



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO.141 OF 2015

(Before D. K. N. Marete)

NORAH MORAA OMBUI.....PETITIONER

VERSUS

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

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

JUDGMENT

This matter comes to court by way of an Ammended Petition ammended on 4th June, 2015. The Petitioner prays as follows;

- a) *A declaration that the respondents have violated the petitioner's right to fair administrative action; stipulated in Article 47 (1) of the constitution of Kenya, 2010.*
- b) *A declaration that the interim committee of six (6) appointed to run the affairs of the Kisii County Assembly Service Board has no legal underpinning, is unconstitutional and incapable of executing the legal mandate of the Kisii County Assembly Service Board.*
- c) *A declaration that the Speaker of the Kisii County Assembly does not and did not have power and jurisdiction to sign or issue the letter of revocation issued to the petitioner dated 14th May, 2015.*
- d) *A declaration that the 2nd respondent in purporting to disband or suspend the 1st petitioner and its membership as constituted; overstepped, usurped, assumed arrogared itself excessive and illegal powers, and acted with impunity.*
- e) *A declaration that the deliberations conducted by the respondents in regard to the petitioner were premature and in breach of the petitioner's right to due process or fair process; the petitioner has been condemned unheard.*
- f) *An order directed at the respondents themselves, their agents, officers of employees nullifying, reversing and or revoking the letters/communication dated 14th May, 2015 and deliberations and preceding the same.*

(i) A declaration that paragraph 250 of the report of the Committee of Justice and Legal Affairs is unconstitutional, borne of legal travesty and same null and void ab initio.

(ii) An order quashing and or expunging paragraph 250 of the report of Committee of Justice and Legal Affairs' inquiry to the members of the county assembly on medical insurance cover released in April, 2015.

g) Costs of the petition to the petitioner.

The respondents, vide Grounds of Opposition dated 2nd June, 2015 oppose the application and pray that the same be dismissed with costs.

The petitioner's case is that at all material times to this case, the 1st respondent was the Chairman of the Kisii County Assembly Service Board and Speaker of the Kisii County Assembly.

Her further case is that on or about 13th May, 2014, the respondent's jointly and severally presided over or transacted County Assembly business regarding and affecting the petitioner in fragrant breach of the petitioner's rights to due process. It is her further case that the proceedings of the house were quasi judicial and subjected to the jurisdiction of the High Court under Article 165 (3) (d) and (6) of the Constitution of Kenya, 2010.

A further case of the petitioner is that the decision of the Kisii County Assembly was extracted by the Hon. Speaker of the County Assembly on 14th May, 2015 and a copy availed to the petitioner. Further, the Speaker issued a letter to the petitioner communicating a revocation of her membership to the County Assembly Service Board.

The petitioner holds and submits that the report filed by the Committee of Justice and Legal Affairs of the 2nd respondent, volume 1 thereof released in April, 2015 violates the fundamental rights of the petitioner and the rights of the entire membership of the Kisii County Service Board. The act of the 2nd respondent purporting to disband the Kisii County Assembly Service board wherein the petitioner is a member, is illegal, ultra vires, null and void *ab initio*.

The petitioner's further case is that the respondents have embarked on a process of replacing the petitioner in fragrant breach and violation of the petitioner's rights to fair process and this decision by the County Assembly Service Board is unlawful, unreasonable, unprocedural, *ultra vires* and unjustifiable in a working democracy. This was intended to deny the petitioner the right to serve as a bonafide member of the Assembly Service Board and undermines fair administration action besides flying on the face of constitutionalism.

The respondent's case is that the petition ought to be dismissed on the following grounds;

- 1. That the application and petition are an abuse of court process.*
- 2.. That the orders sought herein is meant to deny the respondents right to oversight and fair administration of justice as in their legal mandate.*
- 3. That the entire petition ought to have been commenced through prerogative orders.*
- 4. That this application and petition is incompetent, and fails to meet the threshold for the orders sought.*
- 5. That the jurisdiction of this court is ousted by the provisions of Sec.12 of Powers and Privileges Act Cap. 6 Laws of Kenya.*
- 6. That the application and the petition herein ought to be dismissed with costs.*

The matter came to court variously until the 12th April, 2016 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the revocation of the appointment of the petitioner to the County Assembly Service Board vide a letter dated 14th May, 2015 and the deliberation thereof were *ultra vires* and unconstitutional.
2. Whether the action/inaction of the 1st respondent in executing this revocation impugned the petitioner's right to fair administrative action?
3. Whether the petitioner is entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for consideration is whether the revocation of the appointment of the petitioner from the Kisii County Assembly Service Board *ultra vires* and unconstitutional.

The petitioner in her written submissions provides that she is a member of the Kisii County Assembly Service Board. This is a body corporate with perpetual succession and with a specific mandate comprising of 4 members; the Speaker of the County Assembly who is the chairperson, the Leader of the Majority County assembly who is the deputy chairperson, Leader of Minority in the County assembly and one (1) person resident in the County appointed by the County Assembly pursuant to objective criteria set under Section 12(2) of the County Government Act.

In the above order, the petitioner/applicant is the fourth. The appointment of the petitioner/applicant to serve as a member of the Kisii County Assembly Service Board is thus anchored on the said legal criteria and qualifications. The petitioner/applicant joined the Kisii County Assembly Service Board as from 29th June, 2013.

It was reasonably envisaged that pursuant to her appointment, the petitioner/applicant was/is entitled to legitimate expectations in form of; due process, protection of rights and natural justice in regard to her position as a member of the said Kisii County Assembly Service board.

The petitioner's further case is that on or about 13th May, 2015 the 2nd respondent vide motion moved by Honourable Onyancha, member of 2nd respondent, Kisii County Assembly Service Board in regard to the mandate of the Kisii County Assembly Service board deriving a decision culminating in a resolution to dissolve the Kisii County Assembly Service Board.

Further on the 14th May, 201, the petitioner/applicant received two documents pertaining to resolution of the Kisii County Assembly Service Board and revocation of the petitioner's appointment as a member of the Kisii County Assembly Service Board. **We humbly urge and refer your lordship to the tenor, content and scope of the affidavits filed in support of the applicant's motion herein.** The crux of the averments therein is that the allegations leading to the deliberations in the Kisii County Assembly on the 13th May, 2015 pertain to a transaction whose particulars were not disclosed to the petitioner in particular and membership of Kisii County Assembly Service Board in general.

It is her further case and submission that the effect of the letter of revocation was a removal and exclusion of the petitioner from the County Assembly Service Board to the exclusion of the three other members who retained their positions by virtue of their respective offices in the County Assembly.

The petitioner/applicant who is chosen from among members of the public on a criteria and qualifications or ability bears the brunt of the arbitrary decision to dissolve the Kisii County Assembly Service Board. The petitioner is not elected thus not insulated as is the case with the speaker, leader of majority and leader of minority as or seat in the Kisii County Assembly Service

Board by dint of their elective position.

The removal by the 2nd respondent was without regard to due process and did not demonstrate specific allegation, failures, incompetence and or inadequacies on the part of the petitioner/applicant. The 2nd respondent therefore condemned the petitioner/applicant unheard. The accusations leveled against her were not disclosed or particularized to enable her respond. The applicant was denied the opportunity to be heard. Your Lordship, we submit that the end does justify the means.

The petitioner further seeks to rely on Article 23 (1) of the Constitution of Kenya, 2010 as follows;

Case for grant of orders sought

Article 23(1) of the Constitution confers on this superior court authority to uphold and enforce the bill of rights. Under Article 23 (3), this court may grant reliefs which included;

- (a) A declaration of rights;*
- (b) An injunction;*
- (c) Conservatory orders;*
- (d)*
- (e) An order for compensation;*
- (f) An order of judicial review*

She also sought to rely on the celebrated authority of **Giella vs Cassman Brown & Company Ltd. (1973) E.A. 358**; where it was held that for the court to grant injunctive reliefs, the applicant must satisfy the following;

- a. The applicant must show that he/she has a prima facie case with a probability of success against the respondent.*
- b. The applicant must demonstrate that unless the order is granted, he will suffer irreparable harm which cannot adequately be compensated by an award of damages.*
- c. That if the court is in doubt as to a) and b) above, the court will determine the application on balance of convenience.*

The petitioner further seeks to rely on the authority of **MRAO VS FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125** in support of her contention;

“a prima facie case in a Civil Application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will 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.”

The Petitioner/Applicant has demonstrated that her right to due process and fair administrative action as provided in Article 47 (1) were violated. The said rights entailed administrative action or process that is lawful, reasonable and procedurally fair which was not the case herein.

We thus refer the court to the prayers in the Notice of Motion with a simultaneous urge that the same be granted. The petitioner/applicant has demonstrated a prima facie case with a probability of success. Besides, the respondents have not shown whether they will suffer any prejudice.

Indeed, upon filing of the Petitioner's application, the Honourable granted interim orders. The said interim orders have remained in force; the respondents have not suffered any prejudice since and are not likely to suffer any prejudice if prayer (4) of the Notice of Motion dated 18th May, 2015 is allowed."

It is her prayer that the petition be allowed upon her eloquent demonstration that her rights were infringed by the respondents. She submits as follows;

The observance of due process is an integral component of natural justice; the petitioner deserved fair hearing cognizant of the need to insulate the petitioner from the vagaries of arbitrary and capricious conduct of the respondents.

The petitioner was prejudiced through subjection to an arbitrary process. The allegations leading to the deliberations in the house on the 13th May, 2015 pertain to a transaction(s) whose particulars were neither disclosed to the petitioner of Kisii County Assembly Service Board nor attributable to the petitioner in person. The petitioner was a victim of a process whose legal basis was questionable and incompetent ab initio.

Again,

... it is instructive to note that the 1st respondent ironically/paradoxically failed to step aside or disqualify himself during the debate touching on the Kisii County Assembly Service Board which ended up victimizing the petitioner. The 1st respondent instead presided over matters/session or proceedings purporting to discuss matters pertaining to Kisii County Assembly Service Board while aware that he was insulated and the petitioner was not.

All this is a transgression of the petitioner's right to a fair hearing and fair administrative process.

The respondent's case is that the 2nd respondent has an oversight and welfare to its members per the County Governments Act, 2012 and the Constitution. The appointment of the petitioner as a member of the County Assembly Service Board is subject to the approval of the 2nd respondent and therefore her members enjoy the protection of S.12 of the Powers and Privileges Act, Chapter 6, Laws of Kenya.

It is their further case that upon inquiring into the circumstances of the relevant committee this matter was through the committee of justice and legal affairs was mandated to inquire into the expense that was incurred in securing the medical insurance cover for the members of the 2nd respondent. This exercise of procurement of the medical cover was to be discharged by the staff under the supervision of the County Assembly Service Board in which the petitioner was a member representing the interest of the public. The appointment of the petitioner to serve in the board was subject to approval of the 2nd respondent and therefore the members of the 2nd respondent enjoys the protection of the provisions of Section 12 of the Powers and Privileges Act Cap 6 Laws of Kenya as an Act of parliament.

Upon inquiry into the circumstances by the relevant committee the report was tabled before the assembly as a matter of procedure and the decision was unanimously adopted. It was not the duty of the 1st respondent to implement as she did.

Section 12 of the Powers and Privileges Act Cap 6 Laws of Kenya which provides;

No proceedings or decision of the assembly or the committee of privileges acting in accordance with this Act shall be questioned in any court.

.... It is after the report had been adopted unanimously by the 2nd respondent that the petitioner move the court seeking to challenge the decision made by the chairperson of the board who is now the 1st respondent in this matter. This proceedings that is sought to be challenged is immuned to any court proceeding unless done against the provisions of the law which cannot be cured by dint

of the provisions of Article 159 2 (d) of the constitution of Kenya 2010. Though the decision adopted by the 2nd respondent has been challenged through this court, this court has the powers by dint of the provisions of Article 165 of the Constitution as read with Article 23, 159 and 259 of the Constitution of Kenya 2010 to interpret the law and give the proper finding on the matter that is before court.

This is a well fought out matter by the parties. However, the petitioner ably demonstrates a case of transgression of her rights to a fair hearing and a transgression of fair administrative action in the revocation of her membership of the County Assembly Service Board by the respondents. I therefore find that the revocation of the appointment of the petitioner to the County Assembly Service Board vide a letter dated 14th May, 2015 and the deliberations thereof were *ultra vires* and unconstitutional. I also agree with the petitioner that the 1st respondent in executing this revocation impugned the petitioner's right to fair administrative action.

Again, the defence of legal immunity for the respondent as submitted would not be sustained in circumstances like this one. We are beneficiaries of a constitutional democracy with the Constitution of Kenya, 2010 taking sway and supremacy. Any argument of protection or immunity in circumstances of flagrant violation of this constitution would not in any way stand the test.

I therefore find a case for the petitioner and order relief and declare as follows;

- i. That the respondents have violated the petitioner's right to fair administrative action; as stipulated in Article 47 (1) of the Constitution of Kenya, 2010.
- ii. That the interim committee of six (6) appointed to run the affairs of the Kisii County Assembly Service Board has no legal underpinning or basis and is unconstitutional and incapable of executing the legal mandate of the said Board.
- iii. That the Speaker of the Kisii County Assembly Service Board does not and did not have power and jurisdiction to sign or issue the letter of revocation issued to the petitioner dated 14th May, 2015.
- iv. That the 2nd respondent in purporting to disband or suspend the petitioner and her membership as constituted; overstepped, usurped, assumed and arrogated itself excessive and illegal powers, and acted *ultra vires*.
- v. That the deliberations conducted by the respondents in regard to the petitioner's right were premature and in breach of the petitioner's right to due process or fair process resulting in the petitioner being condemned unheard.
- vi. That the respondents' letter/communication dated 14th May, 2015 and deliberations and preceding be and are hereby annulled and revoked.
 - (a) That paragraph 250 of the report of the Committee of Justice and Legal Affairs is unconstitutional, borne of legal travesty and are is null and void *ab initio*.
 - (b) That paragraph 250 of the report of Committee of Justice and Legal Affairs' inquiry to the members of the county assembly on medical insurance cover released in April, 2015 be and is hereby quashed and expunged from record.
- vii. That the costs of this petition shall be borne by the respondents.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mose Nyambega instructed by Mose Nyambega & Company Advocates for the Petitioner.
2. Mr. Nyambati instructed by G.M. Nyambati & Company Advocates for the Respondent.