



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 286 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ANNE ATIENO ADUL.....CLAIMANT

-Versus-

1. KISUMU COUNTY ASSEMBLY

PUBLIC SERVICE BOARD 1ST RESPONDENT

2. COUNTY EXECUTIVE OF KISUMU2ND RESPONDENT

3. ELIUD OWEN OJUOK3RD RESPONDENT

4.HON. NICHOLAS STEVEN OKOLA4TH RESPONDENT

5. ATTORNEY GENERAL5TH RESPONDENT

R U L I N G

The Petition herein was filed on 21st October, 2014 by the Petitioners Nelco Masanya Sagwe and Peter Odera Onditi seeking declarations that the actions of the 1st and 2nd Respondents to suspend them and replace them with the 3rd and 4th Respondents as Acting Clerk and Assistant Clerk of the County Assembly of Kisumu was unconstitutional. They sought orders of certiorari to quash the said actions. The court granted conservatory orders staying the said decisions of the 1st and 2nd Respondent pursuant to a motion filed by the petitioners together with the petition.

On the same date that the petition was filed, another petition was filed in the High Court at Kisumu by Anne Atieno Adul against the Kisumu County Assembly Public Service Board, County Executive of Kisumu, Eliud Owen Ojuok, Hon. Nicholas Steven Okola and the Attorney General seeking basically similar orders of certiorari to quash the decisions of the Kisumu County Assembly Public Service Board and the County Executive of Kisumu against the decisions of the 1st and 2nd Respondents to disband the 1st Petitioner and impeach the 2nd Petitioner from her position as speaker of the County Assembly of Kisumu and replace her with the 5th Respondent.

The actions contested in this petition and in petition No.297 of 2014 were made in the same decision. Petition No.297 of 2014 was transferred to this court where it was heard and determined in favour of the petitioners. The said Judgement, impacted on this petition as the orders of certiorari quashed the decisions sought to be quashed by the petitioners in this suit.

The 1st, 2nd and 5th Respondents were dissatisfied with the decision and appealed to the Court of Appeal in Kisumu. In view of the similarity of facts and issues in the two petitions, parties agreed to stay this petition pending the outcome of the appeal. The Judgement in the Appeal was delivered on 6th October, 2015. The appeal was dismissed and the decision of this court confirmed.

Subsequently, parties recorded a consent adopting the decision in the appeal to apply to this petition but failed to agree on costs. The only issue for my determination is therefore who bears the costs of this petition. Parties agreed to argue the issue by way of written submissions. However only the petitioners and the 1st Respondent filed written submissions.

Petitioners' Submissions

It is the Petitioners' submissions that costs follow the event as was stated by the Supreme Court in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014]eKLR**. It is submitted for the petitioners that they were dragged to the appeal and that with or without the appeal they were entitled to a hearing.

It was further submitted for the petitioners that whether their rights were determined through a full hearing or by adoption of the decision of the Court of Appeal their rights remain the same and the adoption of the Court of Appeal decision only serves the purpose of expeditious disposal of the case and saving precious judicial time, that this view was affirmed in the decision of the court in **Morgan Air Cargo Limited v Evrest Enterprises Limited [2014]eKLR**.

It was submitted that it is only where the losing party proves that there are special circumstances in their favour that the court would stop a successful litigant from being awarded costs and that the Respondents have not shown that such special circumstances existed in this case.

It was further submitted for the petitioners that allowing the Respondents not

to pay costs of this suit would be a miscarriage of justice upon the petitioners as they will be left with the burden of legal fees incurred by them as a direct result of the actions or omissions of the Respondent. Relying on the decision of Mativo J. in **Ethics and Anti-Corruption Commission v Nderitu Wachira & 2 others [2016]eKLR**, it was submitted that it would be injudicious for the court not to order costs in favour of the petitioners. It was submitted that courts should only decline to award costs when a case is lost due to circumstances beyond the control of the losing litigant as was the case in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited** where the case was lost due to section 14 of the Supreme Court Act being declared unconstitutional.

It was further submitted that the circumstances of this petition warrant the Respondents being penalised to pay costs to deter them from repeating the actions complained of by the petitioners as besides those actions complained of, the Respondents also defied the orders of this court necessitating contempt proceedings to be filed. It was submitted that in the circumstances the Respondents should be penalised to pay extra costs to the petitioners.

Counsel for the petitioners urged the court to award costs to the petitioners.

1st Respondents Submissions

The 1st Respondent submitted that the petitioners have already been awarded costs vide the Court of Appeal decision and that this court is bound by the Court of Appeal decision, that the Respondents have already been subjected to agony of prosecuting the appeal which was decided against them with costs to the petitioners and have again been burdened with this suit, that the petitioners are not entitled to costs for the second time and that this court having adopted the Court of Appeal decision, no additional order for costs should be made.

The 1st Respondent relied on the case and of **Jasbir Singh Rai (supra), Devram Manji Daltani v**

Danda [1949]16 EACA 35, Republic v Communications Authority of Kenya & Another [2015]eKLR and Benard Murage v Funserve Africa Ltd & 3 others (Nairobi Pet. No.508 of 2014).

Determination

I have considered the submissions filed herein for the petitioners and the 1st Respondent. I have also considered the authorities relied upon by the parties. Although none of the parties made reference to it, I have considered the ruling of Chemitei J. in High Court Petition No.24 of 2014 which also touched on the issues in this petition.

The first point I must note is that this petition, petition No.24 of 2014 and petition No. 297 of 2014 all relate to events that occurred at the County Assembly of Kisumu culminating in the impugned decision of 21st October, 2014.

In the Judgement in Petition No. 297 of 2014, the court made a determination quashing the decision of the Kisumu County assembly conducted on 21st October, 2014 when it stated as follows:-

2. A declaration that the purported committee of the whole House of 1st Respondent does not have powers and/or jurisdiction to constitute offices in the County Assembly Service Board or to appoint or supervise office holder and a decision made by the 1st Respondent in this respect to appoint or supervise office holder and a decision made by the 1st Respondent in this respect to appoint or deploy clerk or Deputy clerk of the Assembly is hereby quashed and declared null and void.

3. A declaration that the proceedings and resolution for removal of the 2nd Petitioner before the Kisumu County Assembly conducted on 21.10.14 were held in violation of the disregard of the law and court order and were thus null and void and of no effect and undermines the authority of the court under Article 159 and 160 of the constitution.

7.A declaration that the County Secretary of the 2nd Respondent and/or the 2nd Respondent, the County Government of Kisumu does not have jurisdiction and/or power to constitute offices of the County Assembly Service and/or to deploy and/or appoint such office holder and/or the 2nd and 3rd Interested Parties and order quashing and nulling the decision to do so contained in the two letters dated 15/10/2014.

8. A declaration that the appointment of the 3rd Respondent Eliud owen Ojuok as Ag. Clerk and the 4th Respondent, Nicholas Steven Okola as Assistant clerk on 15.10.2014, either by the purported committee of the whole house of the 1st Respondent and/or the County Secretary of the 2nd Respondent is unconstitutional, illegal, null and void and a violation of the law and principle of separation of powers and an order quashing the said purported appointments.

9. A declaration that the 3rd Respondent who has purportedly been appointed in an Ag capacity in violation of Section 64(1) and (2) as read with section 13 of the CGA 2012 is not qualified to so act in these positions.

11. A declaration that the 1st Respondent, as a County Assembly can only perform the roles and duties and functions as spelt out under Article 185 of the Constitution of Kenya and Section 8(1) of the County Government Act 2012 and that in purporting to carry out and perform the powers as purported in the resolution dated 15.10.14, acted *ultra vires* and in the process violated the provision of Article 47 of the Constitution of Kenya 2010.

16. Costs of these proceedings shall be borne by the Respondents.

In the Court of Appeal Judgement, these orders were sustained and the court further made a determination as follows -

In the absence of constitutional or statutory authority empowering aCounty Assembly to suspend

the County Assembly Service Board, the suspension by the Kisumu County Assembly of the Kisumu County Assembly Service Board and the redeployment of the 6th and 7th respondents was null and void.

For these reasons, save on the issue of admissibility of electronic evidence, we uphold the decision of Wasilwa, J. and dismiss these appeals with costs to the 2nd, 6th and 7th respondents against the appellants and the 3rd and 4th respondents jointly and severally.

The decision of the Court of Appeal has been adopted herein. Respondent No.6 and 7 in the Appeal are the Petitioners herein. All their claims have been compromised and or satisfied by the decision of this court in Petition No.297 of 2014 which awarded them costs, and the decision in Appeal No.17 & 18 of 2015 which further awarded them costs of the Appeal.

It is the opinion of this court that all the claims of the Petitioners raised herein having been adjudicated and granted in their favour in entirety, this petition was compromised and/or rendered redundant. It is the opinion of this court that the petition should have been withdrawn or consolidated with petition No.297 of 2014 as soon as the said petition was transferred to this court, or should have been withdrawn upon the Judgement being delivered. Adopting the Judgement of the court amounts to the same thing as conceding that the suit was unnecessary as all the issues are aptly captured and addressed in petition No.297 of 2014 and appeal No.17 & 18 of 2015. The petitioners prayers have been granted and they have been awarded costs. Awarding further costs to the petitioners herein would amount to allowing a party to file multiple suits on the same facts and issues for the sole purpose of being awarded costs in all the suits, as the additional suits add no further value to the petitioners.

it is not lost to this court that apart from the contempt proceedings which were prosecuted leading to a finding of guilt and the fining of the Respondents to pay a fine of Shs.200,000/- no other proceedings took place in this petition as none was necessary, all issues having been addressed in Petition No.297 of 2014 and the consequent Appeal No.17 and 18 of 2015.

For the foregoing reasons, there shall be no order for costs in this petition.

Orders accordingly.

Dated, Signed and Delivered this 15 day of September, 2016

MAUREEN ONYANGO

JUDGE