



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
PETITION NO.88 OF 2014

JAMES OMARIBA NYAOGA.....PETITIONER

- VERSUS -

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

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

DANIEL MBAKA OMWOYO.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd May, 2014)

JUDGMENT

The petitioner filed the petition on 06.05.2014 through Oguttu-Mboya & Company Advocates. The petition was instituted at the court's registry at Kisumu and heard by the court at Nakuru in circumstances whereby Wasilwa J., presiding in the court at Kisumu was on leave and the matter had been certified urgent. The petition was supported by the affidavit of the claimant and the attached exhibits all filed together with the petition. The petitioner made prayers as follows:

- a. **Declaration be issued to the effect that the petitioner is entitled to protection under the Constitution.**
- b. **Declaration that the petitioner is the duly appointed and constituted Clerk, Kisii County Assembly and hence has the mandate and authority to exercise the functions of the office of Clerk, Kisii County Assembly.**
- c. **Declaration that the actions and omissions of the 1st and 2nd respondents herein constitute and amount to unfair labour practices, mistreatment of the petitioner and gross abuse of office.**
- d. **Declaration that the 1st respondent has violated or acted in contravention of the provisions of the County Government Act, No. 17 of 2012 by evicting the petitioner from the petitioner's office and converting same into a boardroom, without regard to the rights of the petitioner.**

- e. **Permanent injunction restraining the 1st and 2nd respondents either by themselves, agents, servants and employees from appointing or constituting the 3rd respondent or any other person as the interim Clerk or Accounting Officer, Kisii County Assembly, preventing, barring, restricting and interfering with the petitioner's performance and execution of his duties as the Clerk, Kisii County Assembly, whatsoever and howsoever, subject only to observance of the County Government Act, 2012.**
- f. **Permanent injunction restraining the 3rd respondent or any other person, fronted by or at instance of the 1st respondent from assuming and purporting to act as the interim clerk and accounting officer, Kisii County Assembly, discharging the functions and exercising the duties of the office of Clerk, Kisii County Assembly, in violation of the provisions of section 12 of the County Government Act, No. 17 of 2012.**
- g. **Costs of the petition be borne by the respondents jointly or severally.**
- h. **The honourable court be pleased to issue such orders and writs as the court may deem fit and expedient.**

The respondents appointed O. M. Otieno & Company Advocates to act for them in the case. To oppose the petition, the respondents filed on 14.05.2014, the replying affidavit of Samwel Kerosi Ondieki, the 1st respondent. The respondents also filed on 16.05.2014, the 1st respondent's supplementary affidavit.

The court certified the case as urgent and by consent of the parties, the case was heard on 19.05.2014. The parties also filed their respective written submissions on 19.05.2014.

The petitioner has dedicated his service as a Career Public Officer. He served in the Government of Kenya as a civil servant prior to the coming into operation of the Constitution of Kenya 2010. In the course of the constitutional transition, the petitioner was interviewed by the Public Service Commission and through the Transitional Authority was deployed as the Interim Clerk of Kisii County Assembly as per the deployment letter dated 25.02.2013 being **exhibit JON1**. The petitioner accepted the deployment and proceeded accordingly.

The 2nd respondent at the meeting held on 24.04.2013, decided at Min.2/4/2013 on the appointment of a substantive Clerk to the County Assembly, thus, **"The meeting was informed that being an Interim official, the Clerk did not yet have authority to transact financial matters as an accounting officer. The members unanimously resolved to retain and appoint the Interim Clerk on a permanent basis. This decision would be communicated to the County Assembly for approval as required by the County Government Act No 17 of 2012."** The minutes are exhibited as **JON2**.

The Kisii County Assembly Order Paper for 29.04.2013, exhibit **JON3** shows at No. 9 that the Leader of Majority was to move the motion that the Assembly adopts Min. 2/4/2013 of the County Assembly Service Board on the retention and appointment of the Interim Clerk of the County Assembly pursuant to the provisions of section 13(1) of the County Government Act, No.17 of 2012. It was submitted for the respondents that the proceedings of the Assembly on that material date were not recorded because the relevant staff had not been engaged. The record of the proceedings was therefore not filed in court. It was the respondent's case that the Assembly did not approve the appointment for want of participation, inclusion, merit and competition as per the principles and values provided for in Articles 10 and 232 of the Constitution. The relevant record was not filed in court.

The petitioner's case was that he was duly appointed by the Board and approved by the Assembly as per his exhibit **JON 4(a)** being the letter addressed to him by the 1st respondent happily conveying the decision of the Kisii County Assembly to approve the petitioner's appointment on 29.04.2013 and accordingly, the County Assembly Service Board had appointed the petitioner as the Clerk of Kisii County Assembly with effect from 29.04.2013. The 1st respondent further addressed to the petitioner the letter dated 10.07.2013 exhibit **JON4(b)** once again conveying the appointment decision by the 2nd

respondent at the meeting of 9.07.2013 and effective 29.04.2013 at the remuneration and benefits set out in that letter. It was submitted for the respondents that the 1st respondent authored the letters to make it appear that the petitioner was duly appointed to enable him undertake financial transactions at the relevant bank accounts. It was submitted for the respondents that in fact, there had been no such appointment of the petitioner with approval of the Assembly.

The petitioner's case was that he served diligently until the County Assembly Service Board undertook the process of recruitment of the directors including for the office of the director, legal services, litigation and corporate affairs. At the relevant interviews, the best candidate was Oira George Mong'are from the Nyamira-Borabu Sub-County with 68.8% and the second candidate was Nyambati Migiro Gideon from the Kisii-Majoge Borabu Sub-County with 64.2%. The petitioner advised the board against appointing the 2nd candidate because he had a disputed fee note for Kshs.8,852,770.00 demanded against the Kisii County Government with respect to legal services he had rendered in High Court Petition No.21 of 2013 and according to the petitioner, the appointment would occasion a conflict of interest for the candidate once appointed. The petitioner further did not see any reason why the best candidate could not be appointed. The 1st respondent's preferred candidate was the 2nd best candidate and was subsequently appointed. The differences between the petitioner and the 1st respondent had been propagated and they continued to roar.

The roaring of the differences came to a loud thunder once Gideon M. Nyambati, the 2nd best candidate was appointed and took office as the director, legal and legislative services. The director wrote to the petitioner and addressed the petitioner as "**Clerk County Assembly**" in the internal memorandum dated 20.12.2013 being exhibit JON 7. The memorandum stated as follows:

"SUBJECT: APPLICATION FOR RENEWAL OF PRACTICING CERTIFICATE 2014

Under the provisions of the Advocates Act and Law Society of Kenya Act, we are supposed to renew our practicing certificate for the year 2014 starting the 1st of January, 2014.

Kindly approve funds for me and the Hon. Speaker each as follows:

- i. Professional indemnity covers Kshs.100,000.00.
- ii. Practicing certificate Kshs. 18,000.00.
- iii. Advocates benevolent fund Kshs. 60,000.00.
- iv. Accountants' certificate rules Kshs.10,000.00.

TOTAL Kshs.178, 000.00.

Signed

Gideon M. Nyambati

DIRECTOR, LEGAL AND LEGISLATIVE SERVICES"

Under unexplained circumstances, the 1st respondent endorsed on the memorandum, thus, "**Clerk: Process for both**". It was not explained to the court why the 1st respondent and the director had made such demand in solidarity for payment of the professional subscriptions instead of each making individual applications.

The petitioner's case was that the solidarity was targeted at harassing and intimidating him in performance of his duties as the Accounting Officer. The petitioner's further case was that he declined to approve and authorize the payment because no budget and funds were provided for in the County Assembly resources for such payments. The petitioner's case was therefore that he had exercised his authority as the Accounting Officer to decline the payment.

Annoyed with the petitioner's performance of his duties as Clerk and the Accounting Officer, the petitioner's case was that the 1st respondent wrote to the Transitional Authority the letter dated 27.12.2013 being exhibit **JON 8** requesting the Authority to recall the petitioner. The Authority proceeded to recall the petitioner by the letter dated 27.12.2013 exhibit **JON 9**. The petitioner wrote to the Authority the letter dated 15.01.2014 being exhibit **JON 10** explaining that he had already been substantively appointed as Clerk as appointed by the County Assembly Service Board and approved by the Assembly on 24.04.2013.

The petitioner stated that the 1st respondent had in December, 2013 published in the print media the advertisement inviting applicants for the position of the Clerk of the Kisii County Assembly and cancelling one such advertisement. The petitioner further case was that the 1st respondent, suggesting that the petitioner was no longer in office, purported to appoint the 3rd respondent the Interim Accounting Officer for Kisii County Assembly. The petitioner's case was that such interim appointment was calculated to harass him and to undermine his performance of duty as the Clerk and Accounting Officer for the Kisii County Assembly. Further, such appointment was without any authorization or decision of the 2nd respondent because a member of the 2nd respondent per exhibit **JON14** dated 1.4.2014 wrote confirming that the petitioner was the duly appointed Clerk with the approval of the County Assembly and there was no decision varying the appointment.

The court considers that the following are the key issues for determination in this petition:

- 1. Whether the petitioner is the duly appointed Clerk for the Kisii County Assembly.**
- 2. Whether the petitioner is entitled to the remedies as prayed for.**

The court has taken into account the petition, the affidavits, the exhibits and the submissions made and makes the findings as follows.

The 1st key issue for determination is whether the petitioner is the duly appointed Clerk for the Kisii County Assembly. It was submitted for the respondents that petitioner was a staff of the Transitional Authority under section 17 of the Transition to Devolved Government Act No. 1 of 2012 which provides thus:

“17. (1) The Authority may appoint such staff as may be necessary for the proper discharge of its functions under this Act.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions of service as the Authority determines subject to the advice of the Salaries and Remuneration Commission.

(3) A public officer seconded to the Authority shall, during the period of secondment, be deemed to be an officer of the Authority and shall be subject only to the direction and control of the Authority.

(4) Every member and employee of the Authority shall sign a confidentiality agreement.”

The court has considered the submission and finds that the section applies to staff of the Authority. At no point in time was the petitioner appointed or seconded to the service of the Authority. The court finds that the petitioner was identified at an interview by the Public Service Commission and deployed by the Transitional Authority to serve as the Interim Clerk in the Kisii County Assembly. The court finds that the petitioner was appointed Clerk by the County Assembly Service Board with the approval of the County Assembly in accordance with section 13(1) of the County Governments Act, 2012. The court finds that there is no doubt that the Assembly approved the petitioner's appointment as Clerk by the Board. First, the board forwarded the resolution to the Assembly as per the order paper on record. Second, the 1st respondent wrote more than once the letters on record conveying the approval by the Assembly. Thirdly, a member of the Board and the Assembly one Protus Aramba Moindi, the Leader of

the Majority Party in the Assembly wrote exhibit **JON14** and confirmed that the petitioner was appointed by the Board with approval of the Assembly. The court finds that there is no material before the court to doubt that the petitioner was appointed in accordance with the relevant statutory provision. To answer the first question for determination, the court finds that the petitioner was duly appointed by the Board with approval of the Assembly.

In making that finding, the court further finds that at all material times, the Board never made a decision to vary the petitioner's appointment and in any event, termination of the petitioner's appointment could not be made without compliance with constitutional and statutory provisions on due process. The court finds that once the decision to appoint the petitioner substantively was made, the Transitional Authority could not validly recall him. In the same vein, the court finds that once the Board appointed and the Assembly approved, the power of the Board and the Assembly to appoint and approve respectively was thereby exhausted as the Board and the Assembly were rendered *functus officio* as far as that appointment was concerned. The court holds that an employer's power to appoint or approve an appointment is exercisable only once and is thereby exhausted as it cannot be exercised forth and back or again and again one way or the other with respect to the same appointment or approval of appointment. The court further holds that once the appointment or approval of appointment inhabits a given person, the same can escape the person only through due process as provided for in the Constitution, relevant legislation and agreement between the parties.

Further, it is the court's considered opinion that the petitioner was entitled to be absorbed into the County Assembly's service as appointed to the office of clerk pursuant to provisions of section 138 of the County Governments Act, 2012. The court upholds its opinion in **Silas Kipruto and Another –Versus- The county Government of Baringo and Another [2014] eKLR**, where the court stated thus, **"The facts are clear on this issue. The claimants were serving civil servants. They applied and the Transitional Authority recruited them for secondment by the Public Service Commission to the County Government of Baringo. The court holds that the recruitment and secondment was founded upon section 15 (2) (a) of the 6th schedule to the Constitution which provided that through legislation, the national government was mandated to facilitate the devolution of power; to assist county governments in building their capacity to govern effectively and to provide the services for which they are responsible; and support county governments. The Transition to Devolved Government Act, 2012 empowered the Transitional Authority to facilitate the young county governments, among other things, to have competent staff at inception and in accordance with section 15 of the 6th schedule to the Constitution. The court finds that the claimants being serving civil servants were legitimately identified in a transparent and accountable process and secondment to the Baringo County Government - which under Article 176 of the Constitution consists of the respective county assembly and county executive."**

Accordingly, the court finds that it was not a case of fresh appointment that required open advertisement, competitive recruitment, participation and inclusion of all interested persons as envisaged in the principles and values provided for in Articles 232 and 10 of the Constitution. The petitioner as a serving public officer had long time ago before the transitional circumstances been engaged in the public service; he was competitively recruited by the Public Service Commission for deployment to the County Assembly as interim clerk; and it cannot be said that the subsequent substantive appointment as Clerk did not meet the constitutional and statutory tests of meritocracy and inclusion because the relevant constitutional and statutory provisions carefully provided for the kind of the petitioner's appointment as clerk during the unique transitional season.

The second issue for determination is whether the petitioner is entitled to the remedies as prayed for. The respondent's opposition to the remedies and by implication was largely predicated on the submission that the claimant had not been duly appointed clerk by the Board with approval of the Assembly. The respondents in urging their case raised some extraneous issues and which the court finds useful to highlight at this stage. First, it was submitted that the petitioner was not in the payroll of the County Assembly. The court finds that the relevant payroll was not filed in court and secondly, the pay point would not override the appointment as made in accordance with section 13(1) of the County Governments Act, 2012. Secondly, it was submitted that the petitioner had not exhibited the certificate of service under

section 51 of the Employment Act, 2007 to confirm his cessation of employment with the Transitional Authority. The court has found that it was misconceived for the respondents to urge that the petitioner was in the employment of the Transitional Authority and the court further finds that at no point has it been established that the claimant held two positions so that Article 77(1) barring state officers from holding other gainful employment has not been shown to have been contravened by the petitioner.

To advance the contravention of the petitioner's rights by the respondents, counsel for the petitioner submitted as follows:

1. The respondents and in particular the 1st and 2nd respondent, failed to make an administrative decision and in accordance with due process as envisaged in Article 47(2) of the Constitution. The petitioner, it was submitted, was not given reasons in view of the 1st respondent's communication appointing an interim accounting officer whereas the petitioner was properly the holder of the offices of clerk and accounting officer. That pretended alteration of the employment of the petitioner, it was submitted, was unilateral, in contravention of Articles 47(2) and 50 (1) of the Constitution, and section 10(5) of the Employment Act, 2007. Such was an adverse decision devoid of due process and the court finds as much.
2. The respondents, it was submitted, violated the petitioner's rights to fair labour practices and reasonable working conditions as envisaged in Article 41 of the Constitution. It was submitted that the petitioner had been intimidated, harassed and subjected to unfair labour practices. First, the petitioner's advice that the best candidate for director legal services be appointed was disregarded by the 1st and 2nd respondents. Secondly, it was submitted that the 1st respondent purported to usurp the petitioner's authority by directing the petitioner to pay the professional subscriptions for the 1st respondent and for the director of legal services. Thirdly, it was submitted that the 1st respondent, and without objection of 2nd respondent as was expected, recommended the appointment of the 3rd respondent as interim accounting officer in circumstances whereby the petitioner was the substantive accounting officer. Fourthly, the 1st respondent misrepresented facts to the Transitional Authority about the employment status of the petitioner. Fifthly, while the petitioner was the substantive clerk, the 1st and 2nd respondents published in the print media an advertisement inviting applications for the office of clerk whereas there was no vacancy in the office. Sixthly, the 1st respondent instigated the filing of High Court Petition No.4 of 2014 at Kisii and the 1st respondent has not, it was submitted, expressly denied that position. Finally, it was submitted that on 28.04.2014, the 1st respondent chased the petitioner out of the County Assembly Clerk's office and ordered his (1st respondent's) bodyguards to remove the official desk, chair and cabinets from the petitioner's office as the clerk. The 1st respondent, it was submitted, converted the office into a boardroom to ensure that the petitioner was properly humiliated and thrown out of office.
3. In view of the respondents' actions and omissions, it was submitted for the petitioner that the petitioner was subjected to gross unfair labour practices. It was further submitted that the petitioner had been victimized for performing his duties and designs were initiated by the respondents to punish the petitioner without due process of law and in contravention of Article 236 of the Constitution.

The court has considered the parties' respective submissions and material on record. The court finds that there are no material rebuttals to the petitioner's case. The court finds that the respondents and in particular, the 1st and 2nd respondents violated the petitioner's constitutional and statutory protections as submitted, for the petitioner. Accordingly, the court returns a finding that the respondent is entitled to the declarations and injunctions as prayed for in the petition.

The court was asked, for the respondents, to stay the hearing of the petition in view of the earlier and pending High Court Petition No. 4 of 2014 at Kisii. The court's opinion is that the application for stay of the proceedings as urged for the respondents was overtaken and rendered nugatory once the parties agreed

to go on with the hearing in this petition. The matter will rest accordingly.

It was urged for the petitioner that the court do find that the 1st respondent is culpable of perjury in view of the materials filed in court. The court has considered the exceptionally high standards and burdens of evidence prescribed of the “**beyond reasonable doubt**” scale for a finding of criminal liability and find that the same did not apply in the present proceedings. Nevertheless, the court has carefully considered the integrity and leadership lapses that have been exposed in this case. Integrity and leadership matters are by the Constitution and relevant legislation vested in the Ethics and Anti-Corruption Commission. In the considered opinion of the court, it is sufficient that the petitioner shall serve upon the Ethics and Anti-Corruption Commission this judgment for the Commission to undertake appropriate investigations and action in accordance with the Commission’s constitutional and statutory authority and functions in view of the leadership and integrity issues exposed in this case. In particular, the Commission will consider and take action as it will deem appropriate and within its mandate in view of the 1st and 2nd respondent’s actions and omissions that culminated into the undermining of the petitioner’s performance as the Clerk, authorized officer and Accounting Officer at the Kisii County Assembly.

In conclusion, judgment is entered for the petitioner against the respondents for:

- a. A declaration that the petitioner is entitled to protection under the Constitution including provisions of Articles 41, 47, 50(1), and 236.
- b. A declaration that the petitioner is the duly appointed and constituted Clerk, Kisii County Assembly and hence has the mandate and authority to exercise the functions of the office of Clerk, Kisii County Assembly.
- c. A declaration that the actions and omissions of the 1st respondent herein constituted and amounted to unfair labour practices, mistreatment of the petitioner and gross abuse of office.
- d. A declaration that the 1st respondent has violated and acted in contravention of the provisions of the County Government Act, No. 17 of 2012 by evicting the petitioner from the petitioner’s office and converting same into a boardroom, without regard to the rights of the petitioner.
- e. A permanent injunction restraining the 1st and 2nd respondents either by themselves, agents, servants and employees from appointing or constituting the 3rd respondent or any other person as the interim clerk or accounting officer, Kisii County Assembly; and preventing, barring, restricting and interfering with the petitioner’s performance and execution of his duties as the Clerk, Kisii County Assembly, whatsoever and howsoever, subject only to observance of the County Government Act, 2012.
- f. A permanent injunction restraining the 3rd respondent or any other person, fronted by or at instance of the 1st respondent from assuming and purporting to act as the interim clerk and accounting officer, Kisii County Assembly, discharging the functions and exercising the duties of the office of Clerk, Kisii County Assembly, being in violation of the provisions of section 12 of the County Government Act, No. 17 of 2012.
- g. The respondents to pay costs of the petition.
- h. The petitioner shall serve upon the Ethics and Anti-Corruption Commission this judgment, within seven days, for the Commission to undertake appropriate investigations and action in accordance with the Commission’s constitutional and statutory authority and functions in view of the leadership and integrity issues exposed in this case with respect to the respondents’ actions and omissions that culminated into the undermining of the petitioner’s performance as the Clerk, authorized officer and Accounting Officer at the Kisii County Assembly .

Signed, dated and delivered in court at Nakuru this Friday 23rd May, 2014.

BYRAM ONGAYA

JUDGE