



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT KISUMU

PETITION NO. 271 OF 2014

**IN THE MATTER OF: ARTICLES 1, 2, (2), 10 (10 (C) 19(2), 22(1) & 165 OF THE
CONSTITUTION, 2010**

AND

**IN THE MATTER OF :VIOLATION AND/OR INFRINGEMENT OF THE FUNDAMENTAL
RIGHTS OF THE PETITIONER**

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: KISII COUNTY ASSEMBLY, KISII COUNTY

AND

IN THE MATTER OF ARBITRARY UNCONSTITUTIONAL EMPLOYMENT OF PERSONS

AND

**IN THE MATTER OF :THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS &
FUNDAMENTAL FREEDOM PRACTISE AND PROCEDURE RULES, 2013)**

BETWEEN

HON. SAMUEL ANGASA ONUKOHPETITIONER/APPLICANT

AND

**THE SPEAKER OF THE COUNTY ASSEMBLY KISII COUNTY1ST
RESPONDENT**

**THE CLERK, KISII COUNTY ASSEMBLY2ND
RESPONDENT**

**THE COUNTY ASSEMBLY SERVICE BOARD - KISII COUNTY3RD
RESPONDENT**

KISII COUNTY GOVERNMENT.....4TH RESPONDENT

**DANIEL MBAKA OMWOYO5TH
RESPONDENT**

**GERVAS GIKOBI KAOSA & 12 OTHERSINTERESTED
PARTIES**

R U L I N G

On 8th October, 2014 Hon. Samuel Angasa Onukoh, the Petitioner filed this petition against the Speaker, Clerk, County Assembly Board and County Government of Kisii County as 1st, 2nd, 3rd and 4th Respondents respectively and Daniel Mbaka Omwoyo, the Deputy Clerk of County Assembly of Kisii County the 5th Respondent, for irregularly employing 273 persons in positions that were not advertised or approved. The Petitioner, an elected member of the Kisii County Assembly, alleges that by so doing the Respondents violated the Provisions of Articles 1, 2(2), 10(1) (c), 20(1) and 22 (1) of the Constitution and denied and deprived serving qualified persons of a right to seek employment with the 3rd Respondent. He alleges that the actions are likely to cause a wastage and misuse of public funds amounting to KShs.18,848,919/= against the interests of the Petitioner and the residents of Kisii County. The Petitioner seeks the following reliefs:-

1. Declaration that the Petitioner is entitled to Protection under the Constitution.
2. Declaration that the enlistment, recruitment and/or employment of a total of 273 employees to the Kisii County Assembly by the Respondents, jointly and/or severally in excess of and/or beyond the number that was duly advertised for and without regard to the due process of the Law, was unlawful, illegal, and illegitimate.
3. Declaration that the Respondents herein were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Kisii County Assembly and thereby carry out and/or conduct a transparent and/or accountable recruitment, in compliance and/or in accordance with Article 10(1), (c) of the Constitution, 2010
4. An Order of Judicial Review in the nature of Certiorari to issue to remove unto the Honourable Court and quash the enlisting, recruitment and employment of the 273 Employees to the Kisii County Assembly, arising from and/or attendant to the non-existent Board meeting of the 3rd Respondent (*sic*) held on the 29th day of August 2014 and who were employed without the relevant advertisement and without due regard to the provisions of County Government Act, No. 17 of 2012 and Article 10 of the Constitution, 2010.
5. Permanent injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from admitting the subject employees to the Payroll of the Kisii County Assembly and/or making any payments to and/or in favour of the said employees, either on account of remuneration, allowances and/or salaries, without the necessary budgetary approval of the Kisii County Assembly, whatsoever and/or howsoever.
6. Permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of Article 10 (1) of the Constitution, 2010.

Simultaneously, the Petitioner filed a Notice of Motion under certificate of urgency seeking the following orders:-

1. The Application herein be Certified urgent and the same be heard Ex-parte in the first instance.
2. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Interim Order of Injunction, restraining the Respondents herein either by themselves, agents, servants and/or employees, from admitting the various Employees who were appointed and/or issued with Letters of Appointments on the 1st day of September, 2014 and/or attendant to and/or arising from the non-existent Board Meeting of 3rd Respondent (*sic*) held on

the 29th day of August, 2014, to the 3rd and 4th Respondents Payroll and/or making any payments, Remunerations and/or Allowances, whatsoever and/or howsoever.

3. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Interim Order of Injunction restraining the Respondents herein either by themselves, agents, servants and/or employees, from further employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of Articles 10 (1) of the Constitution, 2010.
4. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Interim Conservatory Order, to protect, preserve and/or conserve the funds and/or resources of the 3rd and 4th Respondents, from being paid out to irregularly and/or illegally employed Personnel, on account of Salaries, Remunerations, and Allowances.
5. The Honourable Court be pleased to grant an Order of Temporary Injunction, prohibiting and/or restraining the Respondents herein either by themselves, agents, servants and/or employees, from admitting the various Employees who were appointed and/or issued with Letters of Appointments on the 1st day of September, 2014 and/or Attendant to and/or arising from the non-existent Board Meeting of the 3rd Respondent (*sic*) held on the 29th day of August, 2014 to the 3rd and 4th Respondents Payroll and/or making any payments, Remunerations and/or Allowances, whatsoever and/or howsoever, pending the hearing and determination of this Petition.
6. The Honourable Court be pleased to grant an Order of Temporary Injunction prohibiting and/or restraining the Respondents either by themselves, agents, servants and/or employees, from further employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of Article 10(1) of the Constitution, 2010, pending the hearing and determination of this Petition
7. The Honourable Court be pleased to grant Conservatory Order, to protect, preserve and/or conserve the funds and/or resources of the 3rd and 4th Respondents, from being paid out to irregularly and/or illegally employed Personnel, on account of Salaries, Remunerations and Allowances, pending the hearing and determination of this Petition.
8. Costs of this Application be borne by the Respondents jointly and/or severally.

The Notice of Motion was heard *ex parte* on 9th October, 2014 by Hon. Radido Judge who issued the following orders-

1. That pending the hearing and determination of this instant Application, interim injunction orders do and are hereby issued restraining the Respondents herein, either by themselves, agents servants and/or employees, from admitting the various employees who were appointed and/or issued with letters of appointments on the 1st day of September, 2014 and /or attendant to and/or arising from the non-existent Board meeting of the 3rd Respondent (*sic*) held on the 29th day of August, 2014 to the 3rd and 4th Respondents payroll and/or making payments, remunerations and/or allowances, whatsoever and or howsoever.
2. That pending the hearing and determination of this instant Application, interim injunction orders to and are hereby issued retraining the Respondents herein, either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with due process of the law and in particular provisions of Articles 10(1) of the Constitution, 2010
3. That this file be transmitted back to Kisumu Industrial court for mention or further directions on 21st October, 2014.

The 1st, 2nd, 3rd and 5th Respondents filed a replying affidavit opposing the application and further filed a notice of Preliminary Objection on the following grounds:-

1. **That the suit is filed in court offends the mandatory provisions of Section 6 of the civil Procedure Act. Cap 21 Laws of Kenya since there is a similar suit pending, being Kisumu**

- Industrial Court Petition No. 243 of 2014 filed earlier than this suit.**
2. **That the issues raised in this suit were debated and determined by the Kisii County Assembly in its plenary through the impeachment proceedings against the 1st respondent on 17th September, 2014 and therefore contrary to the provisions of the Constitution of Kenya, 2010 in terms of double jeopardy.**
 3. **That the petitioner in this suit lacks *locus standi* to commence the instant proceedings before this court contrary to the provisions of Section 12 of the Industrial Court Act.**
 4. **That the proceedings as commenced by the petitioner are irregular, null and void and an abuse of the due process of court owing to the fact that no leave of court was sought to commence Judicial Review proceedings in the nature of certiorari contrary to the provisions of Order 53 of the Civil Procedure Rules, 2010.**
 5. **That based on the above points of law, this honorable court be pleased to strike out the entire proceedings with costs to the respondent.**

Johnstone O. Ndege filed a replying affidavit on behalf of the 4th Respondent.

Hon. Wasilawa J. heard the Preliminary Objection and dismissed all the grounds raised therein.

On 17th November, 2014, the Interested Parties applied to be enjoined and were subsequently enjoined to the petition as persons who are likely to be affected by the petition having been employed in the impugned recruitment. The 1st Interested Party filed a replying affidavit on behalf of all the Interested Parties on November 2014

On 10th February, 2015 parties appeared before me for directions and I directed that they file written submissions. The submissions were highlighted on 4th June, 2015.

Mr. Ogutu for the Petitioner submitted that no board meeting was held by the Respondents on 29th August, 2014, at which it is alleged the impugned recruitments were approved. This was fortified by the fact that the Respondents were unable to produce the minutes of the alleged meeting. He further submitted that there was no advertisement, short listing and interviews before the appointments. That this violated Article 120(2), (c) which provides for transparency and Section 91(d) of the County Government Act. Mr. Ogutu further submitted that the letters of appointment were signed by the 5th Respondent who is not an authorised officer as the only authorised officer is the 2nd Respondent. That at the time of signing the letters the 5th Respondent had been barred by a permanent injunction from exercising the functions of his office. Mr. Ogutu also submitted that no budget was laid before the County Assembly before the recruitments in violation of Articles 201, 203 and 220 of the Constitution and Section 8(1) (l) of the Act. He submitted that the petition raised fundamental issues that justified granting of the conservatory orders sought in the petitioner's application.

Mr. Nyambati who appeared for the 1st, 2nd, 3rd and 5th Respondents and who also held brief for Mr. Onsembe for the 4th Respondent submitted that the application is an abuse of the court process and does not meet the threshold for grant of interlocutory injunctions as set out in the case of **Giella v Cassman Brown**. He submitted that the petitioner did not produce any evidence in support of his allegations. He further submitted that the vacancies were advertised in Daily Nation of 30th March, 2014 and in the Star Newspaper of 11th August, 2014. He further submitted that the letters of appointment were not signed by the Clerk who was working in collusion and in conspiracy with the Petitioner. He further submitted that the Petitioner had not produced the budget to prove that the recruitments were not budgeted for. He submitted that the Petitioner is a busybody without *locus standi* and had not stated with precision the particulars of the infringement that should be addressed by the court. He further submitted that the Petitioner had not complied with Section 40 of the Government Proceedings Act.

Mr. Nyambati also submitted that the Interested Parties were already in employment yet the Petitioner had not prayed for an order to restrain the 3rd Respondents from admitting them to the office, that allowing the Interested Parties to work without pay would be an infringement of Article 41. He further submitted that the Petitioner had not named the 273 persons who were employed in violation of Article 50 which prohibits making orders against persons who are not parties to a suit. He submitted that the

Petitioner had the option to move the relevant committee of the house to table a report under Article 47 as read with Section 75 of the Act. He prayed that the application be dismissed with costs.

Mr. Otieno for the Interested Parties opposed the application and associated himself with the submissions of Mr. Nyambati on behalf of the Respondents. He submitted that this court has no jurisdiction to hear this petition and the Petitioner has no locus standi under Section 12 of the Industrial Court Act and that he has not filed the petition on behalf of others as provided in Section 13. He further submitted that the Petitioner did not come to court with clean hands as he is an appendage of the Clerk who is fighting supremacy wars with the 1st Respondent and that the petition is not filed in good faith. He urged that the application be rejected.

I have considered the application, the grounds in support thereof, the replying affidavit, grounds of objection as well as the submissions by the parties.

The first issues for determination at this stage based on the submissions of the parties are the locus standi of the applicant and the jurisdiction of this court to hear and determine this petition.

These twin issues were raised in a Preliminary Objection filed by the Respondents on 15th October, 2014 and the court made a determination dismissing both issues on 5th November, 2014. I will not re-open the issues as there is no application to review the orders in the absence of which only a higher court can reopen the issues in the form of an appeal. The Respondents did not file an appeal even though they filed a notice to appeal against the ruling.

The Respondents also raised the issue of compliance with Government Proceedings Act. It is my opinion that proceedings for enforcement of constitutional rights are not subject to government Proceedings Act.

The main issue arising from the application is whether the applicant has made out a prima facie case to warrant the issue of the conservatory orders sought pending the hearing of the petition. The main prayer is to restrain the Respondents from admitting the 273 employees whose employment is impugned from being admitted to the 4th Respondent's payroll and paying salaries, remunerations and allowance to employees issued with letters of appointment on 1st September, 2014.

The Respondents did not specifically deny that there was no board meeting on 29th August, 2014, nor that the advertisements for positions in the Daily Nation of 30th March, 2014 was for 71 posts and that the impugned employment of 273 employees which the petitioner has objected to were not advertised. The Petitioner has submitted a list of 344 names at Appendix SAO 6 of the affidavit in support of the petition and it is not true as submitted by the Respondents that the names of the persons irregularly employed have not been given. The Respondents also failed to submit a budget for the recruitment of the extra 273 employees.

The advertisement in the Star of 11th August, 2014 could not have resulted in recruitments of the 273 employees on 1st September, 2014 as the closing date of 25th August, 2014 could not have been followed by short listing, interviews and recruitments between 25th August, and 1st September, 2014, a duration of only 6 days. In any event no evidence has been submitted by the Respondents on Interested Parties in respect of the short listing and interviews.

The only application for employment form filed by the Interested Parties is dated 8th September, 2014 after the impugned date of appointment which is 1st September, 2014.

The Respondents admitted that the letters of appointment for the impugned recruitments were signed by an unauthorised person. Their justification is that the clerk who is the authorised officer was acting in collusion with the Petitioner. This is not a justification for an unauthorised officer to sign the letters and in any event, was not proved.

The Interested Parties have stated that they will to be affected by the decision of this court but are not

parties to this suit. The petition does not seek any orders against the Interested Parties. The Petitioner was not under obligation to join them as his complaint is against the process through which they were appointed and not against them individually. The Petition was properly filed against the persons who made the impugned recruitments. In any event the Interested parties applied, and have been enjoined in time for them to fully participate in the suit.

For the foregoing reasons I am satisfied that the Petitioner has made a prima facie case warranting the grant of the orders sought. I therefore make the following orders:-

1. I grant an Order of Temporary Injunction, prohibiting and/or restraining the Respondents herein either by themselves, agents, servants and/or employees, from admitting the various Employees who were appointed and/or issued with Letters of Appointments on the 1st day of September, 2014 and/or Attendant to and/or arising from the non-existent Board Meeting of the 3rd Respondent alleged to have been held on the 29th August, 2014 to the 3rd and 4th Respondents Payroll and/or making any payments, remunerations and/or allowances, whatsoever and/or howsoever, pending the hearing and determination of this Petition.
2. I grant an Order of temporary injunction prohibiting and/or restraining the Respondents either by themselves, agents, servants and/or employees, from further employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of Article 10(1) of the Constitution, 2010, pending the hearing and determination of this Petition
3. I grant Conservatory Order, to protect, preserve and/or conserve the funds and/or resources of the 3rd and 4th Respondents, from being paid out to irregularly and/or illegally employed personnel, on account of salaries, remunerations and Allowances, pending the hearing and determination of this Petition.

Costs will be in the cause.

Dated Delivered and signed at Kisumu this 24th day of July, 2015

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE