

The 1st Respondent and the Interested Parties have urged the court to find that there was breach of section 22 of the County Assembly Service Act. The Petitioners have however submitted that the Act was not enacted by 5th July 2017 when the 1st Respondent was sent on compulsory leave by the Chairman of the Board. I have confirmed that the Act was assented to by the President on 6th July and came into force on 27th July 2017. It is therefore true that the Act was not in force on 5th July 2017 when the 1st Respondent was sent on compulsory leave and could therefore not have been breached.

4. Whether the petitioners have established a prima facie case against the Respondents

The 1st Respondent and the Interested Parties have urged the court to find that the Petitioners have not established a prima facie case against the 1st Respondent. The petitioners on the other hand have argued that they have established a prima facie case.

Prima facie is defined in Black's Law Dictionary 9th Edition as *the establishment of a legally required rebuttable presumption, or a party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour*. The Court of Appeal in **Mrao v First American Limited & 2 others (2003) KLR** observed that a prima facie case is-

"a case which on the material present to court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter."

In the present suit the Petitioners have made many allegations against the 1st Respondent. These are that the 1st Respondent has committed acts that would put his integrity into question and lead to an inference that he is not fit to hold public office under Chapter Six of the Constitution. The averments are set out in the petition. The Petitioners have further alleged that the 2nd Respondent has failed in its mandate to investigate and recommend both criminal and civil action against the 1st Respondent. They have backed these allegations with evidence including reports of the Auditor General and the County Assembly Ad-Hoc Committee tabled and adopted by the County Assembly. They have also demonstrated that they are residents of Kisii County with legitimate expectations that both the 1st and 2nd Respondents would exercise the powers of the offices they hold for the public good and that they have a right to enforce the constitution under Article 22 and 258 where there is threat or actual violation of the Constitution.

The 1st Respondent has not expressly denied the specific allegations of questionable integrity and malfeasance against him. He cites the sour relationship between him and the former speaker of the County Assembly as the reason for the letters sending him on compulsory leave and the present petition which he refers to as a witch hunt. He therefore leaves almost all the allegations against him unchallenged with the result that the court is left with the impression that there must be some validity in the allegations against him and therefore valid reason for the petitioners to invoke the jurisdiction of this court.

I thus find that the Petitioners have established a prima facie case.

5. Whether the Petitioners are entitled to the orders sought

The gravamen of the prayers in the petition is the removal of the 1st Respondent from office on the grounds that he is not fit to hold public office, to wit, the office of Clerk of the County Assembly of Kisii. They are asking for the court to issue an order of injunction restraining the 1st Respondent from discharging the duties of Clerk to the County Assembly Kisii, an order of certiorari quashing all the duties, functions so far discharged by the 1st Respondent during the time he was under suspension and a declaration that the 1st Respondent be surcharged for misappropriation of public funds. They further seek a declaration that the duties, functions and activities conducted by the 1st Respondent during the time he was suspended was illegal, irregular and null and void.

The 1st Respondent is a public servant. He is an employee of Kisii County Assembly Service Board with whom he has a valid contract of employment as was upheld by this court in **Kisumu Industrial Court Petition No. 88 of 2014** and confirmed by the Court of Appeal in **Kisumu Civil Appeal No. 51 of 2014**. It therefore boils down to the question of how to remove a public servant from office on the grounds that he is not fit to hold office.

Under section 42 of the Leadership and Integrity Act that the Petitioners have relied on, a person who alleges that a state officer has committed a breach of the leadership and integrity code is required to lodge a complaint with the relevant public entity. Such public entity is the 2nd Respondent who is required to inquire into the complaint and determine whether the state officer has contravened the Code of Leadership and Integrity. Section 43 provides that where the investigations disclose that civil or criminal proceedings ought to be preferred against the state officer the public entity shall refer the matter to the Attorney General with respect to civil matters and to the Director of Public Prosecutions with respect to criminal matters or to any other appropriate authority. Section 52 of the Act extends the provisions of

Chapter Six and the Act to public officers, like the 1st Respondent.

The 2nd Respondent has admitted that it received complaints against the 1st Respondent in 2016 and in 2017 and has commenced investigations against him. It is instructive that the 1st Respondent's letter of compulsory leave refers to communication from the 2nd Respondent as part of the reasons for sending him on compulsory leave.

It is however the court's opinion that although section 52 of the **Leadership and Integrity Act** extends the application of the Leadership and Integrity Code to public servants like the 1st Respondent, the primary Act under which the 2nd Respondent ought to investigate public servants is the Anti-Corruption and Economic Crimes Act, 2003. It is under section 64 of this Act where there is provision for disqualification of a person convicted of an offence under the Act from holding public office. Section 62 of the Act provides for disciplinary action against such an officer as follows-

62. Suspension, if charged with corruption or economic crime

(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:

Provided that the case shall be determined within twenty-four months.

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

(4) This Section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.

(5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the Attorney General –

(a) This section does not apply to the charge unless permission is given by the court or the Attorney General to prosecute or the proceedings are taken over by the Attorney General; and

(b) If permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.

(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(7) This section does not apply with respect to a charge laid before this Act came into operation.

The only valid authority which can remove a public officer from office is therefore the employer of such an officer, after taking them through due process as provided in Article 236 of the Constitution which provides that-

236. A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

The 1st Respondent's case can thus be addressed by the County Assembly Service Board as the employer or the County Assembly which has oversight authority over all matters in the County including the County Assembly Service Board. This is the procedure that has now been codified in the County Assembly Service Act, 2017, which as I have already pointed out came into force after the 1st Respondent had been sent on compulsory leave. The court can therefore not act directly and remove the 1st Respondent from office as this would contravene the 1st Respondent's constitutional rights to due process as provided under Article 236. Due process is an internal disciplinary process to be exercised by an employer. The Court is not expected to enter into the boardrooms of the employers to micro manage their affairs. **Ndolo J** expressed the legal position in the case of **Rebecca Ann Maina v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** when she observed as follows-

As held in the case of Alfred Nyungu Kimungui Vs Bomas of Kenya (Industrial Court Cause No 620 of 2013) the Industrial Court should not take over and exercise managerial prerogatives at the work place.

36. *However, ... the Court will intervene not to stop the process altogether but to put things right.*

In the Case of **Alfred Kimungui** (supra) Rika J. observed that-

The Employment Act does not intend that courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act...

This position was also taken by the courts in the **Benson Riitho Mureithi v J. W Wakhungu & 2 Others (supra)** and **Speaker of the National Assembly v James Njenga Karume (supra)** where the courts observed that where there is a clear procedure for redress of a particular grievance prescribed in the Constitution or by legislation that procedure should be adhered to strictly.

The court will only interfere where there is breach of the process and even so, only with a view to setting the process right. In this case the Petitioners have not alleged that the relevant bodies being the County Assembly Service Board and the County Assembly have been moved and have failed to take action. Neither has it been shown that the petitioners filed a complaint with the 2nd Respondent which it has failed to act on.

What is the role of the courts in such a situation?

The courts can order the 2nd Respondent, the County Assembly Service Board and the County Assembly, all of whom have the obligation to supervise and or investigate the 1st Respondent to perform their role of investigation. However, the Petitioners did not pray for these orders. They did not enjoin the employer of the 1st Respondent who has failed to take disciplinary action against him and although the 2nd Respondent has been joined, no prayers were sought against it in the petition.

Conclusion

I must therefore regretfully dismiss this petition not on grounds that the Petitioners have not established a prima facie case, but on the grounds that they have not brought the relevant parties to court, or have not asked the court to grant the appropriate orders, and have prayed for orders that cannot be granted by the court. The proper way to approach the court, as I have already observed, would have been for the Petitioners to seek orders against the County Assembly Service Board for failing to take disciplinary action against the 1st Respondent and the County Assembly of Kisii for failing in its oversight role which

includes requiring the County Assembly Service Board to take disciplinary action against the 1st Respondent, and by extension, to safeguard the rights of the Petitioners under the Constitution. They should also have prayed for orders to compel the 2nd Respondent to conclude investigations against the 1st Respondent with speed.

On the issue of costs, since this is public interest litigation, each party shall bear its costs.

Dated and delivered in Nairobi this 24th day of November 2017

Maureen Onyango

Judge