



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

PETITION NO. 29 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

GORDON OGOLA.....CLAIMANT

Versus

COUNTY ASSEMBLY OF MIGORI.....RESPONDENT

RULING

The Petitioner Gordon Ogola was elected as the Speaker of the Migori County Assembly the Respondent, and took his oath of office on 24th June, 2013. On 13th October, 2015 the Respondent debated a report of the County Public Investments and Accounts Committee on the Migori County Assembly Books of Account for the period July 2014 to March 2015 but putting of questions was reserved for 14th October, 2015 when it was further pushed forward to 27th October, 2015 due to lack of quorum.

On 27th October, 2015 the Respondent resumed sitting and passed a motion that all members of the County Assembly Service Board step aside to allow for investigations. The Petitioner was issued with a letter dated 28th October, 2015 informing him about the decision to step aside.

Aggrieved by the decision he filed the petition herein seeking the following orders:-

- 1. A declaration that the Respondent's actions/commissions and or omissions pursuant to decisions/resolutions made on 13/10/2015 and 27/10/2015 were in breach of the rules of natural justice, the provisions of Articles 10, 47 and 50 of the Constitution, Section 11 of the County Governments Act and Standing Order 59 of the County Assembly of Migori Standing Orders and any resolutions/decisions and or actions emanating from the said sittings are unlawful , illegal, null and void and of no consequences.*
- 2. A declaration that the Respondent does not have jurisdiction and or power to suspend/dissolve the County Assembly Service Board of Migori County and neither does it have power to suspend the Petitioner as Speaker and Chairman of the said Board as it purported to do in/at sittings held on 13/10/2015 and 27/10/2015.*
- 3. A declaration that the Respondent does not have power and or jurisdiction to suspend, dissolve and or carry out the constitutional and statutory functions of the County Assembly Service Board.*
- 4. A declaration that the Respondent does not have powers and or jurisdiction to constitute offices or to appoint or supervise office holders in the County Assembly Service Board of Migori County Assembly and that any such action was/is null and void **ab initio**.*

5. *A permanent order of injunction and prohibition be issued restraining the Respondents and all its members/officers from entertaining and or debating any motion to remove the Petitioner through any process in violation and without due process and in breach of the right to a fair hearing or in any way interfering with the functions of the County Assembly Services Board of Migori County.*

6. *Costs of this petition.*

7. *Any other or further relief the court may deem just and expedite to grant.*

Simultaneously with the petition the petitioner filed the application before me for determination under certificate of urgency on 10th November, 2015 seeking the following order:-

1. *This application is certified urgent, service of the same e dispensed with and it be heard ex parte at the first instance.*

2. *Pending the hearing and determination of this application inter partes, a conservatory order be issued commanding the Respondent to allow the Petitioner to resume office and carry out his lawful functions.*

3. *Pending the hearing and determination of the Petition herein, a conservatory order be issued commanding the Respondent to allow petitioner to resume office and carry out his lawful functions.*

4. *Costs of the application be provided for.*

The application is made under Rule 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and is supported by the Petitioner's affidavit sworn on 9th November, 2015 and the grounds on the face of the application.

The Petitioner avers that the process of making the decision/resolutions was flawed for the following reasons:-

(a) The Chairman of the County Public Investment and Accounts Committee (CPIAC), Hon. David Chacha Mathews did not move the Assembly for the adoption of the report.

(b) The County Assembly did not adopt the report.

(c) The Hon. Deputy Speaker who presided over the County Assembly on 27/10/2015 did not formulate a question for the vote of the County Assembly in line with Section 20(1) of the County Government Act.

(d) No resolution was made on 27th October 2015 by the Respondent and yet it purported to suspend the petitioner.

(e) The purported decision/resolution of the Respondent was against the law and the rules of natural justice in that:-

(i) It was made without observing the rules of natural justice as I was not accorded a chance of being heard.

(ii) That the Petitioner cannot be suspended in law and can only be removed under the law.

He further avers that:-

(a) The Respondent failed to observe the provisions of Section 11(4) of the County Government

Act which requires that before a decision to remove the Speaker is made, **"..the Speaker shall be accorded an opportunity to respond to the allegations on the floor of the County Assembly"**.

(b) The Respondent's actions, omissions and or commissions are without jurisdiction and hence **ultra vires**.

(c)The decision/resolution by the Respondent offends the express provisions of Standing Orders No.59 (4) of the County Assembly of Migori Standing Orders (a copy of the said Standing Order is attached hereto and marked GO5).

(d) The Respondent's decision to appoint office bearers into the County Assembly offices is against the provisions of Section 12(7) (b) of the county Government Act.

He further avers that although the decision/resolution was made on 27th October, 2015 letters had been written on 26th October, 2015 to change signatures of the Respondent's accounts. He avers that the decision to suspend him is premature as the resolution of the Respondent was that the issues in the County Public Investments and Accounts Committee report be investigated by Kenya National Accounts Office (KENAO) whose findings had not been received.

He urges the court to grant the orders sought.

The Respondent opposed the application and filed a replying affidavit of TOM O. ONYANGO, the interim County Assembly Clerk and Secretary of the County Assembly Service Board who deponed that the Petitioner was adversely mentioned in the Report of the Respondents Public Investment and Accounts Committee together with all other members of the County Assembly Service Boards, and an Accountant 1. The report was tabled in the County Assembly on 13th October, 2013. During debate on the report the Petitioner who is speaker of the Assembly decided on his own motion not to chair the proceedings of the day on grounds that he had been adversely mentioned in the report. Mr. Onyango further depones that the report was discussed by the Assembly and a resolution adopted that all the five members of the County Assembly Service Board, which the Petitioner chairs by virtue of his position as Speaker, should step aside for 60 days to allow KENAO carry out further investigations and a special audit be submitted to the County Assembly on the issues raised in the CPIAC report.

Mr. Onyango states that the Petitioner was aware of and understood the implications of the CPIAC report as did all the other members of the County Assembly Service Board. He states that the report contains indepth analysis and critical examination of bank statements and other books of accounts of the County Assembly and makes findings on the prudent and efficient use of public funds.

Mr. Onyango further deponed that the County Assembly passed the resolution in exercise of its constitutional, statutory and legislative mandate and function which is not justiciable. That the petition invites the court to macro manage and in the process, interfere with the internal affairs, control and management of the County Assembly and in effect amounts to an interference with the doctrine of separation of powers.

Mr. Onyango further deponed that at the time these proceedings were commenced the petitioner was the speaker of the County Assembly of Migori having been elected pursuant to Article 178(1) of the Constitution of Kenya until 25th November, 2015 when he was removed from office by the County Assembly. That prior to 25th November, 2015 there was no threat or attempt to remove the petitioner from office as alleged in the petition, and that his removal on the said date was properly done pursuant to a motion which was introduced later, debated and passed unanimously by the County Assembly as by law mandated.

Mr. Onyango states that the orders sought have therefore been overtaken by events. He further states that by issuing the orders the court would be condoning the plunder, misappropriation and embezzlement of Public Funds entrusted to the County Assembly for the benefit of the people of Migori County and managed by the County Public Service Board at which the Applicant was chairperson. That during the

Petitioners tenure as chairperson of the County Assembly Service Board there was loss of public funds which have now been documented in a County Assembly Committee Report.

Mr. Onyango further deponed that it is in the Public Interest and in the interest of justice that the prayers in both the motion and the petition be refused.

The application was argued by way of written submissions.

Petitioners submissions

The Petitioner alleges that the Chairman of the CPIAC Hon. David Chacha Mathews did not move the Assembly for adoption of the report and the report was never adopted, that the Hon. Deputy Speaker who presided over the sitting of 27th October 2015 did not formulate a question for the vote of the Assembly in line with section 20(1) of the County Government Act. He further avers that the provisions of section 11 and 12(7) of the County Assembly Act and Standing Order No.59(4) were not observed and the Respondent acted without according the petitioner a right to be heard, that the Respondent arrogated to itself non-existent powers, without jurisdiction and hence ultra vires.

The Petitioner further avers that the resolution to remove him was riddled with political innuendos, backstabbing, disregard for house procedures and constitutionalism and his removal amounted to a constitutional coup.

On the issue of jurisdiction it was submitted for the petitioner that this court has jurisdiction to entertain this petition. The petitioner relied on the case of **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015]eKLR** in which the court of Appeal rendered itself as follows:-

"...Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation..... If Parliament violates the procedural requirements of the supreme Law of the land, it is for the courts of law ... to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution."

The petition further relied on the case of **Joseph Maina Theuri v Gitonga Kabugi & 3 others [2013]eKLR** in which the court stated as follows:-

"The court has found that the respondents have invented and invoked a disciplinary procedure that was not agreed upon by the parties to the contract of employment, namely stepping aside; the respondents under the stepping aside procedure have moved to design to deny the claimant a chance to renew his contract of employment as otherwise stipulated in the agreement; the respondents have designed to preempt any genuine disciplinary procedure by resolving that the claimant should take a terminal leave; and the respondents are proceeding in total disregard of the contract and the provisions of the Employment Act, 2007. In the circumstance of the case, the court finds that the claimant has established a prima facie case with a probability of success. The respondents appear engaged in surreptitious designs and schemes to deny the claimant the benefit of the agreed renewal clause and a fair or genuine disciplinary process. Such, in the opinion of the court amounts to irreparable injury beyond the remedy of damages. The court finds that the claimant is entitled to the temporary injunction in such special circumstances that invite protection of due process and freedom of the parties to contract and uphold the contractual terms and conditions."

On whether the Petitioner has raised sufficient grounds for court's intervention the Petitioner submitted that the Respondent failed to act within the confines of section 11 of County Government Act, Standing

Orders No.55 and 56 of Migori County Assembly Standing Orders, the provisions of the Fair Administration Act and Article 47 of the constitution.

The Petitioner prayed that the orders sought be granted.

Respondent's Submissions

The Respondent submitted that the report of the CPIAC was adopted on 27th October, 2015 and this court has no jurisdiction to question either the process or manner in which it was presented to the County Assembly, debated and passed, or the recommendations thereof as there is no employer employee relationship in the matter. The Respondent further submitted that the adoption of the report did not amount to termination of the Petitioner's employment. The Respondent further submitted that the interim process did not violate the petitioner's fundamental rights or freedoms.

The Respondent submitted that the Resolution of 27th October 2015 was implemented following which the petitioner was addressed a letter on 28th October, 2015. That the action did not amount to the removal of the speaker under Article 178 of the constitution or section 11 of the County Government Act, or the Standing Orders No.59.

The Respondent submitted that there is no evidence that the debate and adoption of the report was prompted by any ulterior motive or purpose as alleged by the petitioner, and further that there is no evidence of bad faith on the part of the Respondent, and that by asking the applicant and all members of the Public Service Board to step aside to allow for investigations for a period of 60 days the Respondent did not violate any right of the applicant. It further submits that there was no abuse of power as the respondent was exercising its legitimate oversight role, mandate and functions under the law. The Respondent submitted further that the Petitioner cannot challenge the debate and resolutions on the CPIAC report without contesting the contents of the report. The Respondent also submitted that under section 17 of the County Government Act the proceedings of the County Assembly cannot be questioned in any court.

The Respondent relied on the case of **Nick Githinji Ndichu v Clerk Kiambu County Assembly & Another [2014]eKLR** in which the court stated as follows:-

"The court is also of the view that if the petitioner is eventually successful on the merits of the petition he is not likely to suffer irreparable harm since he is at liberty to pursue payment of damages if the court finds that his removal was unlawful and in contravention of his constitutional rights."

The Respondent further submitted that the Petitioner has been removed from office as Speaker of the County Assembly and that the removal is the subject of **Petition No.31 of 2015** which is pending before this court.

The Respondent urged the court to dismiss this application.

Determination

I have considered the pleadings in respect of this application and the rival submissions of the parties. The issues arising from the pleadings and submissions are the following:-

1. Whether this Court has Jurisdiction to hear and determine this petition and the application.
2. Whether the applicant is entitled to the orders sought.

Jurisdiction

The jurisdiction of this court is provided for in Article 162(2) (a) of the constitution and section 12 of the

Employment and Labour Relations Court Act as follows:-

Article 162. (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to

such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

The Respondent submitted that under Article 165(3) of the Constitution, it is the High Court with jurisdiction in such matters. In the case of **Nick Githinji Ndichu** (Supra) which the Respondent has quoted with approval and stated is on all fours with this one, one of the issues was whether this court had jurisdiction to determine the case. The Court at Paragraph 20 of the Judgement held that this court has jurisdiction to hear such cases. The court held at paragraphs 11, 12, 13 and 14 that;

11. *The jurisdiction of the Court under Article 162(2) as read with Section 12 of the Industrial Court Act, 2011 is very clear and was well elaborated by **Hon. Majanja J.** in the matter of **United States International University (USIU) v Attorney General (2013) e KLR***

In the matter, counsel Kibe Mungai persuaded the court to find;

a) *The Industrial Court has jurisdiction to determine applications for enforcement of rights and fundamental freedoms under Article 22 and 23 in relation to all matters within their jurisdiction under the Act;*

b) *for purposes of all matters falling within the Industrial Court, reference to the "High Court" in the Constitution shall be deemed to refer to the "Industrial Court", and*

c) *in order to avoid apparent conflict, the court having the status of the High Court should have all the powers of the High Court in determination of disputes.*

12. *The Honourable Judge relying on Kenyan and South African jurisprudence and statutory law found; at page 14;*

'In light of what I have stated, I find and hold the Industrial Court as constituted under the Industrial Court Act, 2011 as a court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provision of Section 12 of the Industrial Court Act, 2011.'

*This decision was cited with approval by the Court of Appeal, at Nairobi in **Civil Appeal No.6 of 2012 Professor Daniel N. Mugendi Vs. Kenyatta University and 3 others.***

*Section 12(1) of this Act provides that the Court has jurisdiction to hear and determine disputes **relating to employment and labour relations including:***

a. *disputes relating to or arising out of employment between an employer and an employee Under Section 2 of the employment Act, 2007 a 'contract of service' is defined to mean;*

"an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time."

Whereas an "employee" is defined as "a person employed for wages or a salary."

13. *It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;*

- (i) *be having an oral or written contract of service;*
- (ii) *be providing a service to a real or legal person;*
- (iii) *be receiving a wage/salary for the services rendered.*

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.

14. It is the Court's finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent.

This court has therefore got jurisdiction over this matter.

I need not belabour the issue any further. Suffice to state that I agree with the rendition of the position by my brother Nduma J and have nothing useful to add.

Whether the Petitioner is entitled to the orders sought;

The Petitioner prayed for conservatory orders pending the hearing of the petition. In the case of **Nick Githinji Ndichu** (supra) the court also made a determination of when a party may be entitled to conservatory orders. The court stated as follows:-

Injunction

*Whether or not the Court is to extend the temporary injunction issued on 4th March, 2014 to stop the filling of the position of the speaker pending the hearing and determination of the Petition depends on the requirements for grant of interim orders well set out in the case of **Mary Aliviza & Okoth Mondo v. Attorney General of Kenya and Secretary General of East African Community; Application No.3 of 210, EALS, Law Digest 2005-2011 P.1** which is cited with approval in the **Industrial Court of Kenya at Nairobi, Petition No.39 of 2013, Gladys Boss Shollei Vs. Judicial Service Commission** as follows, page 17;*

*"The Judges relying on the authority in **Sergeant V. Paul (1949) 16 E.A.C.A 63** stated;*

"One, the grant or refusal of a temporary injunction which is an interlocutory order, is an exercise of judicial discretion which must be exercised judiciously.

*Two, the purpose of a temporary injunction is to preserve the status quo (see; **Noor Mohamed, Hanmohamed v. Kassamali Virji Madhani (1953) 20 E.A.C.A 8** and **Garden Cottage Food Limited v Milk Marketing Board (1984) A.C.130.***

Three, the conditions for the grant of an interlocutory injunction are now well settled in East Africa;

- a. an applicant must show a prima facie case with a probability of success;*
- b. an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and*
- c. If the Court is in doubt, it will decide an application on the balance of convenience."*

To summarise the foregoing, the position is that the applicant must establish a prima facie case with probability of success.

The Petitioner referred the court to several standing orders that were violated by the Respondent and which is the basis of the Petitioner's allegation that the process of adoption of the CIIAC report was flawed. Unfortunately the standing orders have not been availed to this court by either party and I am thus not able to determine whether or not the Respondent violated any of the standing orders referred to.

The Petitioner also argued that his rights under Article 47 which provides for fair administrative action were violated, and so were his rights under the Fair Administration Act 2015. In the Hansard reports annexed to the Affidavit of the Petitioner as Appendix GO-3, it is clearly stated that the Petitioner "recused" himself and requested Hon. Benta Otieno to Chair the session of 13th October, 2015 at which the motion on the Report on Migori County Assembly Books of Accounts was debated. In his opening statement to the Assembly the Petitioner stated the following:-

***Hon. Speaker:** Hon. Members as the Chairman of CPIAC (County Public Investments and Accounts Committee) comes I want to notify you that the report which is going to be debated by this House contains certain sections which adversely mention the Chair, some members of the staff and some Members of County Assembly. Under the principles of natural justice one cannot be a judge of his own case.*

These are principles which originated from Genesis, that is, in the bible during the time that Eve and Adam sinned and God asked them, "Adam where are you and what have you done?"

In essence, God was asking of giving them an opportunity to defend themselves before giving judgment on them. It is on that basis that that principle was developed so that in a scenario where a case is being decided which involves your participation, act or omission then the only logical thing to do is to recuse yourself from it.

And, the conclusion by the CPIAC, that is, I believe, in page number 26 says, "It is for this purpose that the committee has called upon Kenao (Kenya National Audit Office) to conduct a special audit on the issues raised herein and hand the report to the Assembly within 60 days.

'In the meantime," and you underline that, "the County Assembly Service Board, the finance officer and accountant I," and all members mentioned; I believe there are two reports with differing conclusions, "to step aside."

On that basis I will recuse myself.

And since in page 21, 22 and 23 the name of the Deputy Speaker does also appear, he may not therefore also be able to sit on this chair because that will be tantamount to doing the same thing. I, therefore, call upon a member of the Speaker's Panel, hon. Benta Otieno, to come forth and chair the sitting, only for the purposes of this report. Thank you very much.

It is clear that the Petitioner was aware of the contents of the report that was tabled and the resolutions in the report which were adopted by the Respondent and which recommended that the entire County Assembly Service Board should "step aside."

The report did not recommend the removal of the Petitioner as Speaker of the County Assembly and therefore the provisions of section 11 of the County Government Act did not apply to the adoption of the motion that was before the Respondent for debate.

The Respondent has submitted that this application has been overtaken by events as the Petitioner has subsequent to the filing of this petition been removed from his position as Speaker of the County Assembly of Migori, an allegation that the petitioner has not denied. The Court has been informed through the Respondent's submissions that the Petitioner's removal is the subject of another petition before this court being **Petition No.31 of 2015** which again the Respondent has not denied. If this is the case, the prayers sought in the Petitioner's application, even if granted, will be incapable of being enjoyed by the Petitioner. The orders will thus constitute an academic exercise. Courts do not grant orders in

vain.

From the foregoing, I find that the Petitioner has not satisfied the principles for grant of the conservatory orders sought being that he has not established a prima facie case with probability of success or that he will suffer irreparable loss or injury that is incapable of adequate compensation by way of monetary damages.

For these reasons, I find the application without merit and dismiss it. Each party shall bear its costs.

Ruling Dated, signed and delivered this 16th day of May, 2016

MAUREEN ONYANGO

JUDGE