



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

**PETITION NO. 17 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSEPHAT ALUSIOLA MUSAMBAYI.....PETITIONER**

**-Versus-**

**VIHIGA COUNTY ASSEMBLY.....1ST RESPONDENT**

**VIHIGA COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT**

**J U D G E M E N T**

The Petitioner was until 17th July 2015 the Clerk of Vihiga County Assembly, having been so employed on 14th January, 2014 when he took the oath of office.

The 1st Respondent is the County Assembly of Vihiga County established under the Constitution of Kenya 2010 and the County Government Act while the 2nd Respondent is the Vihiga County Assembly Service Board established under the County Government Act and the Vihiga Assembly Service Act.

By his Amended Petition dated 14th October, 2015 the Petitioner seeks the following remedies against the Respondents.

- a) A declaration is hereby issued to the effect that the suspension of the Petitioner as the Clerk of Vihiga County Assembly was unlawful and unconstitutional hence null and void.
- b) A declaration is hereby issued to the effect that the termination of employment of the Petitioner as the Clerk of Vihiga County Assembly vide the letter from the 2nd Respondent dated 17th day of July, 2015 was unlawful and unconstitutional hence null and void.
- c) The Respondents are hereby ordered to refrain from ejecting, blocking, denying access into the office and/or otherwise impeding the Petitioner from occupying or discharging the functions of the office of Clerk to the Vihiga county Assembly.
- d) The Respondents are hereby ordered to immediately and unconditionally release and pay all salaries, allowances and/or benefits withheld from the Petitioner on account of the purported suspension and termination.
- e) The Respondents shall bear the Petitioner's costs of and incidental to this Petition.

f) Any other order that the Honourable court may deem fit to grant.

The Respondents filed a Response to the Amended Petition on 11th December, 2015 in which they aver that they strictly adhered to the relevant provisions of the Constitution, the fair Administrative Actions Act, the rules of natural justice and other relevant statutory provisions.

Both parties filed a number of Applications which were on 15th March 2015 abandoned. For clarity, the Applications that were abandoned are dated **4th August 2015, 16th December 2015** and **7th March, 2016**, respectively. On the same day the Parties also agreed to have the Petition canvassed by way of written submissions.

### **Petitioners Case**

The Petitioner was recruited by the Public service Commission and deployed to the Transition Authority which seconded him to the 1st Respondent upon inception as the Interim Clerk to the County Assembly. The 2nd Respondent thereafter engaged the Petitioner as clerk following a competitive process. Consequently the Petitioner took the oath of office as clerk to the 1st Respondent on 14th January, 2014.

It is the Petitioner's contention that he executed his mandate and duties in line with the provisions of section 12 of the County Government Act and the Public Finance Management Act until 15th April, 2015.

In the course of discharging his duties and mandate, on 15th April, 2015 he issued a letter to the speaker and Members of the County Assembly of Vihiga requiring them to submit collateral security for car and mortgage loan facilities to the Fund Administrator by 27th April, 2015. The letter required those with car loan facility to submit the log books while those with mortgages were to submit title deeds. The letter stated that those who will not have complied will have their salaries for May withheld.

According to the Petitioner, the said letter irked the members of the County Assembly to an extent that on 18th April, 2015 they issued him with a letter of suspension. The letter of suspension was signed by one Hon. David Ogova Mulanyi in his capacity as Chairman. The letter stated that members of the Vihiga County Assembly Service Board met and resolved that the Petitioner steps aside to facilitate investigations by a select committee on the following issues -

"1.You sponsored some members of the Executive and the County Assembly to Singapore without approval of the County Assembly Service Board.

2.Workers have not been paid and you spent money on foreign trips without the approval of the Board.

3.You purchased vehicles for the County Assembly without following the correct procedure and without the approval of the Board.

4.It is in public domain that you are facing criminal charges in Kakamega Court of Law contrary to chapter 6 or the constitution of Kenya 2010.

5.Failure to provide a harmonized supplementary Budget for the Executive and County Assembly.

6.Failure to advertise for the position of the Deputy Clerk as resolved and directed by the County Assembly Service Board.

7.Insubordination and other misconducts, enumerated in letters of the County Assembly Service Board you dated 3rd April, 2014 and 6th August, 2014.

8.You have deliberately frustrated the external member of the County Assembly Service Board by paying him the allowances that he is entitled to for a long time."

The Petitioner stated that pursuant to the said letter he proceeded on suspension. The petitioner submits that he waited to be summoned to appear before the select committee but did not receive any summons. He was also not invited to respond to the allegations levelled against him in the letter of suspension.

On 1st August 2015 the Petitioner was issued with a letter of termination dated 17th July, 2015.

It is the petitioners case that the 2nd Respondent could not properly and/or lawfully terminate the services of the Petitioner during the pendency of the Petition herein, that the purported termination was unlawful to the extent that it was sub judice and an affront on the authority, sanctity and adjudicatory function of the Honourable Court. it is further the petitioner's case that the suspension and termination are unlawful and unfair to the extent that:

- (i) they are *ultra vires* the provisions of articles 47 and 236 of the Constitution of Kenya, 2010;
- (ii) they are *ultra vires* the provisions of sections 41, 44 and 45 of the Employment Act, 2007;
- (iii) they are *ultra vires* section 4 of the Fair Administrative Action Act, 2015;
- (iv) it is *ultra vires* Standing Order 64 (3) of the Standing Orders of the Vihiga County Assembly;  
and
- (v) they are *actuated by malice and vendetta*;

It is the case of the Petitioner that he has suffered and stands grave harm and damage unless the suspension and termination are lifted and/or reversed by the Honourable Court. In particular, the Petitioner states that he will be unlawfully and unfairly haounded out of office unless the Honourable Court intervenes by granting his prayers herein.

The Petitioner submits that there are discrepancies between the letter of suspension and the letter of dismissal as the grounds in the letter of termination were very different from those set out in the suspension letter. According to the petitioner this confirms the Respondent's bad faith and contrivance to hound the Petitioner out of office. In particular, the petitioner points out that the termination letter contained many allegations which were not set out in the suspension letter, including:

- (a) constant conflicts with members and staff of the County Assembly (b) failure to submit the Audit report dated 9th September, 2014 for deliberation by the 2nd Respondent;
- (c) failure to deduct and submit statutory deductions from members and employees of the 1st Respondent;
- (d) fictitious fuel payments for vehicles not belonging to the 1st Respondent; and
- (e) illegal salary payments to persons who are not employees of the 2nd Respondent;
- (f) using the 1st Respondent's funds to buy space in the Daily Nation and Standard newspapers to advertise the death of the Petitioner's relative.

It is the Petitioner's submission that only the 2nd Respondent had authority to carry out disciplinary proceedings against him and his suspension by letter dated 18th April, 2015 was invalid for want of authority. He submitted that the procedure under section 41 of the Employment Act was not complied with and the termination of his employment was therefore irregular, illegal and invalid for failure to adhere to comply with the said mandatory provisions as well as Article 1(1) and 2(2) of the Constitution.

The petitioner relied on the case of SHANKAR SAKLANT v DHL GLOBAL FORWARDING KENYA LIMITED [2012]eKLR at which the court observed that -

*"In view of the wording and provisions of the Sections, the Honourable Court finds that the provisions are mandatory in scope and applications and in particular, the Court holds that (a) A hearing and notification on the part of the employer are mandatory where it is contemplated to terminate the contract of employment on the grounds of misconduct, poor performance or physical incapacity of the employee. (b) Gross misconduct that justified summary dismissal under Section 44(4) and conduct amounting to a Fundamental breach of an employee's obligations as envisaged in Section 44(3) of the Act, are misconduct for which a notification and hearing are necessary as envisaged under section 41 of the Act."*

The Petitioner further relied on the Court of Appeal decision in the case of COUNTY ASSEMBLY OF KISUMU & 2 OTHERS v KISUMU COUNTY ASSEMBLY SERVICE BOARD & 6 OTHERS where the court restated the necessity of notice and right to be heard before rendering an adverse decision.

The Petitioner further relied on the case of SAMWEL G. MOMANYI v ATTORNEY GENERAL & ANOTHER [2012]eKLR.

The petition submits that the recruitment of his successor was carried out *Lis Pendence* and was mala fides with the intention to render this petition preposterous and academic, an act that, he submits, must be deprecated. It is the Petitioner's submission that where a party knowingly proceeds to alienate or deal with a matter that is subject to pending proceedings the court can make orders restoring its dignity and integrity. In this respect the Petitioner relied on the court's decision in MBUGUA NJUGUNA v ELIJAH MBURU WANYOIKE & ANOTHER in Civil Appeal No.27 of 2002 where the court stated -

*"Apparently, the Respondent caused the suit land to be partitioned when litigation was pending in the Superior Court and in breach of the orders of injunction in order to impede the cause of justice by making it more difficult to enforce the orders of the Superior that could have been made if it had allowed the Appellant's claim. The Respondent's action was illegal and had the Superior Court allowed the Appellant's claim, it had the jurisdiction to enforce the order of injunction by revoking the Partition and restoring the register of the suit stand to the state prevailing at the time the suit was filed in order to give efficacy to its orders".*

The Petitioner submitted that the Respondents breached his right to fair administrative Action under Article 47 of the Constitution, that the basis upon which the petitioner was suspended and subsequently terminated was the discharge and/or execution of the mandate of his office as accounting officer of the 1st Respondent and therefore was protected under Article 236 of the Constitution.

The Petitioner further submitted that the actions of the 1st Respondent was in violation of his fundamental and constitutional rights under article 41(1) of the constitution and amounted to unfair practice and a violation of the Rule of Law. He prayed that the petition be allowed.

## **Respondents' Case**

The Respondent filed a reply to the Amended petition in which it states that the actions taken against the Petitioner were lawful, procedural and regular. The Respondents submitted that it was established that the Petitioner:-

- (i) Breached the relevant provisions of the Public procurement and Disposal Act, 2005.
- (ii) Breached the relevant provisions of the Public Procurement and Disposal Regulations, 2006.
- (iii) Acted against the provisions of the County Governments Act, 2012 as regards budgeting issues.
- (iv) Offended the relevant provisions of the Employment Act, 2007 as regards termination/suspension and of relevant labour relations.

(v) Carried out activities which were in gross contravention of Articles 41 and 47 of the Constitution.

(b) The Petitioner had offended and breached Article 10 of the Constitution of Kenya. As a public officer, he had failed to:-

(i) Properly and objectively apply or interpret the Constitution;

(ii) Make or implement public policy decisions to the benefit of his employer,

(iii) Failed to demonstrate patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(iv) Acted against human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(v) Failed in good governance, integrity, transparency and accountability; and sustainable development.

(c) The Petitioner failed to act, conduct himself and or carry out his duties in line with the values and principles of public service include by failing to:-

(i) Uphold high standards of professional ethics;

(ii) effectively, efficiency and economically use resources;

(iii) be responsive, prompt, effective, impartial and equitable in provision of services;

(iv) involve the people in the process of policy making;

(v) be accountable in administrative acts;

(vi) be transparent in provision to the public of timely, accurate information;

The Respondents contend that prior to the termination of his employment, the 1st Respondent wrote a letter dated 3/4/2014 to the petitioner in respect of alleged insubordination by the Petitioner. That the said letter set out several instances in which the Petitioner was alleged to have insubordinated the 1st Respondent. That the Petitioner was required **"...to respond to the above issues by providing the necessary documents to the Board (read the 2nd Respondent) by latest 10th April, 2014."**

it is further the Respondents' submissions that they sought assistance from the Ethics and Anti-Corruption Commission to investigate the allegations against the Petitioner on financial impropriety.

The Respondents submitted that in a letter dated 6/8/2014, the Respondents served the Petitioner with a "Notice to show Cause Why Disciplinary Action Should Not Be Taken Against You" which letter sets out clearly and in point form the allegations/accusations made against the Petitioner, which the petitioner has deliberately decided not to mention in his petition. The Respondents submit that the Petitioner failed to respond to the said letter and hence failed to show cause why disciplinary action could not be taken against him. The Respondents submit that they set in motion a process for the discipline of the Petitioner by setting up an ad hoc committee to investigate the allegations levelled against him. They submit that the Petitioner was duly notified of the said ad hoc committee and was invited to attend and give his contributions and comments on each of the allegations.

They submit that the letter of termination sets out the grounds for termination. That the Petitioner did not find it necessary to respond to any of the letters from the Respondents and he also failed to attend any of the meetings/forums set out by the Respondents to address the issues at hand.

In the replying affidavit of DANIEL C. CHITWA, the speaker of the 1st Respondent filed in reply to the petition, he avers that the petitioner is answerable to the 2nd Respondent and vide Sec 59(1)(c) of the County Government Act the 2nd Respondent has the right to exercise disciplinary action over any person holding office in County. That the Adhoc committee was formed to investigate the applicant after the 2nd respondent established that the applicant had declined to respond to the notices issued to him and further that the committee was discharging its mandate as provided under article 95 of the Constitution of Kenya. The respondents deny that they were actuated by malice and vendetta as alleged by the applicant.

It is submitted that the applicant is being investigated by Ethics and Anti Corruption Commission and Public Procurement Oversight Authority and allowing him to access the office will be compromising the investigation, that he cannot be trusted to hold office at the Assembly since he denied the Ethics and Anti-Corruption officers access to relevant information.

The respondents submit that the petitioner was dismissed after several warnings and he was accorded enough opportunity to defend himself before the Adhoc Committee and the 2nd Respondent but he declined to do so, that it is clear from the dismissal letter that the applicant was dismissed due gross misconduct, abuse of office and financial mismanagement among other grounds.

The Respondents submit that there was no court order or anything in law and the policy compelling the respondent to stay the disciplinary process pending the outcome of this case. That the moment the applicant declined to respond as instructed the 2nd respondent was right to dismiss the him hence the law governing employment procedures in law and Vihiga county Assembly Service Act were followed.

It is submitted that since the office of the County Assembly is very vital for the running of the Assembly the 2nd Respondent has already advertised for a substantive replacement of the applicant and the process is at an advanced stage.

It is the Respondents submissions that the petitioner failed to comply with section 147, 148 (4) and 149 of the Public Finance Management Act (Cap 412 c) and Article 232 of the Constitution, and that the Petitioners actions, conduct and performance were against and in breach of the values and principles of public service and that he was therefore unfit to hold a public office.

The Respondents submit that they complied with Article 47 of the Constitution and section 4 of the Fair Administrative Actions Act, that the petitioner was accorded a chance to be heard and was asked to defend himself which he failed to do. The Respondents pray that the petition be dismissed with costs.

The Respondent relied on the case of **Judicial Service Commission v Gladys Boss Shollei & Another [2014]eKLR.**

### **Findings and Determination**

I have considered the pleadings and submissions of the parties and will adopt the issues as extracted by the Petitioner in the submissions filed on his behalf as follows-

The first issue is therefore whether termination of the employment of the petitioner was lawful, valid and legitimate and whether the 1st Respondent was seized of the requisite capacity to commence/sustain disciplinary proceedings against the petitioner.

According to section 13 of the County Government Act, the office of the clerk is an office in the County Assembly Service Board and the County Assembly clerk is the secretary to the County Assembly Service Board whose duties include appointment and supervision of office holders. The clerk can therefore only be disciplined by the County Assembly Service Board, the 2nd Respondent herein.

In the present case, the letter suspending the Petitioner was signed by one Hon. David Ogora Mulanyi as chairman. It is not stated what body Hon. Mulanyi is chairman of. The letter itself states in part as follows -

*"Following serious allegations against you by the members of the County Assembly and the Public, the Vihiga County Assembly Service Board met and resolved that you step aside as clerk as you are being investigated by the select committee of the County Assembly."*

The date of the meeting or minutes of the meeting that made the decision to suspend the Petitioner have not been disclosed. The minutes of the County Assembly meeting setting up a select committee to investigate the Petitioner have not been disclosed or availed to the court. There is no letter addressed to the Petitioner raising the issues in the letter requiring him to respond before disciplinary action is taken against him.

For these reasons I find that the suspension of the Petitioner was by an unauthorised body and was irregular as the issues raised in the letter had not been brought to the attention of the Petitioner for him to respond to before disciplinary action was taken against him.

Following the Petitioner's unauthorised suspension an Ad Hoc Committee of the Vihiga County Assembly prepared a report dated May 2015 in which there is a recommendation that the petitioner stands suspended on half salary until he is cleared by the relevant institutions named in the report being Ethics and Anti Corruption Commission, Public Procurement Oversight Authority, Commission on Administrative (sic) Justice (Ombudsman), Auditor General, the Senate, the Kenya National Commission on Human Rights, the Public Service Commission and the Director of Public Prosecutions. In the Committee's report under the heading "Methodology" it is stated that the Committee carried out interviews on 15 individuals. The list of those interviewed does not include the petitioner. The report states that the Petitioner failed to appear before the committee twice but does not state on what dates, or how he was notified. The foregoing means that the Petitioner was condemned without a hearing.

The Petitioner was subsequently terminated by letter dated 17th July, 2015 which refers to a meeting of the County Assembly Service Board of 16th July 2015. There is no mention of invitation of the applicant to appear before the 2nd Respondent for a disciplinary hearing before his employment was terminated. All that the Respondents say in their submissions is that the petitioner was accorded a chance of being heard while in the same breath stating that he was asked to defend himself but failed to do so.

One other concern that I must mention here is the number of "charges" preferred against the petitioner and the generality of the said charges. In the suspension letter there were 8 charges while in the letter of termination there are a total of 12 charges. All the charges are so generally framed as to make it impossible for the petitioner to respond to them effectively. Crowding a person with so many general charges as to cause him difficulty in responding to the charges amounts to denying the person a fair hearing, and also gives the impression that the disciplinary process is a sham intended to get rid of him at all costs. Such a process is intended to arrive at a predetermined conclusion and is not objective or fair.

Under section 41 of the Employment Act, an employer is supposed to specify charges against an employee and give him a reasonable opportunity to present his case at a disciplinary hearing.

Article 47 of the Constitution requires that a person likely to be affected by an administrative decision be given a fair hearing. Further Article 236 protects a Public Officer from dismissal or removal from office or being subjected to disciplinary action without due process of the law.

I find and hold that the Respondents failed to comply with the provisions of section 41 of the Employment Act and further violated the Petitioner's Constitutional rights under Article 41, 47 and 236 of the Constitution.

The next issue for determination is whether the filling of the position of the Petitioner is barred by the doctrine of Lis Pendence.

It is the Petitioner's position that although he was served with the letter of termination on 1st August 2015, a substantive clerk was not appointed immediately. On 19th August 2015 he was granted orders restraining the Respondent from recruitment, employment and/or appointment of a substantive clerk. It is

further the Petitioner's case that on 6th January, 2016 he sought and obtained orders barring the Respondents from vetting and/or approving the candidates who had undergone interviews for the post of clerk of the 1st Respondent. The Petitioner submits that in blatant disregard of the said orders the Respondents proceeded with and concluded the process of recruitment of clerk who took oath of office on 3rd March, 2016 and therefore the recruitment is contrary to the doctrine of Lis Pendence. It is the Petitioner's submission that the filling of his position is mala fides, that the action must be abated by revoking the appointment for purposes of restoring the dignity of the court.

The Respondents have in their submissions not commented on this issue. It is however manifested from the record that the Petitioner obtained the following orders on 19th August, 2015-

*1. **THAT** a conservatory order be and is hereby issued precluding the Respondents, their servants, officers, agents, successors and/or assigns from advertising, recruiting, filling, replacing and/or otherwise commencing any process or action having as its object or effect the enabling of a person other than the Applicant to assume or excise the functions of the Clerk to the Clerk of the Vihiga County Assembly pending the full hearing and determination of the petition herein.*

*2. **THAT** the application be heard before Employment & Labour Relations Court in Kisumu on 30/9/2015.*

It is further manifest from the record that the Petitioner further obtained the following orders on 7th January, 2016.

*1. **THAT** temporary injunction against the Respondent, their servants, agents and/or assignees to stay the vetting and/or approvals and candidates who have undergone the interviews for the posts of Clerk and Deputy Clerk to the Vihiga County Assembly Clerk as advertised on the Daily Nation and Standard Newspapers of 10th December 2015 pending the hearing and determination of this application be and is hereby issued.*

*2. **THAT** application be served and the same be responded to within 10 days.*

*3. **THAT** inter parte hearing before Maureen Onyango J. on 19th January, 2016.*

*4. **THAT** the Deputy Registrar forward the file to Kisumu Law Courts forthwith.*

It is trite law that it is the duty of every person who is aware of an order of a court to obey it whether or not they agree with it, and whether or not it has been properly obtained until such a time that it has been either set aside or varied by another court order. This was succinctly expressed by **Lord Cottenham, LC in Chuck v Cremer (1846)E.R. 841** as follows -

*A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. "It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."*

In the Case of **HADKINSON v HADKINSON**, the court stated that -

*"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believed it to be irregular or even void."*

In this case the Respondents evidently disobeyed the orders of this court of 19th August, 2015 leading to

this court granting leave to the Petitioner to institute contempt proceedings following his application dated 16th December, 2015. The orders of 7th January, 2016 were however discharged following the Petitioner's failure to serve the said orders.

Be that as it may, it is the court's opinion that both orders of 19th August, 2015 and 7th January, 2016 were compromised by the parties on 15th March, 2016 when parties agreed to abandon all pending applications and deal with the petition.

The court will say no more on the issue of Lis Pendence.

## **Remedies**

In the Amended Petition the Petitioner prays for a declaration that his suspension and the subsequent termination of his appointment as clerk of Vihiga County Assembly were null and void. He further prays for orders reinstating him to the office of clerk to Vihiga County Assembly and release of salaries, allowances and benefits withheld by the Respondent since his suspension and subsequent termination of his appointment.

As I have already found above, the Petitioner's suspension was by an unauthorised body and without due process. I therefore declare the suspension null and void.

I have also found the termination of his appointment to be a violation of his fundamental and statutory rights under Article 41, 47 and 236 of the Constitution and section 41 of the Employment Act. I have however agonised over the prayer for reinstatement and find that although he has proved his case and is entitled to the order, I am hesitant to grant the said orders because it may not be in the interest of either himself or the public. From the evidence in the file, it is evident that the decision to terminate the appointment of the petitioner was a well orchestrated and executed decision of the Respondents acting in collusion. This is clearly evinced by the timing of the suspension, the framing and number of charges, the disobedience of court orders and the subsequent filling of the position in utter disregard of court orders. The foregoing notwithstanding, I take judicial notice that the office of Clerk to County Government is intended to serve both the County Assembly and the County Public Service Board and without the support of both entities, imposing a clerk on them would be setting a stage for conflict between the petitioner and the Respondents. Section 49(4) of the Employment Act requires this court to consider the factors stated therein, among them the practicability, before making an order for reinstatement.

I am however alive to the fact that fundamental rights and freedoms are normative derivatives of the Constitution which also prescribes the manner in which breaches are to be assuaged.

For these reasons I will instead of granting the order of reinstatement order compensation to the petitioner as follows against the Respondents jointly and severally -

- 1. The sum of Shs.5,000,000 being compensation for breach of the Petitioner's fundamental rights.**
- 2. Maximum compensation of 12 months gross salary being compensation for loss of employment.**
- 3. Pay the Petitioner full salary and allowances withheld from the date of suspension to the date of termination of employment.**
- 4. Pay the Petitioner full terminal benefits including notice and any earned leave earned up to the date of termination.**
- 5. The Respondents shall pay petitioners costs of the petition.**

**6. The decretal sum shall be subject to payment of interest from the date of judgement.**

**Dated, Signed and Delivered this 24th day of November, 2016**

**MAUREEN ONYANGO**

**JUDGE**