



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 28 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ALLAN WAFULA MABUKA PETITIONER

-Versus-

THE SPEAKER, COUNTY ASSEMBLY OF BUSIA 1ST RESPONDENT

COUNTY ASSEMBLY OF BUSIA COUNTY 2ND RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD, BUSIA COUNTY..3RD RESPONDENT

R U L I N G

The Petitioner is the Clerk of the County Assembly of Busia County having been appointed as such by an undated letter signed by the Chairman of the County Assembly Service Board.

The 1st Respondent is the Speaker of the County Assembly of Busia County while the 2nd and 3rd Respondents are the County Assembly of Busia County and the County Assembly Service Board respectively.

The interested party is a member of the County Assembly of Busia County.

By a petition dated 9th November 2015 supported by the affidavit of the Petitioner he seeks several orders as set out on the face of the said petition. Together with the petition the petitioner filed an application seeking orders of temporary injunction restraining the Respondents from taking any disciplinary action against him, removing him from office, filling the position of clerk by any other person other than himself or enforcing the resolution of the County Assembly of 4th November 2015.

The Respondents filed a joint response to the application through the Replying Affidavit of BERNARD MUBINJA WAMALWA, the speaker of the County Assembly Busia County who is also the chairman of the County Assembly Service Board, the 3rd Respondent.

The interested party did not respond to the application but filed written submissions in respect of the application.

Background of the Petition

On 8th October, 2015 a member of the County Assembly (MCA) Hon. Vincent Wanyama Obisa presented a motion to the 2nd Respondent seeking the suspension of the petitioner, his investigation and surcharge for alleged impropriety, his prosecution and a bar from holding public office for 10 years. The

motion was dealt with administratively by the House Business Committee and therefore did not find its way to the order paper on grounds that it was inadmissible.

On 8th October, 2015 another MCA Hon. Patrick Ombo presented a motion on the failure of the County Assembly Service Board and County Public Service Board to remit statutory deductions recovered from MCAs and Staff to NHIF, NSSF, KRA and HELB and to pay salaries in time. After the motion was presented and debated on 29th October, 2015 by the 2nd Respondent who directed the motion to be amended and placed on the Order Paper of 3rd November, 2015, two MCAs Hon. Patrick Ombo and Hon. Maurice Chetambe drafted amendments to the motion. The Amended Motion sought the following resolutions;

- 1. This house resolved that the Clerk to the County Assembly of Busia has contravened the Public Finance Management Act 2012 as set out in section 156(4) a, b, c, and d.*
- 2. The County Executive Committee Members for Finance and Economic planning pursuant to Section 156(3) should forthwith revoke the appointment of the Clerk to the County Assembly as designated accounting officer.*
- 3. The County Executive Committee Member (CEC) Finance And Economic Planning do submit approvals of all the statutory deduction remitted for the said officers to date within seven (7) days*
- 4. The County Assembly Service Board appoints the Deputy Clerk in acting capacity in the office of the Clerk immediately.*
- 5. The Clerk of the County Assembly steps aside forthwith to pave way for investigation to be carried out by the relevant government bodies, ie. Ethic and Anti-corruption Commission (EACC), Transparency International, special Audit by the Auditor General and Public Procurement Oversight Authority (PPOA)*

On 2nd November 2015 the Petitioner note to the 1st Respondent, the speaker, objecting to the motion on grounds that;

- 1. The motion is contrary to Standing Order 55(ii). The motion has raised substantive matters which were not in the original motion and this requires a notice to be given.*
- 2. The motion is unconstitutional as it infringes on Article 47 (1&2) and 236 of the Constitution of Kenya*
 - a. Infringement on Article 47(1&2) fair administrative action*
 - (i) Every person has the right to administrative action that is expeditious, efficient, reasonable and procedurally fair.*
 - (ii) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
 - b. The motion infringes on Article 236, the Clerk as a Public Officer shall not be:*
 - (i) Victimised or discriminated against for having performed the functions of his office in accordance with the Constitution or any other law.*
 - (ii) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of Law.*
- 3. The motion infringes section 3, 4, 5, 6 of the Fair administration Act,2015.*

4. Matters raised are administrative in nature which the County Assembly Service Board has the mandate is to investigate and report to the County Assembly; matters touching on the office of the Clerk and staff of the County Assembly are better addressed by the County Assembly Service Board.

5. The amendment motion will likely expose the County Assembly to litigation by The Public Officer adversely mentioned.

The motion was unanimously adopted by the 2nd Respondent after debate at its setting of 4th November 2015. The petitioner/Applicant, aggrieved by the adoption of the motion, filed this petition together with the application now before me for determination.

Findings and Determination

The issue for determination is whether the petitioner/applicant is entitled to the orders of injunction as set out herein above. For the applicant to be entitled to the said orders he must demonstrate to the court that he has a prima facie case with likelihood of success and that unless the orders are granted there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution. This was the holding of the court in the case of **Centre for Rights Education and Awareness (CREAW) and 7 others v Attorney General and others in Nairobi HC Petition No.16 of 2011**.

The second principle is whether should the orders not be granted the applicant's petition will be rendered nugatory.

The third Principle is that enunciated by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others in Petition No.2 Of 2013**. The principle is that public interest must be considered when considering an application for grant of conservatory orders against a public agency.

In the **Embu HC Petition No.7 of 2014**, the court stated that;

".....where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with one caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest...."

The complaints of the applicant herein are that the actions of the Respondents amount to commencing disciplinary process against him through the floor of the assembly in breach of the relevant provisions of the constitution, the Fair Administration Actions Act, 2015 and the rules of natural justice. The applicant avers that the actions of the Respondents were tainted with illegalities and violated his fundamental rights.

The interested party submitted that no order of certiorari can issue against a body mandated to carry out the action complained of and that such order would amount to usurpation of the Respondents powers. The interested party submitted that under the Public Finance Management Act the Clerk to the County Assembly is the accounting officer of the Assembly and is accountable to the County Assembly. The interested party further submitted that under the County Government Act the Clerk is the Secretary of the County Service Board.

The Interested Party submits that this court cannot interfere with the business of the Assembly by way of Judicial review.

The role of the court at this stage is only to consider if the application by the applicant meet the three principles set out above.

According to section 13 of the **County Assembly Act** the Clerk to the County Assembly is appointed by

the County assembly service board with approval of the County Assembly. Once appointed he becomes part of the staff of the County Assembly besides acting as secretary to the County Assembly. The clerk to the County Assembly is a public officer and therefore protected by Article 236 of the constitution. Being an employee, he is also entitled to protection under the Bill of Rights including the right to a fair hearing.

The motion passed by the 2nd Respondent is contradicting and unconstitutional on the face of it. It resolves that the applicant has contravened the Public Finance Act 2012 yet no investigations have been carried out. The motion further resolves to revoke the appointment of the applicant, which can only be done by the County Assembly Service Board after due process as set out in Article 236 (2). By ordering the revocation of the applicant without due process, the 2nd Respondent stepped into the province of the 3rd Respondent, and by allowing the County Assembly to debate the motion as submitted, the 1st Respondent failed in his duty to guide the house on the proper exercise of its powers. The 1st Respondent allowed the 2nd Respondent to pass resolutions that contravene both the constitution and the County Government Act.

On these grounds alone, the applicant has a prima facie case with high chances of success. He thus meets the 1st principle.

The second principle is whether the applicant would suffer irreparable loss or injury. It is my opinion that the applicant would suffer a violation of his right to due process and right to be heard should the orders herein not be granted.

The constitution grants this court powers to protect the petitioner from violation of his constitutional rights.

On the third principle, should the applicant's services be terminated as resolves in the motion, the purport of this petition which is to stop the violation of his fundamental rights would be rendered nugatory as once that is done he would have to abandon the prayers in this petition and file a fresh petition or amend to seek damages for breach.

For these reasons the application succeeds and I make the following orders:-

1. Pending the hearing and determination of the petition herein, the Respondents by themselves, agents, servants and/or employees are restrained from acting on, effecting or enforcing the decision, or resolution adopting the motion passed by the 2nd Respondent vide proceedings of the 2nd Respondent in its 127th sitting on Wednesday 4th November, 2015.
2. Pending the hearing and determination of this petition, an order of injunction be issued restraining the Respondents by themselves, their agents, servants, employees, and or persons claiming their authority from commencing disciplinary action, disciplining, suspending, preventing, barring, restricting and/or in any other way interfering with the Petitioner's/Applicant's performance, discharge and/or execution of his duties as the clerk, Busia County Assembly, subject only to observance of the provisions of the **County Government Act, No.17 2012 and the Public Finance Management Act, 2012**
3. Costs of the application shall be in the petition.

Dated, signed and delivered this 16th day of June, 2016.

MAUREEN ONYANGO

JUDGE