



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**PETITION NO. 141 OF 2015**

**(Before D. K. N. Marete)**

**NORAH MORAA OMBUI.....PETITIONER**

**VERSUS**

**THE SPEAKER KISII COUNTY ASSEMBLY.....1ST RESPONDENT**

**THE KISII COUNTY ASSEMBLY.....2ND RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 18th May, 2015 and brought to court vide a certificate of urgency of the same date. It seeks the following orders of court;

- 1. THAT this Honourable Court be pleased to certify this matter urgent and fit to be heard ex-parte in the first instance.*
- 2. THAT pending the hearing and determination of the Petitioner's Application inter-partes conservatory orders of injunction and prohibition do issue restraining the Respondents, their agents, servants, members of officers from barring, preventing, hampering, restricting, prohibiting or inhibiting the Petitioner's membership in the Kisii County Assembly Service Board.*
- 3. THAT pending the hearing and determination of this Application conservatory orders of injunction and prohibition do issue restraining the Respondents, their agents, servants, members or officers from disbanding, reconstituting, replacing the petitioner as a member of the Kisii County Assembly Service Board pending the hearing and determination of the instant application.*
- 4. THAT interim orders of injunction do issue restraining the Respondents themselves, their agents, servants by whatever name called from barring, preventing, hampering, restricting or dismissing the Petitioners from membership, or disbanding the Kisii County Assembly Service Board or reconstituting same and or interfering with the Petitioner's membership of the Kisii County Assembly Service Board pending the hearing and determination of the petition filed herein.*
- 5. THAT costs of and incidental to this application be provided for.*

and is grounded as follows;

1. *On or about the 13<sup>th</sup> May, 2014, the respondents jointly and severally presided over/transacted house business regarding and affecting the petitioners in flagrant breach of the Petitioner's fundamental rights and in breach due process.*
2. *The said decision was extracted and signed by the Hon. Speaker County Assembly on the 14<sup>th</sup> of May, 2015 and made available to the Petitioner. On the same date the Speaker Kisii County Assembly issued a letter to the Petitioner communicating revocation of her membership to the County Assembly Service Board.*
3. *The gist of the said letter dated 14<sup>th</sup> May, 2015 was/is to the effect that the Honourable Speaker Kisii County Assembly commenced revocation of the Petitioner's appointment as a member of the Kisii County Assembly Service Board.*
4. *The Respondents have announced/set or commenced a process to replace the Petitioner in flagrant breach and violation of the Petitioner's rights. The end does not justify the means.*
5. *The said decision/communication by the respondents dated 14<sup>th</sup> May, 2015 revoking or purporting to revoke the Petitioner's appointment to the County Assembly Service Board is unlawful, unreasonable, un-procedural, ultra vires, unjustified null and void abinitio.*
6. *The Petitioner states that the intention of the respondents and or their agents is to circumvent a due process and deny the Petitioner the right to serve as a bonafide member of the Kisii County Assembly Service Board. The said decision files the face of constitutionalism and serves to undermine fair administrative action on the part of the Respondents or person acting on behalf of the Respondents; in flagrant breach of the constitution.*
7. *In making this Petition, the Petitioner relies upon others; the provisions of Article 47 (1) of the Constitution of Kenya, 2010 which states that;*  
  
*“Every person has a right to administrative action that is expeditious, lawful, reasonable and procedurally fair.”*
8. *In pursuance of the abovementioned provisions, the Respondents are jointly and severally obligated to abide or operate withing the precincts of the Constitution. The decision derived and the process attendant thereto flies the face of the law.*
9. *The Petitioner stands to suffer grave and irreparable career loss and prejudice if the respondents' decision is implemented.*

The matter came to court and on 21st May, 2015 and by consent the parties agreed on the award of orders 2 and 3 pending hearing and determination of this application. On 3rd July, 2015 the parties further agreed on a disposal of the application by way of written submissions and therefore today's ruling.

The petitioner's case is that she is a bonafide member of the Kisii County Assembly Service Board having served in the said assembly from July 2013. That as a consequence of a report of the members of the Justice and Legal Affairs Committee of the County Assembly in an investigation of impropriety during a medical insurance cover exercise, the 1st respondent issued a letter revoking the petitioners membership of the County Assembly Service Board. This was after a resolution to dissolve the County Assembly Service Board.

The Petitioner avers that this was an infringement of her right to due process, protection of rights, and natural justice and also an affront to her right to fair administrative action.

The respondents in support of their case raise Grounds of opposition in response and opposition to the application as follows;

1. *THAT the application and petition are an abuse of Court process.*
2. *THAT the orders sought herein is meant to deny the respondents right to oversight and fair administration of justice as in their legal mandate.*
3. *THAT the entire petition ought to have been commenced through prerogative orders.*
4. *THAT this Application and petition is incompetent, and fails to meet the threshold for the orders sought.*
5. *THAT the jurisdiction of this court is ousted by the provisions of Section 12 of Powers and Privileges Act Cap, 6 Laws of Kenya.*
6. *THAT the application and the petition herein ought to be dismissed with costs.*

They also raise a preliminary objection as follows;

1. *That this court lacks territorial jurisdiction to hear and determine the instant petition.*
2. *That the 2<sup>nd</sup> Respondent has no legal capacity to sue or to be sued.*
3. *That the petition as commenced is premature, incompetent and an abuse of due process of the court.*
4. *That the petition and the instant proceedings offends the mandatory provisions of Section 12 Powers & Privileges Act Cap 6 Laws of Kenya.*

The petitioner in her written submissions on the petition opens by reiterating her case as presented in the initial pleadings; This is as follows;

*“It is logical to conclude that the so called dissolution of the Kisii County Assembly Service Board was calculated to dislodge the Petitioner/Applicant from office without according her the requisites of due process. The reasons given, arguments and contribution of the County Assembly did not entail or demonstrate specific allegation, failures, incompetence and or inadequancies on the part of the Petitioner/Applicant.*

She further submits as follows;

*The 2<sup>nd</sup> respondent condemned the Petitioner/Applicant unheard. The accusations levelled against her were not disclosed or particularized to enable her respond. The applicant was denied the opportunity to be heard. Your Lordship, we submit that the end does justify the means.”*

and thereby concludes by submitting that due process was not pursued or accommodated circumstances of her case.

The petitioner further seeks to rely on the authority of **MRAO VS FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125** in support of her contention;

*“a prima facie case in a Civil Application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the 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 or rebuttal from the latter.”*

*The Petitioner/Applicant has demonstrated that her right to due process and fair administrative action as provided in Article 47 (1) were violated. The said rights entailed administrative action or process that is lawful, reasonable and procedurally fair which was not the case herein.*

*We thus refer the court to the prayers in the Notice of Motion with a simultaneous urge that the same be granted. The petitioner/applicant has demonstrated a prima facie case with a probability of success. Besides, the respondents have not shown whether they will suffer any prejudice.*

*Indeed, upon filing of the Petitioner's application, the Honourable granted interim orders. The said interim orders have remained inforce; the respondents have not suffered any prejudice since and are not likely to suffer any prejudice if prayer (4) of the Notice of Motion dated 18<sup>th</sup> May, 2015 is allowed.”*

The petitioner concludes this by submitting that she has established a *prima facie* case in support of her quest for injunction.

The respondent in their written submissions also reiterate their pleadings in their Grounds of Opposition and preliminary objection. It is their further submission that this application and petition touches on their oversight and welfare role duty to its subjects as provided for under the County Government Act, 2012 and the Constitution of Kenya, 2010.

Further, they submit that the respondent through the committee of Justice and legal affairs was mandated to enquire into the expenses incurred in the medical insurance cover for members of the 2nd respondent and therefore the investigations and findings. Further, the appointment of the petitioner/claimant to serve in the board was subject to approval of the 2nd respondent and members of 2nd respondent enjoy the protection of Section 12 of the Powers and Privileges Act, Chapter 6 Laws of Kenya.

*“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.”*

This renders their action immunized from all court action. They also deny the establishment of a *prima facie* case or any other conditions established for the issue of an injunction in the **Giella Vs. Cassman Brown** authority aforesaid.

The Respondents also submit on lack of jurisdiction on this court to try and determine the issues in dispute but their arguments and submissions fell short of satiating this Grounds of opposition and Preliminary Objection. The respondents pleadings and submissions in all would not sustain a tangible opposition to the application as framed and prosecuted.

The issue for determination is which of the two cases outweighs the other and should be upheld in terms of the law and practice on injunctions. The petitioner/ applicant presents a case of revocation of her appointment as a member of the 2nd respondents County Assembly Service Board by a resolution of the Justice and legal committee of the respondent. This was without consultation or hearing in a meeting which involved the 1st respondent and the only other member the leader of minority in the County Assembly, who were members of the committee that set out the revocation of the board. This, to the petitioner, was a ploy to remove her from the board without lawful cause. She further argues and submits that this inaction satisfies the prerequisites of a *prima facie* case as established on the authority of **Giella Vs. Cassman Brown & Company Ltd (1973) E.A 358**, it was held that for the court to grant injunctive reliefs, the applicant must satisfy the following;

- a. The applicant must show that he/she has a prima facie case with a probability of success against the respondent.*
- b. The applicant must demonstrate that unless the order is granted, he will suffer irreparable harm which cannot adequately be compensated by an award of damages.*
- c. That if the court is in doubt as to a) and b) above, the court will determine the application on balance of convenience.*

The respondents opposition to this application is hollow, evasive and escapist. It does not go far in

controverting the case for the petitioner. It is not compelling or supportive of their grounds of opposition or preliminary objection. I therefore allow the application and order as follows;

i. THAT orders of injunction be and are hereby issued restraining the Respondents themselves, their agents, servants by whatever name called from barring, preventing, hampering, restricting or dismissing the Petitioners from membership, or disbanding the Kisii County Assembly Service Board or reconstituting the same and or interfering with the Petitioner's membership of the Kisii County Assembly Service Board pending the hearing and determination of the petition filed herein.

ii. THAT the costs of this application shall be borne by the respondents.

Delivered, dated and signed this 28th day of January 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mose Nyambega instructed by Mose Nyambega & Company Advocates for the Petitioner.
2. Mr. Nyambati for the Respondents.