



REPUBLIC OF KENYA  
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

JUDICIAL REVIEW APPLICATION NO. 5 OF 2016

*(Before Hon. Lady Justice Maureen Onyango)*

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF KISUMU....1ST RESPONDENT

THE CLERK, THE COUNTY

ASSEMBLY OF KISUMU.....2ND RESPONDENT

EX PARTE: ANN ATIENO ADUL

JUDGMENT

By motion dated 8<sup>th</sup> and filed on 9<sup>th</sup> December 2016 the Applicant, the Applicant seeks the following orders-

1. An order of Certiorari to bring into this honourable court and quash the decision of the Clerk of the County Assembly of Kisumu vide letter dated 01.12.2016 directing the applicant to cease to be the chairperson of the County Assembly Service Board of Kisumu pending the determination of **Kisumu High Court Criminal Appeal Number 12 of 2016, Republic of Kenya Vs Anne Atieno Adul & 7 others.**
2. An order of Certiorari to bring into this court and quash the decision/resolution of the Respondent made on 06.12.2016 that the Applicant to “step aside” as the Speaker of the County Assembly of Kisumu until **Kisumu High Court Criminal Appeal Number 12 of 2016, Republic of Kenya Vs Anne Atieno Adul & 7 others** is determined as provided by the letter of the Clerk of the County Assembly of Kisumu dated 01/12/2016.
3. An order of prohibition stopping the Respondent from giving effect to or in any other manner further implementing the resolution passed on 06/12/2016 suspending and/or requiring the Applicant to “step aside” as the Speaker of the County Assembly of Kisumu.
4. **That** the costs of this application be borne by the Respondents.

The application is supported by the Statutory statement dated 8th December 2016 and the verifying

affidavit of **ANN ATIENO ADUL** and **DAN ODHIAMBO ONYANGO** both sworn on 8th December 2016.

## **Background**

Ann Atieno Adul, the Ex parte applicant, is a female adult resident and working for gain in Kisumu City within the Republic of Kenya. At the time of filing this application, she was the elected speaker of the County Assembly of Kisumu and by virtue thereof, she was also the chairperson of the Kisumu County Assembly Service Board. On 1st December 2016 the County Assembly Service Board suspended the 2nd Respondent the Clerk of the County Assembly, one **Philip Adundo**, from performing the functions of his office on several allegations of misconduct. On the same day the Applicant received a letter written by the said 2nd Respondent directing her to cease being chairperson of the County Assembly Service Board pending the hearing and determination of **Kisumu High Court Criminal Appeal No.12 of 2016, Republic v Ann Atieno Adul & 7 Others**. The Appeal arose from the decision in **Kisumu Anti Corruption Case No. 2 of 2015** in which the Ex parte Applicant and all the other accused persons were acquitted under section 210 of the Criminal Procedure Code. On 6th December 2016 the 1st Respondent passed a resolution requiring the Ex Parte Applicant to step aside on grounds that an appeal had been filed challenging her acquittal.

The Ex parte Applicant was aggrieved by the actions of the Respondents and filed this application.

## **Applicant's Case**

She avers that the letter stopping her from carrying out her functions as chairperson of the County Assembly Service Board is a display of impunity and insubordination by the 2nd Respondent and that there is no law requiring her suspension from duty pending determination of an appeal in a matter in which she has already been acquitted. She further avers that there is no provision under the Anti-Corruption and Economic Crimes Act providing for the suspension of a speaker of the County Assembly.

The Applicant further states that the 1st Respondent acted in excess of its powers in making the resolution requiring her to step aside, that the decision is an abuse of power and was made with an ulterior motive and in bad faith. She avers that the decision is unreasonable, unfair and violates her right to legitimate expectations. She further avers that at the time of making the resolution the County Assembly was in recess and was not formally convened, that the resolution was made under the stewardship of a Clerk on suspension and was a knee jerk reaction to her efforts to deal with cases of financial impropriety involving the Chief Finance officer and the Clerk to the Assembly in her capacity as head of the Assembly and Chair of the County Assembly Service Board.

In the skeleton submissions filed on behalf of the Ex-Parte Applicant by Ongoya & Wambola, Advocates, it is submitted that none of the Respondents has power to suspend a speaker of a county assembly. The Ex-Parte Applicant relies on the case of **Republic v Clerk, County Assembly of Baringo Ex-Parte William Kamket**. It is further submitted that the concept of "stepping aside" is unknown to the law, that there was no substantive motion to discuss the applicant as provided in the standing orders and the decision was taken without affording the Ex-Parte Applicant an opportunity to be heard. It was further submitted that **Kisumu High Court Appeal No. 12 of 2016** is filed by the Director of Public Prosecutions from a case in which the Ex-Parte Applicant was acquitted and there is no such requirement in the Anti-corruption and Economic Crime Act for suspension of a state officer pending the determination of such as appeal, that the letter dated 01.12.2016 was made by a clerk who was, himself on suspension by the County Assembly Service Board, that the said resolution was a knee jerk reaction to the efforts by the applicant, as the Head of the Assembly and the Chair of the County Assembly Service Board, to deal with cases on financial impropriety involving the Chief Finance Officer and the Clerk of the Assembly. It is submitted that the said decision is, therefore, a collateral attack against the County Assembly Service Board for its insistence on implementation of the Public Finance Management Act.

It is submitted that the Respondents denied the applicant, to whom the impugned resolution or decision related, a reasonable or any opportunity to state her case, that the impugned resolution or decision was

procedurally unfair, that the impugned resolution or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant, that the Respondent acted on the direction of a person or body not authorized or empowered by any written law to give such directions, namely a suspended clerk of the Respondent. It is submitted that the impugned resolution or decision was made in bad faith, the impugned resolution or decision is unreasonable and that the impugned resolution or decision violates the legitimate expectations of the Applicant to whom it relates, is unfair and is taken or made in abuse of power.

## **Respondent's Case**

In response to the application the Respondents filed an unsworn Replying Affidavit of PHILIP OTIENDE ADUNDO, the 2nd Respondent on 10th February 2017. The affidavit being unsworn is bad in law and not admissible as evidence. Coincidentally, in **Philip Otiende Adundo v Kisumu County Assembly Service Board & 5 others [2017] eKLR** which is related to this suit the said PHILIP OTIENDE ADUNDO also filed an unsworn affidavit.

In the written submissions filed on behalf of the Respondents it is argued that the suspension of the 2<sup>nd</sup> Respondent, the Clerk to the Assembly, was unprocedural and in violation of statutory provisions, that the Assembly (1<sup>st</sup> Respondent) has power to remove the speaker (Applicant) under section 11(1) of the County Governments Act through a resolution supported by not less than 75% of all the members of the County Assembly. On the issue whether the 1<sup>st</sup> Respondent has power to suspend the Applicant pending appeal in the criminal case the Respondents submit that the Applicant is not off the hook under section 62 of Anti-Corruption and Economic Crimes Act and should still be on suspension.

On whether the suspension of the Applicant was valid by virtue of the letter of suspension having written and signed by the Clerk it is submitted that under section 18(a) and (b) of the County Assembly Services Bill the functions of the Clerk include being the Chief Executive Officer of the County Assembly as well as being responsible for the day to day management and functions of the County Assembly and therefore the Clerk had authority to draft and sign the letter of suspension of the Applicant. It is further submitted that the Assembly was in session during the period 1<sup>st</sup> to 6<sup>th</sup> December 2016 following a resolution during the sitting of 1<sup>st</sup> December 2016 to extend the sitting of the Assembly from 1<sup>st</sup> to 6<sup>th</sup> December 2016, contrary to the assertions of the Applicant that the Assembly was not in session.

## **Determination**

I have considered the motion by the applicant, the grounds and affidavit in support thereof together with the documents attached thereto. I have also considered the submissions filed on behalf of the Respondents. As pointed out earlier the replying affidavit filed on behalf of the Respondents is not admissible as it has not been sworn before Commissioner for Oaths. I have therefore only considered the submissions filed on behalf of the Respondents.

In proceedings of judicial review the court is not concerned with the merits of the case but with the decision making process.

The Supreme Court practice 1997 vol 53/1-14/6 states:

**“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute by law the decision in the matter in question.”**

The Supreme Court commentary has made the position even clearer by stating in the same paragraph cited above:

**“The Court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty itself of usurping power. Lord Brington in Chief Constable of North Wales Police v Evans [1982] I WLR 1155 P 1173.”**

Bearing the foregoing in mind, the issues for determination herein are in my assessment the following:

1. Whether the 1<sup>st</sup> Respondent has power to suspend the Applicant from Office;
2. If the answer to 1. above is in the affirmative, whether the suspension of the applicant was in compliance with the process set out in law; and
3. Whether the applicant is entitled to the remedies sought.

The letter that the applicant is unhappy about and which is the subject of this application states that the applicant has been removed from office on grounds of section 62(1) of the Anti-Corruption and Economic Crimes Act, 2013. The letter is reproduced below for its full tenure and purport.

*REF: kca/adm/12/2016*

*01/12/2016*

*Ann Atieno Adul*

*Chairperson County Assembly Service Board*

*Kisumu County Assembly*

*P O Box 86-40100*

**KISUMU**

**RE: CHAIR OF KISUMU COUNTY ASSEMBLY SERVICE BOARD**

*You are aware that you appeared in court on 24<sup>th</sup> November 2016 on criminal Appeal case No. 12 of 2016. In line with section 62(1) of the Anti Corruption and Economic Act 2013 and Chapter six of the Constitution of Leadership and Integrity on your position as Chairperson of the County Assembly Service Board has become untenable since you are facing a criminal offence.*

*In the circumstances therefore you cease to be the Chairperson of the County Assembly Service Board of Kisumu County Assembly until your case is determined.*

*In the meantime the vice chairperson who doubles as the Majority Leader will preside over all meetings until you are cleared by the Court.*

*Kindly be informed.*

*Philip Otiende Adundo*

**CLERK OF ASSEMBLY/SECRETARY CASB**

Section 62(1) of the Anti-Corruption and Economic Crimes Act, 2013 provides as follows:

**62. Suspension, if charged with corruption or economic crime**

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

(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. **[Emphasis added]**

The section does not apply to the applicant whose removal is provided for in Article 178 of the Constitution and section 11 of the County Governments Act. Since the removal was solely based on the section it follows that the removal was unprocedural.

Apart from section 62(1) of the Anti-Corruption and Economic Crimes Act, 2013 there is no other provision for suspension of the Applicant from office as both Article 178 of the Constitution and section 11 of the County Governments Act provide for removal from office and not temporary vacation of office as is intended by the letter.

Article 178 provides as follows:

**Speaker of a county assembly.**

**178.** (1) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.

(2) A sitting of the county assembly shall be presided over by—

(a) the speaker of the assembly; or

(b) in the absence of the speaker, another member of the assembly elected by the assembly.

*(3) Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.*

Section 11 of the County Governments Act provides as follows:

***Removal of Speaker from office.***

*11. (1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.*

*(2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.*

*(3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9 (4).*

*(4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.*

The letter to the applicant dated 1<sup>st</sup> December 2016 only removes her from being the Chairperson of the County Assembly Service Board. The powers of the County Assembly Service Board are set out in section 12 (7) of the County Governments Act and does not include removal of any of its members.

*(7) The county assembly service board is responsible for–*

*(a) providing services and facilities to ensure the efficient and effective functioning of the county assembly;*

*(b) constituting offices in the county assembly service, and appointing and supervising office holders;*

*(c) preparing annual estimates of expenditure of the county assembly service and submitting them to the county assembly for approval, and exercising budgetary control over the service;*

*(d) undertaking, singly or jointly with other relevant organizations, programmes to promote the ideals of parliamentary democracy; and*

*(e) performing other functions -*

*(i) necessary for the well-being of the members and staff of the county assembly; or*

*(ii) prescribed by national legislation.*

Vacation of office by the members of the County Assembly Service Board is provided for in subsection (5) as follows:

*(5) A member of the county assembly service board shall vacate office –*

*(a) if the person is a member of the county assembly -*

*(i) at the end of the term of the county assembly;*

*or*

*(ii) if the person ceases to be a member of the county assembly; or*

*(b) if the person is an appointed member, on revocation of the person's appointment by the county assembly;*

*or*

*(c) if the person is the Speaker, leader of majority party or leader of minority party when the person ceases to be such Speaker, leader of majority party or leader of minority party.*

*(6) Despite subsection (5), when the term of the county assembly ends, a member of the county assembly service board under subsection (3)(d) shall continue in office until a new member has assumed office in the member's place in the next assembly.*

This therefore means that the County Assembly Service Board has no powers to remove any of its members from office.

From the foregoing it is clear that **section 62(1) of the Anti-Corruption and Economic Crimes Act, 2013** which was the basis of the impugned removal of the Applicant from performing the functions of the office of chairperson of the County Assembly Service Board does not provide for such powers. It is further clear that the County Assembly Service Board does not have any powers to remove any of its members including the applicant from office. The upshot is that the Respondents acted in excess of their authority in the attempted removal of the Applicant from exercising the functions of chairperson of the County Assembly Service Board.

The Applicant having proved that the Respondents acted without authority is entitled to the prayers sought in the Application and I therefore grant her the following orders:

1. An order of Certiorari be and is hereby issued to bring into this honourable court and quash the decision of the Clerk of the County Assembly of Kisumu vide letter dated 01.12.2016 directing the applicant to cease to be the chairperson of the County Assembly Service Board of Kisumu pending the determination of **Kisumu High Court Criminal Appeal Number 12 of 2016, Republic of Kenya Vs Anne Atieno Adul & 7 others**.

2. An order of Certiorari be and is hereby issued to bring into this court and quash the decision/resolution of the Respondents made on 06.12.2016 that the Applicant to "step aside" as the Speaker of the County Assembly of Kisumu until **Kisumu High Court Criminal Appeal Number 12 of 2016, Republic of Kenya Vs Anne Atieno Adul & 7 others** is determined as provided by the letter of the Clerk of the County Assembly of Kisumu dated 01/12/2016.

3. An order of prohibition be and is hereby issued stopping the Respondents from giving effect to or in any other manner further implementing the resolution passed on 06/12/2016 suspending and/or requiring the Applicant to "step aside" as the Speaker of the County Assembly of Kisumu.

4. **That** the costs of this application shall be borne by the Respondents.

**DATED, SIGNED AND DELIVERED ON THIS 2<sup>ND</sup> DAY OF NOVEMBER 2017**

**MAUREEN ONYANGO**

**JUDGE**