



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO 18 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JAMES OMARIBA NYAOGA.....1ST**  
**PETTITIONER**

**JOSEPH MARANGA MENYA.....2ND**  
**PETITIONER**

**VRS**

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

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

**THE COUNTY ASSEMBLY SERVICE BOARD KISII COUNTY..... 3RD**  
**RESPNDENT**

**RULING**

The Petitioners/Applicants are the Clerk and Director of Finance of Kisii County Assembly respectively.

By letters dated 7th August, 2015 the Chairman of the Kisii County Assembly Service Board sent the Applicants on compulsory leave. The letters referred to a resolution of the County Assembly at its sitting of 5th August, 2015. Both Applicants responded to the letters contesting the reasons, process and powers under which the decision to send them on compulsory leave was taken.

On 13th August, 2015 the Applicants filed this petition seeking the following reliefs:-

- a) *The instant matter touches and/or concerns breach and/or infringement of fundamental rights of the Petitioners/Applicants. Consequently, it is by its nature and pursuant to the provisions of the Constitution, 2010, extremely urgent and thus requiring to be disposed of on priority basis.*
- b) *The Petitioners/Applicants herein, are by virtue of being the clerk/Accounting officer and Director of Finance, Kisii Assembly, respectively, are mandated and/or authorized to prepare and or process payments of salaries and sitting allowances, to and in favour to the honourable members of the 2nd Respondent and Staff thereof*

c) Towards and in respect of processing and payments of the sitting allowances, the Petitioners/Applicants rely on the Plenary Register prepared and maintained by the designated officer of the County of Assembly, namely Director Chamber and Procedural Services.

d) Relying on the plenary register and summaries submitted from the 2nd Petitioners/Applicants herein, processed and then after paid out the sitting Allowances for the months of June and July, 2015, respectively. However, the Honourable members of the 2nd Respondent were aggrieved and commenced agitation for the removal and/or disciplining of the Petitioners/Applicants.

e) Pursuant to and in a bid to actualize the removal and/or disciplining of the Petitioners/Applicants. The members of the 2nd Respondent unlawfully and illegally, resolved that the Petitioners/Applicants be disciplined by way of compulsory leave.

f) On the 7th day of August, 2015, the 1st Respondent herein, albeit without the sanction and/or authority of the 3rd Respondent, issued and/or purported to send the Petitioners/Applicants on compulsory leave and indicated inter-alia.

".....Due legal process shall be followed hereafter."

g) Owing to the irregular and illegal letters issued on the 7th day of August, 2015, the Petitioners/Applicants herein, have been removed from office and subjected to indefinite Compulsory leave, which compulsory leave arose from the due execution and discharge of duties by the Petitioners/Applicants.

h) The actions and/or omissions of the Respondents herein, followed the illegal and unlawful resolution of the 2nd Respondent, who is not the employer of the Petitioners and hence incapable of commencing and/or sanctioning any disciplinary process, either in the manner resolved or at all. Consequently, the compulsory leave meted against the Petitioners/Applicants amounts to and/or constitutes persecution.

i) On the other hand, the actions and/or omissions of the Respondents complained of, amounts discrimination, unfair administrative action, unfair hearing and thereby constitutes unfair labour practices. In the premises, the actions complained of constitute violation and/or infringement of the Petitioners/Applicants' Fundamental rights under the Provisions of Articles 2(2), 27(1), 47(1), 50(1) & 236 of the Constitution, 2010.

j) Consequently, the failure to grant the Conservatory orders would sanitize the unfair labour Practices, Intersection and conspiracy carried out at the instance of the 1st and 2nd Respondents and sanctioned (by way of silence) by the 3rd Respondent, in utter abuse and/or disregard of the provisions of Article 41(1) of the Constitution, 2010.

k) The instant Application is a cry for restoration of sanity in the Administration of Justice and in particular, the respect for the Rule of Law, national values and good governance more particularly, by the 1st and 2nd Respondents herein, who have acted in an opaque, prejudicial and Detrimental manner.

i) Unless the orders sought are granted, the Crux of the petition shall dissipate and/or be destroyed and hence the petition shall be rendered Nugatory.

m) In view of the foregoing, there exist special and/or peculiar circumstances to warrant the instant Application being certified urgent and same be heard on priority basis.

Simultaneously with the petition the Applicants filed the application under consideration under certificate of urgency seeking the following orders:-

1. That an interim Order of Mandatory Injunction, be and is hereby granted directed unto the Respondents either by themselves, agents and/or servants to forthwith re- admit, re-instate, restore and/or

carrying out their mandate, Discharge and/or Execution of their duties as the Clerk/Accounting officer and Director Finance, Kisii County Assembly, respectively, subject to adherence and observation of the provisions of the County Government Act, No. 17 2012 and the Public Finance Management Act, 2012 pending the hearing and determination of this application.

2. That an Interim Order of Injunction be and is hereby granted restraining the Respondents either by themselves, agents, servants and/or employees, from commencing disciplinary action, disciplining, suspending, preventing, barring, restricting and/or interfering with the Director Finance, Kisii County Assembly, respectively, whatsoever and/or howsoever, on account of the issue of deduction(s) and/or non-payments of sitting allowances, which were (sic) neither due nor payable to the Honourable members of the 2nd Respondent, subject only to observance of the provisions of the County Government Act, No. 17 2012 and the Public Finance Management Act, 2012 pending hearing and determination of this application

3. That the matter be placed before the duty judge on 1/9/2015 for further directions.

4. Pending the hearing and determination of the instant application, the Honourable court be pleased to grant an interim order of injunction restraining the Respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting any other person(s) to act as the clerk and Director of Finance, Kisii County Assembly, in place of the Petitioners/Applicants respectively, without regard to the due process of the Law.

5. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim conservatory order, to protect, preserve and/or conserve the status of the Petitioner/Applicants as the clerk and director Finance, Kisii County Assembly respectively and in particular, barring the Respondents jointly and/or severally from commencing and/or undertaking any Disciplinary action against the Petitioners/Applicants, based on account of the issue of deduction(s) and/or non- payments of sitting allowances which were(sic) neither due nor payable to the honourable members of the 2nd Respondent.

6. The Honourable court be pleased to grant an Order of Temporary injunction, prohibiting and/or restraining the respondents either by themselves, agents, servants and/or employees from commencing disciplinary action, disciplining, suspending, preventing, barring, restricting and/or interfering with the Petitioners'/Applicants' performance, discharge an/or execution of their Duties as the clerk and Director finance, Kisii County Assembly, respectively, whatsoever and/or howsoever, on account of issue of deduction(s) and/or non- payments of sitting allowances, which were (sic) neither due nor payable to the honourable members of the 2nd Respondent, subject only to observance of the provisions of the County Government Act, No. determination of this petition.

7. The Honourable court be pleased to grant an order of Temporary injunction, prohibiting and/or restraining the Respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting any other person(s) to act as the clerk and Director of Finance Kisii County Assembly, in place of the Petitioners/ applicants, respectively, without regard to the due process of law, pending the hearing and determination of this Petition.

8. The Honourable court be pleased to grant conservatory order, protect, preserve and/or conserve the status of the Petitioners/Applicants as the clerk and Director Finance, Kisii County Assembly, respectively and in particular, barring the Respondents jointly and/or severally from commencing and/or undertaking any Disciplinary action against the petitioners/applicants, based on account of the issue of deductions and/or non-payments of sitting allowances which were (sic) neither due nor payable to the Honourable members of the 2nd Respondent, subject only to observance of the provisions of the county Government Act , No. 17 2012 and the Public Finance Management Act, 2012, pending the hearing and determination of this petition.

9. The Conservatory orders, if any, granted by this Honourable Court to be implemented and/or enforced by the O.C.P.D, Kisii Central police Division and/or such other officer as the Honourable court

may decree.

10. Costs of this application be borne by the Respondents jointly and/or severally.
11. Such further and/or other orders be made as the court may deem fit and expedient.

The Respondents filed a Preliminary Objection on the following grounds ;

1. That this court lacks jurisdiction to hear and determine the present petition by dint of the provisions of Section 12 of the Powers and Privileges Act Cap 6 laws of Kenya.
2. That these proceedings are one and the same as the proceedings currently pending before Kisumu Petition No. 12 of 2015 and therefore this amounts to subjudice.
3. That the Petitioners have not invoked the provisions of Section 77 of the County Government Act No. 17 of 2012 before commencing the current proceedings in court.
4. That no judicial review proceedings shall be commenced without seeking leave of the court as required by the law.
5. That the application and the entire petition be struck out with costs.

On 21st August, 2015 the Applicants' were granted interim orders pending hearing of the application as follows:-

1. That an Interim order of Mandatory Injunction, be and is hereby granted directed unto the Respondents either by themselves, agents and/or servants to forthwith re-admit, re-instate, restore and/or allow the Petitioners/Applicants back to their offices, with a view to executing and/or carrying out their mandate, discharge and/or execution of their duties as the clerk/accounting officer and Director Finance, Kisii County Assembly, respectively, subject to adherence and observation of the provisions of the County Government Act No. 17 2012 and the Public Finance Management Act, 2012 pending the hearing and determination of this Application.
2. That an Interim Order of Injunction be and is hereby granted, restraining the Respondents either by themselves, agents, servants and/or employees, from commencing interfering with the Director Finance, Kisii County Assembly, respectively, whatsoever and/or howsoever, on account of the issue of deduction(s) and/or non-payments of sitting allowances, which were (sic) neither due nor payable to the Honourable members of the 2nd Respondent, subject only to observance of the provisions of the County Government Act, No.17 2012 and the Public Finance Management Act, 2012 pending hearing and determination of this application.
3. That the matter be placed before the duty Judge on 1/9/2015 for further directions.

The Preliminary Objection was heard by Mbaru J on 1st September, 2015 and in her ruling delivered on 21st September 2015 she dismissed the same paving way for hearing of the application before me for determination.

The Respondents opposed the application and filed a replying affidavit of Samuel Kerosi Ondieki sworn on 20th July 2015 (date must be a typographical error as the petition and application were both filed on 13th August, 2015). The Replying affidavit was filed on 20th August, 2015.

### **Applicants' submissions**

The applicants aver that

- a) The 1st Petitioner/Applicant is the duly appointed and constituted Clerk of the 2nd Respondent

- b) The 1st Petitioner/Applicant is also the Secretary and the Chief Executive officer of the 3rd Respondent.
- c) By virtue of being the Clerk of the 2nd Respondent, the 1st Petitioner/Applicant is also the duly appointed Accounting Officer and hence charged with the responsibility of protecting the funds and/or resources of the 2nd and 3rd Respondents
- d) On the other hand, the 2nd Petitioner/Applicant is the duly appointed and constituted Director of Finance of the 2nd Respondent.
- e) Consequently, the petitioners/applicants are the persons charged and/or responsible for processing and payments of the salaries, emoluments and allowances to the Honourable members of the 2nd Respondent and staff thereof.
- f) The Honourable members of the 2nd Respondent are entitled to sitting allowances in respect of the sittings attended either in the committee and/or Plenary sessions.
- g) The calculation and/or reckoning of the sitting allowances is founded and/or anchored on the Plenary Register.
- h) The preparation and maintenance of the Plenary Register is the responsibility of the Director of Chamber and Procedural Services.
- i) The period from 22nd day of May, 2015-22nd day of June 2015, the 2nd Respondent was in recess and there no sittings by the 2nd Respondent.
- j) No sitting allowances are due and/or payable in favour of the honourable members of the 2nd Respondent.
- k) Besides, payments of sitting allowances to and in favour of the members of the 2nd Respondent, is predicated and/or founded upon the Plenary Register.
- l) Consequently, during the period of June and July 2015, the Honourable members of the 2nd Respondent, were only entitled to and were indeed paid sitting allowances, for the sitting duly attended.
- m) Nevertheless, the Honourable members of the 2nd Respondent demanded and sought to be paid sitting allowances for all sittings, irrespective of the Plenary Register.
- n) Besides, the Honourable member of the 2nd Respondent also sought to be paid sittings allowances for the period when the house (read 2nd respondent) was on Recess.
- o) Notwithstanding the foregoing, the Honourable members of the 2nd Respondent were only paid sitting allowance in line with and/or accordance to the Plenary Register.
- p) As a result of the adherence to the Plenary Register, the Honourable members of the 2nd Respondent became annoyed and hence commenced agitation to have the Petitioners/Applicants removed from office.
- q) Subsequently, the 2nd Respondent (sic) resolved that the Petitioners/Applicants be sent on compulsory leave.
- r) Owing to the foregoing, the 1st Respondent herein wrote and issued letters dated 7th August 2015.
- s) Pursuant to the contents of the letters, the Petitioners/Applicants have (sic) been sent on compulsory leave.
- t) The letters sending the Petitioners/Applicants on compulsory leave, is however, irregular, illegal and

void.

- v) In any event, the 1st Respondent was neither mandated nor authorized to author the offensive letter.
- x) At any rate, the compulsory leave meted against the Petitioners/Applicants constitutes an/or amounts to abuse of the Due process of the law.
- y) Besides, the purported compulsory leave amounts to an/or constitutes persecution.
- z) On the other hand, the actions of the 1st and 2nd Respondents herein, are absurd, unreasonable, oppressive and vindictive.
- aa) Besides, the actions and/or Decisions of the 1st and 2nd Respondents, were informed and/or influenced by Political vendetta and extraneous circumstances and/or issues.
- bb) Notwithstanding the foregoing, the purported disciplinary action and/or process against the petitioners/applicants is fraught and/or wrought with irregularities and illegalities.
- cc) At any rate, the Petitioners/Applicants have been subjected to mistreatment and unfair labour practice contrary to and in contravention of the Provisions of Article 41(1) of the Constitution, 2010.
- dd) The intended disciplinary Process, is contrary to and in violation of the Petitioners'/Applicants' rights under the provisions of Article 50(1) of the Constitution 2010.
- ee) In the circumstances, the actions of the 1st and 2nd Respondents herein with the connivance and tacit approval (silence of the 3rd Respondent,(details in terms of the foregoing paragraphs), amounts to violation of the Petitioners'/Applicants' Constitutional and Fundamental Rights and hence requiring urgent address and protection.
- ff) As a result of the foregoing, the Petitioners/Applicants are bound to Dismissed from employment contrary to and in violation of the Rule of Natural Justice.
- gg) In a nutshell, the Petitioners/Applicants have been subjected to unfair labour Practices and mistreatment by and/or at the instance of the Respondents.
- hh) Consequent to the acts and/or omissions of the Respondents, the Petitioners/Applicants have suffered and are bound to suffer an infringement of their Constitutional rights and thus requiring the protection of this Honourable court.
- ii) The actions and/or omissions complained of are dehumanizing and discriminatory in nature.
- jj) Besides, the actions and/or decision complained of are contrary to and/or violation of the provisions of Article 236 of the Constitution, 2010.
- kk) In the premises, the Petitioners/Applicants have a *prima facie* case against the Respondents.
- ii) The acts of the Respondents shall occasion irreparable loss to he Petitioners/Applicants.
- mm) Unless, there is urgent and appropriate intervention, the Respondents are bound to continue with the illegal, fraudulent and unfair practices meted out against the Petitioners/Applicants.
- nn) Consequently, this is a fit and proper case to grant Conservatory Orders of Injunction.
- oo) it is in the interest of justice that the Application herein be granted *Ex-Debito Justiae*

In the skeleton submissions which were highlighted by the Applicants' counsel Mr. Mboya Oguttu, he

extracted the issues for determination as follows:

- a) Whether the Honourable members of the 2nd Respondents had the mandate and/or jurisdiction to send the Petitioners/Applicants on compulsory leave?
- b) Whether the 1st Respondent was seized of mandate and/or authority to issue letters of compulsory leave?
- c) Whether the members the 2nd Respondent were entitled to sitting allowance when the Assembly was on Recess?
- d) Whether the Compulsory leave offend the provisions of Article 236 of the Constitution, 2010.
- e) Whether the Petitioner/Applicant has established a *prima -facie* case as against the Respondents?
- f) Whether circumstances exist to warrant granting of the Orders of Temporary Injunction and Conservatory Orders, respectively?

Mr. Oguttu submitted that the 2nd Respondent is a creature of Article 185 of the Constitution which defines its mandate and jurisdiction being legislative and oversight authority over designated County Executive Committees and any other County Executive organs as provided in Article 185(3). That it has no mandate to create offices/appoint or supervise office holder or discipline such officers which is the mandate of the 3rd Respondent, the County Assembly Service Board. He submitted that the compulsory leave issued by the 2nd Respondent to the Applicants was ***ultra vires*** and consequently, null and void. That it is also ..... of powers of 3rd Respondent.

The Applicants relied on Mafoy -v- United Africa Co. Limited (1961) 3 ALL E.R pages 1169-1173 wherein the court considered the effect of an illegality and held that what is illegal remains illegal and no amount of innovation or craft can change the same.

Mr. Oguttu for the applicants further relied on the case of Commissioner of Lands & Another V Coastal Aquaculture Limited KLR(E&L) 1 in which the court of Appeal dealt with the doctrine of ***ultra vires***.

The Applicants submit that the 1st Respondent as the titular head of the 2nd Respondent and chairperson of the 3rd Respondent, has the mandate to convene meetings of the 3rd Respondent which are issued by the clerk. Mr. Oguttu submitted that the 3rd Respondent being a corporate body can only make decisions pursuant to a duly convened board meeting and the letters of compulsory leave issued to the applicants having not been passed by a duly convened Board meeting of the 3rd Respondent, are irregular, illegitimate and unlawful.

Mr. Oguttu submitted that the Applicant;s being public officers are both espoused their statutorily circumscribed responsibilities and ensure resources of the Assembly are utilised prudently and they are shielded from punishment for acts or omissions arising from the performance of other duties. He submitted that the letters of compulsory leave offered the provisions of Article 236 of the Constitution.

Mr. Oguttu submitted that the Applicants have demonstrated a *prima facie* case against the Respondents on the principles enunciated in Mrao Limited V first American Bank Limited in which the stated

*" a genuine and arguable case is one which, on the material presented to the court, a Tribunal properly directing itself with 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."*

Mr. Oguttu also relied on the case of Gitirau Peter Munya V Dickson Mwenda Kithinji & 2 Other [2014] eKLR where the supreme Court underlined the circumstances under which conservatory orders may issue as follows:

*"Conservatory Orders bear a more decided Public law connotation; for these are orders to facilitate ordered functioning within public Agencies, as well as to uphold the adjudicating authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as the prospects of irreparable harm occurring during pendency of a case, or high probability of success in the supplicant's case for orders of stay. conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interests, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."*

Mr. Oguttu submitted that the commencement of disciplinary proceedings against the applicants and the meting out of the letters of compulsory leave constitute and/or establish a *prima facie* case. He further submitted that the failure to pay sitting allowances which were neither due or payable, could not form the basis of victimisation of the Applicants and further that the Respondents, prosecutors and ultimately judges in own cause contrary to the doctrine of natural justice and fair hearing in terms of Article 50(1) of the Constitution.

He prayed that the court grants the orders sought by the Applicants/Petitioners.

### **Respondents submissions**

In the replying affidavit Mr. Samuel Kerosi Ondieki the 1st Respondent states that the Applicants have filed suit against the 2nd and 3rd Respondents in respect of matters arising during Plenary sessions as the County Assembly and County Assembly Service Board of Kisii County respectively.

He submitted that the Petitioners failed to discharge their duties as required by law and engaged themselves in politicking contrary to the rules of the Public Service. He stated that the action taken against the Applicants was a decision of the 2nd Respondent as implemented by the 3rd Respondent in line with their Constitutional mandate of oversight and protection of public funds which had been embezzled by the Petitioners jointly with third parties resulting in their suspension.

He deposes that the Petitioners were sent on compulsory leave to pave way for investigations over allegations of the manner in which they performed their duties and did not constitute dismissal, that they did not stand to suffer during the investigations. He submitted that compulsory leave does not amount to persecution, victimisation or vindictiveness as alleged.

In the Respondents' submissions which were highlighted by Mr. Nyambati counsel for the Respondents, he submitted that under Section 12(7) of the County Government Act 2012 the 2nd Respondent has an oversight role over all organs of the County government including the staff, among them the Applicants. He submitted that the 2nd and 3rd Respondents are immune under Section 12 of the Powers and Privileges Act as read with Section 17 of the County Government Act as the decisions were made while exercising their legislature role. He submitted that the 1st Respondent has been joined in these proceedings wrongly as the acts complained of were done in the capacity of chairman of the Service Board.

Mr. Nyambati narrowed down the issues for determination as follows:

1. Whether the 2nd Respondent had the duty to exercise its oversight role over the 3rd respondent in line with the provisions of section 12(7) of the County Government Act 2012.
2. Whether the Petitioners/Applicants were answerable to the 3rd respondent and therefore subject to the 3rd Respondent's disciplinary proceedings.
3. Whether the 3rd respondent's decision to send the Petitioners/Applicants on compulsory leave pending investigation and subsequent disciplinary proceedings was within their mandate.
4. Whether the 1st respondent authored any suspension letter in his capacity as the speaker of Kisii

county assembly.

5. Whether the petitioners have a *prima facie* case to guarantee grant of conservatory orders sought.

I have considered the application and the Replying affidavit together with rival submissions of the parties and the authorities relied upon:

The issue in contention in these proceedings are the letters sending the Applicants on compulsory leave is not recognised in the Employment Act.

They further allege that the 1st Respondent cannot make personalised decisions and pass them out as decisions of the Board, the 3rd Respondent as there was no reference to minutes of the Board further that the only person authorised to communicate decisions of the 3rd Respondent is the Clerk, or a temporary clerk. The last issue is that the Applicants were being penalised for doing their job by refusing to pay out unmerited sitting allowances to members.

I have looked at the letters complained of. They state as follows in the main body

*"Pursuant to a resolution of the Kisii County Assembly in its sitting on 5th August, 2015, you are hereby directed to proceed on compulsory leave pending clearance by the County Assembly Service Board on allegations contained in the face of the motion tabled and approved on even date. due legal process shall be followed hereafter."*

I do not see anything wrong with the letter. There was a resolution by the County Assembly which has the mandate to make such resolution in its oversight authority. The letter specifies the date of the resolution. The letter does not interdict or suspend or dismiss the Claimant. It does not state they will not earn their salary. It only promises that due process will be followed thereafter. It is written by the chairman of the county Assembly Service Board, and the Board has mandate to employ, discipline and terminate the Services of the Applicants.

In stead of heading the letter and waiting for the due process promised, the Applicant's respond with guns blazing and get into the offensive. They address the issues raised by the Applicants, the person who wrote the letters being the chairperson of the County Assembly Service Board, had the mandate to do so. The authority cited in the letter being the County Assembly, also had the mandate to pass the resolution as they did. The action taken was only asking the Applicants to step aside pending clearance by the Service Board, with a promise that due process would be followed.

As stated in the case of Gataru Peter Munya (supra) relied upon by the Applicants; Conservatory Orders should be granted on the inherent merit of the case, bearing in mind, public interest, the Constitutional values and proportionate magnitudes and priority levels attributable to the relevant causes.

I find that the Applicants came to court prematurely, before any right was contravened or threatened to be contravened. I also find their attitudes as expressed in their letters responding to the notices of compulsory leave to be contemptuous and demeaning of their employer and extremely arrogant. I do not think such attitudes compatible with conservatory orders.

The court must take into account the consequences of sending back such employees to their offices to carry on their duties before the issues for which they were sent on compulsory leave are resolved. These being public servants, it is against public interest to do so.

For these reasons I find no merit in the application and dismiss the same with costs.

**Dated, signed and delivered this 1st Day of February, 2016.**

**MAUREEN ONYANGO**

**JUDGE**