



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 141 OF 2014**

***(Before Hon. Lady Justice Hellen Wasilwa on 23.7.2014)***

**NEHEMIAH NYABUTO NYAKUNDI.....CLAIMANT**

**VERSUS**

**CLERK, COUNTY ASSEMBLY OF NYAMIRA..... 1ST RESPONDENT**

**COUNTY ASSEMBLY OF NYAMIRA..... 2ND RESPONDENT**

**NYAMIRA COUNTY ASSEMBLY SERVICE BOARD..... 3RD RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD**

**COUNTY GOVERNMENT OF NYAMIRA..... 4TH RESPONDENT**

**COUNTY GOVERNMENT OF NYAMIRA.....5TH RESPONDENT**

**R U L I N G**

The Application before Court is the one dated 16.6.14 and filed in Court on the 17.6.2014 through the firm of S. M. Sagwe and Company Advocates. The application was filed in Court under Certificate of Urgency and brought through a Notice of Motion pursuant to Article 10, 23, 27, 41, 47, 174, 175(a) and (b), 176, 195, 196, 201 and 236 of the Constitution of Kenya 2010, Section 16(1), (2) of the Industrial Court Rules 2010, and Section 3, 12(1)A, (2) (3) (I) (II) of the Industrial Court Act 2010, Section 3A and 63(E) of CPA, CAP 21 Laws of Kenya, Section 72, 74, 75 and 6 of the Guidelines to Governance, Order 40 Rule 1 and 2, 3, 4 and 8 and Order 51 Rules 1, 3 and 4 of the CPR, CAP 21 Laws of Kenya, Section 63 and 76 of the County Government Act, 2012 and all other powers and provisions of the Law.

The applicants seek orders that:-

- 1. The Honourable Court be pleased to issue a restraining order restraining the respondents in that having instituted criminal investigations against the claimant with the Ethics and Anti-corruption Commission, disciplinary proceedings against the claimant for dismissal or imposition of any other punishment on any grounds involved in the criminal charge at the Ethics and Anti-corruption Commission shall not be taken until the conclusion of the criminal proceedings and investigations started by the Ethics and Anti-corruption Commission and determination of any appeal there from has been made.**
- 2. This Honourable Court be pleased to grant an injunction restraining the respondents by themselves, their agents, their employees or servants or any other person acting on the instructions of the respondents or any of them from barring the claimant from entering his**

- office, performing the duties of his office, withholding his salary and/or benefits that he may be enjoying, or instituting disciplinary proceedings against the claimant for dismissal or imposition of any other punishment on any grounds involved in the public accounts investments committee report of the County Assembly of Nyamira which unfairly, discriminatively and falsely adversely maligned the character and image of the claimant until the hearing and final determination of this application.
3. This Honourable Court be pleased to grant an injunction restraining the respondents by themselves, their agents, their employees or servants or any other person acting on the instructions of the respondents or any of them from dismissing the claimant, barring the claimant from entering his office, performing the duties of his office, withholding part of his salary and/or benefits that he may be enjoying, or instituting disciplinary proceedings against the claimant for dismissal or imposition of any other punishment on any grounds involved in the biased, discriminative, unprofessionally collected public accounts investments committee report of the County Assembly of Nyamira which unfairly, discriminatively, falsely and adversely maligned the character and image of the claimant until the hearing and final determination of this claim.
  4. The PUBLIC ACCOUNTS AND INVESTMENT COMMITTEE report being used as a basis for my interdiction be set aside in its entirety as the same was not subjected to expert investigation since I am challenging the findings of the PAIC Committee which alleged it was investigating fraud (which is a very serious criminal act) but deliberately refused to refer the investigation to an expert body and especially in the areas that mention of 2 tender board minutes and 2 tender evaluation report and that if the respondents or any of them is decided to send the claimant home, the respondents be condemned to pay the claimant damages equivalent to the balance of the claimant's years in service up to and including the 60th year plus all benefits interests and costs.
  5. In the alternative, and without prejudice to the foregoing, if the respondents are bent on having the claimant dismissed, the respondents be condemned to pay damages as against the number of years of service remaining together with all his benefits till the age of 60 years old and the same be paid lump sum plus costs and interests.
  6. The respondents to pay costs of this application.

The Application is also based on the grounds that;

1. The claimant sometimes last year 2013 was given a chance to chair the County Assembly tender board in place of the clerk of the County Assembly.
2. By virtue of chairing of the said tender board the claimant signed tender minute as chairman while the procurement officer signed as secretary.
3. Consequent to the signing of the tender the evaluation committee had evaluated the tenders and given the tender board the green light to award the tender to JOHNCELE Insurance Brokers Limited.
4. Later on the clerk of the County Assembly prepared the payment vouchers and cheque payable to the said insurance brokers.
5. Consequent to the payment of the cheque worth 30 million shillings by the clerk county assembly of Nyamira and other members of both the tender board committee were subjected to interrogation by PAIC wherein PAIC having questioned me only several issues surrounding the tender award they did not give me a copy of the final investigation report for me to read and understand in order to be able to respond to issues touching on me and my office.
6. The said report was later used to sack the County Assembly Speaker without the same having been subjected to expert scrutiny and investigations are required by both the Constitution of Kenya and the County Assembly Standing Orders as well as the County Government Act 2012.
7. Sometimes in June 2013 I was served with a letter by the clerk authorizing me to the Ethics and Anti-corruption offices Kisumu to be interrogated on unspecific charges.
8. During the same Month I was served with a show cause notice and copy of the PAIC report dated the 2nd May 2014 at exactly 9.40 a.m by the Ag Clerk which notice emanated from the

- said PAIC requiring me to respond within 48 hours to the said notice.
9. The 48 hour ultimatum was unconstitutional as the claimant ought to have been given enough time to write his defence and this is a violation of his constitutional right and a denial of his basic labour rights as provided in the Constitution 2010.
  10. Later the following day on the 13th June 2014 the claimant received a call from the Ag clerk requiring me to surrender to him with immediate effect the original of the show cause notice he had served on him.
  11. In the claimant's response to the show cause notice he had raised issues of two separate tender board minutes and two different evaluation committee minutes shown to me by the PAIC chairman during interrogation and had denied knowledge of tender board minutes signed by the secretary alone contrary to the practice and norm of chairman and secretary signing such tender board minutes.
  12. I claimant denied in writing knowledge of the second tender board minutes signed by secretary alone and the tender evaluation committee minutes which had given the tender board a green light to proceed and award the tender to JOHNCELE Insurance Brokers Ltd.
  13. The manner in which the PAIC report was conducted and its final report drafted was contrary to the county assembly standing orders no. 184, 186, 189, 191 respectively.
  14. The office of the Governor County Government of Nyamira had invited the awardee to tender and the awardee was accordingly notified by the County Secretary that he had been prequalified for provision of insurance services on as and when required basis.
  15. The claimant never informed the PAIC Committee that the tender board had approval from the CASB to award the tender to JOHNCELE Insurance Brokers Ltd contrary to the report at page 6 which is a creation of the chairman of the PAIC who insisted that the claimant writes and signs a different tender board minutes which he declined.
  16. The conclusion talks of fraud which is a criminal term that required proper expert investigation and such expert intervention was not sort by PAIC and that recommendation is discriminatory in nature and a contravention of both the county standing orders and the constitution.
  17. Later on 13 June 2014 the claimant was verbally informed by the clerk that he I should be packing my belongings and leave office as my letter of dismissal was getting ready.
  18. The claimants was condemned unheard and that he ought to have been given a chance to read and understand the PAIC report where it adversely mentions him to be able to defend himself but not to use the court to condemn the claimant wholesale.
  19. The claimant cannot be indicted on a report that lacked in professional investigators' input as the matter of fraud is serious and highly technical and the report ought to have been subjected to scrutiny by an expert body which had not been done by the Clerk, the County Assembly and The County Assembly Service Board.
  20. The claimant denies any knowledge that the speaker had ordered for per diem of Kshs 5000 for each tender committee and that the report is untrue and a creation of a different report from the one done earlier a fabrication meant to fix those who are known to be independent.
  21. This Honourable court be pleased to grant an injunction restraining the respondents by themselves, their agents, their employees or servants or any other person acting on the instructions of the respondents or any of them from barring the claimant from entering his office, performing the duties of his office, withholding his salary and/or benefits that he may be enjoying or instituting disciplinary proceedings against the claimant for dismissal or imposition of any other punishment on any grounds involved in the public accounts investment committee report of the County Assembly of Nyamira unfairly, discriminatively and falsely adversely maligned the character and image of the claimant until the hearing and final determination of this application.
  22. In the alternative, and, if the respondents are bent onto unlawfully and unprocedurally removing the claimant from office without due process of the law by they be condemned to pay damages for the rest of the years in service adding up to 60 years less my current age plus costs and interests.
  23. The show cause letter was discriminatively and in contravention of the prescribed procedure served on me an the application of the respondents PAIC report as a basis for removal from office before my involvement in any wrong doing in the whole affair is determined by a

- competent and expert investigator is in itself unfair administrative action contrary to Article 47 of the Constitution, is discriminative contrary to Article 27 of the Constitution and the action ought to be halted in accordance to Article 23 of the Constitution.**
- 24. The administrative action of removing me from office unconstitutionally is a plant ant abuse of national values and principles of governors as provided for in Article 10, 19, 20, 21, 41, 174, 175(a), 176(2), 178, 196, 197, 200, 201, 232, 235(a), 259 of the Constitution of Kenya 2010 and Section 3, 14, 34, 55, 76, 80, 81, 83, 84, 85 of the County Government Act, 2012.**
  - 25. As a public officer, the claimant ought not to be victimized or discriminated against for having performed the function of office in accordance with this constitution or any other law or dismissed or removed from office, demoted in rank or otherwise subjected in disciplinary action without due process of law and that due process of law is wanting this particular treatment he receiving from the respondents and they ought to be halted and due process of the law takes place.**
  - 26. The claimant is not avoiding or barring the law from taking its course but that such process must be duly authorized by law and natural justice.**
  - 27. The claimant now prays that this application be granted.**
  - 28. The application is meritorious.**

The Application is also supported by the Supporting Affidavit of one Nehemiah Nyabuto Nyakundi, the applicant herein.

In principle, the Applicant's case is that he was appointed to chair the tender board in year 2013 in place of the clerk of the County Assembly. Professionally, the Applicant is an accountant with the County Assembly of Nyamira. The procurement officer was however the one in-charge of advertising of the tender for all departments. It is applicant's case that he had no powers to direct the procurement office on what to do with the tender and this what happened on the tender for insurance, motor vehicles, civic education and i-pads and smart phones which were all granted without any advertisement being done. The minutes of the tender board meeting were usually signed by the applicant as chair and by the secretary of the tender board as per **App NNN 2**.

In the case of the tender in question, it is the applicant's contention that the board awarded the tender after the evaluation committee had evaluated the tender and gave a green light for the award of the same.

It is as a result of this tender that the respondents took action against the applicant. **App NNN 4** is a report of PIC and PAC of Nyamira County on the procurement and award of insurance cover for MCA's and their families. The committee meetings recommended that the Applicant as chairman of CASB should take responsibility for leading and guiding a board meeting which approved the award and payment of a fraudulent process and also allowing a staff to participate in the meeting and signing the minutes as secretary which is contrary to the law.

The speaker of the County Assembly was impeached as per **App NNN 5** following the same tender. The Applicant on his part was now ordered to appear before the Ethics and Anti-corruption Commission for investigation on 23- May 2014 at 10 a.m (**App NNN 6**) and was also served with a show cause letter which is undated (**App NNN7**) but which is signed as received on 9.6.14. The Applicant replied to the show cause letter on 10.6.2014 (**App NNN 8**) stating that he was not capable. However on the 16.6.2014 he was interdicted as per (**App NNN 9**).

It is this interdiction that the applicant is contenting. It is his submission that disciplinary proceedings leading to his dismissal or imposition of any other punishment or any grounds be stopped until the conclusion of the investigations currently underway by the Ethics and Anti-corruption Commission and determination of any appeal therefrom.

It also appears that the applicant has been barred from entering his office and performing his duties, an issue he also contends. He wants to be allowed to enjoy his salary/benefits pending the hearing and determination of this claim. It is also his contention that PA &IC report that has been used to interdict him was not subjected to investigation hence his challenge of the report. He avers that he is being

discriminated upon as he is a resident of Kisii County and the respondents would be glad to get rid of him and replace him with their own from Nyamira County.

The respondents opposed this application. They filed their statement of claim and a Preliminary Objection dated 2.7.14 through the firm of Nyachiro Nyagaka and Company Advocates. They also relied on a Replying Affidavit sworn on 2.7.2014 by one Joash Nyamoko, the Speaker of the County Assembly of Nyamira herein. The respondents Preliminary Objection is to the effect that this court lacks jurisdiction to entertain this application as presented as its jurisdiction has expressly been ousted by the Constitution of Kenya and Regulations. It is also their contention that the issues of the propriety of the Public Accounts and Investment Committee report has been determined in other courts and is therefore *res judicata*. They further contend that orders sought are anticipatory and if granted may perpetuate a fraud.

In reply to the application, it is the respondents contention that indeed the applicant was an accountant working for Nyamira County and his letter of job designation dated 11.12.13 (**App JN1**) never included permission to expressly chair a tender board. He apparently executed minutes of a tender board which was an illegality as he was not authorized to chair and sign them as such. Further, it is the respondents submission that the entire procurement process was flawed and it was recommended that the entire process be started afresh. Kshs 30,000,000 had already been paid to the insurance brokers as per **App JN 5**. The matter was reported to the Ethics and Anti-corruption Committee and the Speaker was impeached. Other officers implicated were suspended in tandem with the CASB regulations that require such regulation to be undertaken. It is respondents contention that the disciplinary process and investigations were in tandem with the public service work code of conduct and Ethics and Anti-corruption investigation process and the same can go hand in hand as the officers who are culpable must take responsibility and the public must be protected. That this process will offer the claimant a chance to clear his name and is not subjecting the claimant to double jeopardy.

They deny this process is victimization of the claimant and neither is it discriminatory to the claimant.

Having concluded submissions from both parties, the issues for determination are as follows: \_

- 1. Whether this court has jurisdiction to entertain this application.**
- 2. Whether the application and orders sought herein are res judicata having been determined by another court of competent jurisdiction.**
- 3. Whether the disciplinary process being meted on claimant/applicant amounts to double jeopardy.**
- 4. Whether the applicant has been discriminated upon by the respondents.**
- 5. Whether the Applicant is entitled to order sought.**

On the 1st issue, jurisdiction is everything and without jurisdiction , this court should not proceed and make any further pronouncements.

It is respondents contention that this court lacks jurisdiction to entertain this cause, the same having been ousted by the Constitution of Kenya and by Regulation. The issues raised by applicant refer to his employment relationship with the respondent. The respondent have admitted that indeed the applicant is an accountant employed by the respondent. The Industrial Court as a court with the status of the High Court derives its Jurisdiction from Article 162(2) of the Constitution and Section 12 of the Industrial Court Act 2011. The jurisdiction extends to any question in relation to employment and labour relations and Section 12(a) of the Industrial Court Act 2011 states that this jurisdiction includes

**“disputes relating to or arising out of employment between an employer and an employee”**

What the Applicant contends in what arose while he was on duty however illegal he may have acted and

this is a matter which is a preserve of the Industrial Court. The jurisdiction of the Industrial Court cannot be ousted by proceedings before a County Assembly.

A similar matter was raised in the case of *Evans Kaiga Inyangala and 2 others -Vs- County Government of Vihiga and 2 others – Kisumu Industrial Cause No. 81/2014.*

In deciding whether the court had jurisdiction to handle the case or not, the court relied other authorities amongst them *Nick Githinji Ndichu -Vs- Kiambu County Assembly and Kiambu County Government* and held that

**“-----if such a person had a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such a dispute and has available remedies for that purpose-----”**

It is this court's findings that the Constitution and regulation has not ousted its jurisdiction to entertain this matter and the court therefore has jurisdiction to hear and determine the matter.

On 2nd issue, the respondent raised a preliminary objection that this matter is *res judicata* having been determined before the High Court in Kisii – pleadings in the Kisii Court were submitted before Court as. This is in relation to *Kisii HCCC NO 17 of 2014 Lucas Obogo Nyabuto -Vs- County Assembly of Nyamira and Kisii HCCC PET NO. 14 of 2014 – Nicholas Obare and Clerk Nyamira County Assembly and 4 others.* From the onset it is clear that the parties in these 2 cases are different from those in the current case . The prayers sought in the 2 Petitions were also different from what is being sought before this court. To submit that the application before Court is *res judicata* is a misdirection and I find that the application before court is not *res judicata* and this court has authority and ability to entertain it.

On the 3rd issue, the process leading to interdiction of the applicant has been explained. The applicant came to court to stop the process contending that it is flawed and amounts to double jeopardy. The process of disciplining a staff of a County Assembly is set out in the County Government Act 2012 which provides for the establishment of the County Public Service Boards and County Assembly Public Service Boards. These boards are responsible for hiring, disciplining and terminating services of employees serving in the Counties but after following due process.

Guidelines issued to Governors by the Transition Authority state that the staff if on secondment remain staffs of the Central Government. However, upon recruitment by the County Public Service Board they are governed by provisions of the County Public Service Human Resource Manual of May 2013.

Under S. D31 of the said manual, Procedure for interdiction is explained:-

**“(a) An officer may be interdicted where misconduct which is likely to lead to dismissal is reported or a report that an officer has been charged in criminal proceeding is received.**

**(b) If the case relates to a criminal charge, the officer is served with an interdiction letter. If the misconduct is one which can lead to dismissal but is not of criminal nature, the officer will be served with a show cause letter which shall also contain a communication or interdiction.”**

**(c) ---**

**(d) A County Public Officer who is interdicted shall receive half basic salary and full house allowance but other benefits shall be withheld by the authorized officer; provided that an officer on suspension shall be paid medical allowance or medical insurance premium remitted which ever in the case.**

**(e) If in any case an authorized officer is satisfied that the public interest requires that a County Public Officer should cease forthwith to exercise the powers and function of the County Public Office, the authorized office may interdict the County Public Officer from the exercise of those**

**powers and functions provided proceeding, which may lead to the public officer's dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against the County Public Officer.”**

It is apparent from these provisions what procedures need to be followed in disciplining a County Public Officer. The applicant rushed to court wanting this court to stop any further investigation in his conduct following the interdiction. It would be unfortunate if courts will be used to curtail due process. I do not find any procedure that the respondents have flouted by taking the necessary action against the applicant. They are paying him his ½ salary as the other processes continue. There is no bar to the Ethics and Anti Corruption Commission from doing its investigations as the internal discipline procedure continue so long as due process is followed. It is also therefore this court's finding that the applicant is not being subjected to double jeopardy and I therefore decline to stop any disciplinary procedures currently underway so long as all due process is adhered to. It therefore follows that the applicant cannot be dismissed by respondents unless all due process is followed and I order so.

On the issue of discrimination, I do not find any evidence laid before this court to show that the applicant has been discriminated against because of hailing from another County. That remains a mere allegation.

In conclusion, I decline to grant orders sought by the applicant. I direct that due process be adhered to and the applicant should not be victimized for seeking court's intervention. All due process in disciplining him should be adhered to. Those are the orders of this court.

**HELLEN WASILWA**

**JUDGE**

**24/7/2014**

**Appearances:-**

Sagwe for applicant present

Respondents absent

CC. Wamache