



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
INDUSTRIAL PETITION NO. 297 OF 2014

KISUMU COUNTY ASSEMBLY SERVICE BOARD..... 1ST PETITIONER
ANNE ATIENO ADUL..... 2ND PETITIONER
VERSUS

1. KISUMU COUNTY ASSEMBLY

PUBLIC SERVICE BOARD.....1ST RESPONDENT

2. COUNTY EXECUTIVE OF KISUMU..... 2ND RESPONDENT

3. ELIUD OWEN OJUOK..... 3RD RESPONDENT

4. HON. NICHOLAS STEVEN OKOLA..... 4TH RESPONDENT

5. ATTORNEY GENERAL..... 5TH RESPONDENT

JUDGMENT

On 21.10.14 the Petitioners came before the High Court Kisumu through the firm of Okongo Wandago and Company by way of Petition No. 22/14. They also filed an application under Certificate of Urgency through a Notice of Motion filed the same day seeking various orders. Their application was heard by Learned Judge Hon. E. Maina on the same day. She certified the application urgent and gave conservatory orders of injunction and prohibition in favour of the 2nd Petitioner as against the Respondents.

The orders were in the following terms:-

a. Pending the hearing and determination of the Application interpartes on the 24th October, 2014, and or further orders of this court, a conservatory order of injunction

and prohibition be issued and is hereby issued in favour of the 2nd Petitioner as against the 1st Respondent, its members and or officers from holding elections, electing and appointing whether permanently or in an acting capacity any person to the position and office of the Speaker of the County Assembly.

b. Pending the hearing and determination of this application interpartes on the 24th October 2014, a conservatory order of injunction and prohibition be issued and is hereby issued in favour of the 1st Petitioner as against the Respondents from suspending, dissolving, removing from office or in any other manner interfering with the Constitution and Membership of the Kisumu County Assembly Service Board and further from in any way obstructing, interfering and/or preventing it from carrying out its functions as provided under Section 12(7) of the County Government Act No 17 of 2012.

The application was then set down for hearing interpartes on 24.10.2014. When the application came for interpartes hearing on 24th October 2014, the 1st and 5th Respondents raised a preliminary objection whose gist was on the court's jurisdiction amongst other issues.

Upon hearing the Preliminary objection, the learned Judge made a Ruling referring this Petition to the Industrial Court. The interim orders remained in force and were to remain in force unless or until vacated by the Industrial court.

When the matter was transferred to the Industrial Court, it was registered as Petition No. 294/2014. The parties made their initial submissions on 5/11/14 and this court gave directions that the application be collapsed and that the Petition proceed for timely disposal of the matter. The conservatory order were also maintained. The Court also gave direction on timeliness to be followed by each party towards disposing of the petition.

By an application dated 13.11.14, brought through a Notice of Motion, the petitioner sought an order to amend their petition. This Application was allowed and subsequently the Respondents were allowed to file replies thereto/amendments to the reply to the Petition and further Supplementary Affidavits.

1) **The Petition**

Vide their amended Petition filed before this Court on 13.11.14, the Petitioners sought the following prayers:

a. A declaration that the 1st Respondent, through its purported committee of the Whole House, at a meeting convened on 15.10.2014, at 9.30 a.m, after the Assembly adjourned indefinitely on the 14/10/2014 following Standing Order Number 109 does not have power to suspend, dissolve and or carry out the statutory functions of the Petitioners as are by written law and the constitution bestowed.

b. A declaration that the purported Committee of the Whole House of the 1st Respondent does not have powers and or jurisdiction to constitute offices in the County

Assembly Service or to appoint or supervise office holders and/or to appoint the 2nd and 3rd Interested Parties and an order quashing and nullifying the said decision.

c. A declaration that the County Speaker of the 2nd Respondent and/or the 2nd Respondent, the County Government of Kisumu does not have jurisdiction and/or powers to constitute offices to the County Assembly Service and/or to deploy and/or appoint such office holders and/or the 2nd and 3rd Interested Parties and an order quashing and nullifying the decision as contained in the two letters dated 15.10.14.

d. An Order of injunction and prohibition be issued in favour of the 2nd Petitioner as against the 1st Respondent, its members and/or officers from entertaining and or debating any motion to remove the 2nd Petitioner through a process in violation of without due process and in breach of the right to a hearing.

e. A declaration that the appointment of the 3rd Respondent, Eliud Owen Ojuok as Acting Clerk and of the 4th Respondent, Nicholas Steven Okola as Assistant clerk on the 15.10.2014 by either the purported Committee of the Whole House of the 1st Respondent and/or the County Secretary of the 2nd Respondent, is unconstitutional, illegal, null and void and is a violation of the law and an order quashing the said purported appointments.

f. A declaration that 3rd and 4th Respondents who have purportedly been appointed in an acting capacity in violation of the Provisions of Section 64(1) as read with Section 13 of the County Governments Act, are not qualified to so act in those positions.

g. A declaration that in purporting to disband, dissolve and or suspend the 1st Petitioner and its membership as presently constituted, the 1st Respondent, through its purported Committee of the Whole House abused its constitutional and statutory mandate and powers, falsely assumed and usurped powers, is unconstitutional, unlawful and amounts to an act of impunity.

h. A declaration that the purported removal of the 1st Interested Party Nelco Masanya Sagwe as the interim Clerk and the 2nd Interested Party, Peter Odero Anditi, through deployment by the County Secretary, and his purported appointment of the 3rd and 4th Respondents as Acting Clerk and Assistant Clerk respectively, violates the provisions of Section 13(1) as read with Section 13(2)(b) and 72(2) of the County Governments Act and amounts to unfair administrative action and violates the Interested Party's constitutional right and fundamental freedom and the provisions of Article 47 of the Constitution of Kenya, 2010.

i. A declaration that the 1st Respondent, as a County Assembly can only perform the roles, duties and functions as spelt out under Article 185 of the Constitution of Kenya, 2010 and Section (89) of the County Government Act, and no other and that in purporting to carry out and perform the powers as purported in the resolutions dated 15.10.2014, it acted ultra vires and in the process violated the provisions of Article 47 of the Constitution of Kenya, 2010.

j. A declaration that the positions of Interim Clerk, County Assembly of Kisumu and Assistant Interim Clerk, County Assembly of Kisumu were not vacant at the time the 3rd

and 4th Respondents were purportedly appointed to act in the said positions and that this was an affront to the provisions of section 69(2) of the County Governments Acts.

k. A declaration that the purported redeployment of the 1st and 2nd Interested Parties to be Assistant Sub County Administrators, positions which do not exist in law was done without jurisdiction as the only statutory body which can move create and abolish offices and or to fill them, is the County Assembly Service Board and not the County Secretary and thus constituted a violation of the provisions of the law set out under Section 59, 60, 61, 62, 63, 64, 65, 66 and 69 of the County Governments Acts, and is thus illegal and unlawful.

l. A declaration that under the provisions of section 72 of the County Governments Act, the power to deploy a public officer from one department to another is vested in the County Public Service Board and not the county Secretary and that there is no such power to deploy an officer of the County Assembly Service Board by the Public Service Board which are all concurrent statutory public bodies.

m. An order of Judicial Review, in the nature of Certiorari to issue to bring to Court the decision of the 1st and 2nd Respondents, dated 15th October 2014 suspending the 1st Petitioner, the 1st and 2nd Interested Parties and the same be quashed forthwith.

n. An order of Judicial Review, in the nature of Prohibition, do issue to prohibit the 1st Respondent either by themselves, agents, servants and/or employees from acting on and usurping the functions of the 1st petitioner.

o. An order of Judicial Review, in the nature of Prohibition, do issue to prohibit the 1st Respondent either by themselves, agents, servants and/or employees carrying out a process to remove the 2nd Petitioner without complying with the law, the constitution due process, a hearing and without following the standing orders.

P1 A declaration that the proceedings to remove the Speaker from office under Article 178 and Section 11 of the County Governments Act and Standing No 58 of the Interim Standing Orders are quasi judicial in nature and are subject to the jurisdiction of the High Court under Article 165(3)(d) and (6) of the Constitution.

P2 A declaration that the proceedings and resolution for removal of the 2nd Petitioner before the Kisumu County Assembly conducted on the 21st October 2014 were held in violation of and disregard of the law and court orders and were thus null and void and of no effect and undermines the authority of the Court under Article 159 and 160 of the Constitution of Kenya.

P3 A declaration that the proceedings before the Kisumu County Assembly conducted on the 21st October 2014 for removal of the 2nd Petitioner as Speaker of the County Assembly gravely violated the provisions of Article 178, Sections 11 of the County Governments Act, Act Number 17 of 2012, the Principles of natural Justice and Standing Order No 58 of the Interim Standing Orders of the County Assemblies and is thus null and void.

P4 An order of certiorari to remove unto the court the proceedings and the resolutions of the Kisumu County Assembly dated 21st October 2014 purporting to remove the 2nd Petitioner from the office of the Speaker and quashing the same.

P5 An order declaring that the 2nd Petitioner remains the Speaker of the County Assembly of Kisumu unless and until lawfully removed as prescribed by the Constitution, written law and the Standing order.

1. A declaration that Section 11 of the County Governments Act and Standing Order No 58 of the Interim Standing Orders, County Assembly of Kisumu are inconsistent with the provisions of Articles 47, 38(3)(c), 50(1) and 236 (a) & (b) of the Constitution.

2. A declaration that the 2nd Petitioners fundamental rights and freedoms as contained in the bill of rights, Articles 25 (a), (c), 27 (1)(2), 28, 29(c) (d) (f), 38(3) (c), 47, 50 (1) (2), 41, and the rights given under Article 236 (a) & (b) of the Constitution have been violated, infringed and threatened with continued violations and thus she deserved to be protected under the constitution.

3. A declaration that the members of the 1st Respondent, the 1st Respondent, 2nd Respondent, the 3rd Respondent, 4th Respondent and 5th Respondent, in view of the acts complained of in relation to the acts of violation of rights and contravention of the law, as against the petitioners, have contravened the Constitution of Kenya and written laws.

4. An order declaring as illegal, unconstitutional, null and void the proceedings of the County Assembly of Kisumu and the resolutions, motions, debates held between 15.10.2014, up to and including the 11.11.2014 and in deed any other proceedings of the County Assembly presided over by Speaker who were never elected as contemplated under Article 178(1) and 178(2) (b) of the Constitution as having been so conducted in violation of the law.

5. A declaration that the proceedings and resolution for removal of the Speaker from office, before the Kisumu County Assembly conducted on the 21st October, 2014 were held in violation of Article 38(3)(c), 47, 50(1), 196 (1) & 236 (a) & (b), of the Constitution and disregard of the law and court orders and were thus null and void and of no effect and undermines the supremacy of the Constitution of Kenya over all persons and state organs and undermines the authority of the court under Article 159 and 160 of the Constitution of Kenya.

6. A declaration that the proceedings before the Kisumu County Assembly conducted on the 21st October 2014 for removal of the Speaker of the County Assembly gravely violated the provisions of Article 178, sections 11 of the County Governments Act now sought to be declared unconstitutional, the principles of natural justice and Standing Order No 58 of the Interim Standing Orders and contravened the rights under Articles 47, 38(3)(c) and 50(1) and 236 (b) of the Constitution and is thus null and void.

7. A declaration that the proceedings to censure the 2nd Petitioner, as Speaker, County Assembly of Kisumu conducted on the 16th October, 2014 violated the 1st, the 2nd

Petitioner's fundamental right to a hearing, natural justice and violated Standing order No. 83(1) of the Interim Standing Orders.

8. An Order of certiorari to remove unto the court the proceedings and the resolution of the Kisumu County Assembly dated 15/10/14, 16/10/14, 21/10/14 and thereafter so conducted without being presided over by the Speakers elected as contemplated under Article 178(1) and 178(2) (b) of the Constitution until the Assembly reconvenes and the same be quashed.

9. An order declaring that the 2nd Petitioner, remains the Speaker of the County Assembly of Kisumu, elected and as contemplated under Article 178(1) of the Constitution, unless and until lawfully removed as prescribed by the Constitution.

10. A declaration that the 2nd Petitioner does not hold the office of Speaker to which office she was elected pursuant to Article 178(1) of the Constitution as read with Section 21(1) of the Elections Act, at the pleasure of the members of the County Assembly of Kisumu.

11. An order declaring as unconstitutional, illegal, null and void the resolutions of County Assembly of Kisumu dated 22nd October 2014 purporting to appoint and swear in the 5th Respondent, Gabriel Ochieng as Acting Speaker, as it contravened the provisions of Article 178(2) of the Constitution of Kenya and was done in violation of the constitution, written law and Standing Orders.

3. An Order of compensation against the acts of violation of rights complained of in this Petition.2.

2. Why the various parties are enjoined in this Petitioner

The Petitioner has submitted before this court that the 1st Respondent is a Constitutional body established under Chapter 11 of the Constitution that establishes the principle of devolved government for Kisumu County. It is therefore a state organ established under the Constitution. The 2nd Respondent is enjoined in this Petition because the 2nd Respondent is a State Organ created under Article 176 of the Constitution and as read with the County Government Act and the action of the County Secretary where office is created under Section 44 of the County Government Act have been wanting.

The 3rd Respondent on the other hand is purported to have been appointed by the County Secretary, an officer of the 2nd Respondent to perform the function and office of clerk, to the County Assembly as contemplated under Section 13 of the County Government Act and in violation of the law and without jurisdiction and in contravention of the statutory requirement of educational qualification, experience, character and suitability.

The 4th Respondent is said to have been appointed by the County Secretary under similar circumstances like the 3rd Respondent.

The 5th Respondent is an elected member of the Kisumu County Assembly Pursuant to Article 177(1) of the Constitution and is purported to have been appointed otherwise than

through the process of election contemplated under Article 178(2)(c) the Constitution by the County Assembly of Kisumu on 22nd October 2014 as Acting Speaker, County Assembly of Kisumu. He now purports to be titular and constitutional head of the County Assembly of Kisumu and now performs the functions contemplated under Article 178 of the Constitution in respect of the Assembly County of the illegal acts and resolutions passed on 15th October 2014 and 22nd October 2014 now complained of in this petition.

The 6th Respondent – the A.G is enjoined by virtue of being the Principal Legal Advisor to the government and particularly in relation to his duty to promote, protect, uphold the rule of law and defend the public interest, a duty the Petitioner avers he has failed to perform in relation to the ongoing at the County Assembly of Kisumu in respect of the issues complained of in this Petition.

The 2nd Petitioner avers that she has brought this Petition in defense of the Constitution of Kenya which she alleges in being contravened and that pursuant to Article 258(1) of the Constitution, she seizes the right to commence these court proceedings and further states that the Provision of the Chapter or bill of rights on fundamental rights and freedoms and respect of the rule of Law as a Constitutional obligation of every state organ and state officer is not being observed by the State Organ, in this case the County Assembly of Kisumu and its members.

The 2nd Petitioner further avers that the office of the Speaker County Assembly, Deputy Speaker, County Assembly and Clerk County Assembly are all important constitutional and statutory offices and enjoy the protection under Article 236 of the Constitution.

3. Contraventions of the Constitution

The 2nd Petitioner avers in her Petition that the Constitution of Kenya is being contravened by virtue of events at the County Assembly of Kenya. This she says is as captured in the verbatim report of the County Assembly proceedings on 14th October 2014, 15th October 2014, 16th October 2014, 21st October 2014 and 22nd October 2014 and thereafter shows that the County Assembly of Kisumu has degenerated into a grave disorder and the proceedings are being conducted in contravention of the constitution and the power donated to the Assembly as a state organ to exercise its sovereign power of the people of Kenya, Contrary to Article 1, 3(a) and (b) in violation of the Constitution, written law and the standing order.

She avers that the supremacy of the Constitution as enshrined under Article 2(1), (2) and (4) and the obligation of every Kenyan to respect and uphold and defend the Constitution as enshrined under Article 3(1) has not been observed in relation to the circumstances obtaining at the County Assembly of Kisumu since 14th October 2014, 15/10/2014, 16/10/14, 21/10/14, 23/10/14, 11/11/14 and thereafter as proceedings the Assembly is purporting to have without the Speaker, elected as contemplated under Article 178 of the Constitution and Section 21 of the Elections Act.

The 2nd Petitioner has also averred that in relation to the on goings at the County Assembly of Kisumu as reported in the verbatim reports, the national values and principles of governance as provided for under Article 10, have not been observed by the County Assembly of Kisumu, its members and staff and the County Assembly is now operating beyond the stipulations of

the Constitution of Kenya and written law. She avers that her fundamental rights and freedoms have been contravened by the action of the County Assembly and its members which should be at the forefront in recognizing the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

4. Petitioner's evidence

The Petition is supported by various Affidavits amongst them the Affidavit of one Dennis Kongo, a freelance photo journalist and news correspondent sworn on 11.12.14 deponing that he was at the County Assembly of Kisumu on 21.10.14 and on 11.11.2014 and captured what transpired as impeachment proceedings of the Speaker of the County Assembly and an incident which took place at the Assembly where several members of the Assembly majority of their female physically and in the most inhumane and degrading manner manhandled the County Assembly Speaker Anne Atieno Adul. The said Dennis Okongo produced before Court the two DVD's which he captured marked DK1 of 21-10-2014 and DK2 of 11th November 2014.

Another Affidavit in support of the Petition is the one dated 11.12.14 sworn by Anne Atieno Adul, the 2nd Petitioner herein where she depones that she never went to the County Assembly of Kisumu with rowdy youths carrying placards and/or chantings as alleged in Affidavits of various deponents dated 26th November, 2014. She further avers that despite the denials by the said deponents that they never committed acts complained of on 11.11.14, the said events did occur as captured in the DVD's annexed to the Affidavit of Dennis Okongo. It is her averment that on 11.11.14, at around 2 p.m, she went to the office expecting to carry out her duties but she found her office locked and she was in the company of her official driver Nicholas Ayoro and security detail, Philip Odidi and was in her official car – KBG 246 C. Her office was locked and had been locked since 15/10/14 except for 27th October, 2014.

Pildas Odidi – the 2nd Petitioner security detail has also sworn an Affidavit dated 11.12.2014, detailing what transpired on 11.11.2014 at 2 p.m when he was with 2nd Petitioner and that 2nd Petitioner was treated in an inhumane manner and insulted by several women, members of the County Assembly namely Lydia Atieno Ndege, Jane Atieno Omolo, Nereah Akoth Okombo, Petronilla Achieng Omondi and a male member Joseph Onyango Otiende.

In another Affidavit by the same Pildas Odidi sworn on 29.10.14, he deponed that on 15.10.14 at 7.30 a.m he escorted the 2nd Petitioner to her office and found the office locked. He also deponed that on 21/10/14 he went with her to the Assembly but this time found the main gate locked and they found a lady security guard who rudely notified the Speaker to go back as she had been instructed by one Hezbon Odhiambo Okelo a Sergeant at Arms not to allow her to the office. On 22.10.14, he stated that they were also denied access to the office and also on 28.10.14.

The Petitioner's evidence is also in form of a Supporting Affidavit sworn by one James Okoth Dianga a member of the County Assembly of Kisumu sworn on 29.10.14 where he depones on the sequence of events that occurred before the purported impeachment of the 2nd Petitioner which events were laced with irregularities and breach of the law and the Standing orders.

5. Respondents Evidence

In response to this Petition, the 2nd Respondents filed their grounds of opposition on 24.10.14 through the firm of Otieno, Yogo, Ojuro and Company Advocates. The 3rd and 4th Respondents also filed their grounds of opposition on the same date – 24.10.14 through the firm of Olel Onyango, Ingutiah and Company Advocates.

One Eliud Owen Ojuok who is also the 3rd Respondent herein filed a Replying Affidavit, sworn on 24.10.14 and filed through the firm of Rodi Orege and Company Advocates.

The 5th Respondent Gabriel Ochieng also filed a Replying Affidavit sworn on 24.10.14 through the firm of Rodi Orege and Company Advocates. In their Replying Affidavits, Eliud Ojuok deponed that he is a clerk to Kisumu County Assembly and therefore competent to swear the said Affidavit. He averred that the 2nd Respondent was impeached on 21st October 2014 by the County Assembly Members Pursuant to Section 11 of the County Government Act 2012 and Standing Order No. 58 of the interim County Assembly Standing Order. He annexed a copy of the hausard reflecting the same and marked as EOO-1. It is therefore his contention that the Petitioner is not competent to swear the Supplementary Affidavit attached to the amended application dated 24th October 2014 either on her behalf or on behalf of the Kisumu County Assembly Service Board as she is no longer the Speaker of the County Assembly of Kisumu. He further depones that the 2nd Petitioner was never locked out of her office as alleged but was impeached on 21st October 2014 upon being notified of the same and she appeared in person but declined to enter the Assembly – E002 as copies of the notices to her and the reminder thereof.

He avers that the Assembly was indefinitely adjourned as per annexures 8 and there could not be a resumption of the Assembly on 21st October 2014 – which the deponent avers is a clear contradiction by the 2nd Petitioner.

The 3rd Respondent also avers in this Affidavit that the same clerk to the Kisumu County Assembly – the 1st Interested Party was deployed to perform duties of Assistant Sub-county Administration for Kisumu West as per Annex E003. He avers that the issues of impeachment of the Speaker – 2nd Petitioner are overtaken by events and that operations of the Assembly have not stalled contrary to the allegations of Para 34 of the Petitioner's Supporting Affidavit.

On allegations that the 3rd respondent was not qualified to be clerk to the Assembly he has deponed in a Supplementary Affidavit dated 30.10.14 that he is indeed qualified as he holds an LL.B degree from the University of Nairobi and annexed E002 – copies of relevant documents being a letter from the Dean School of Law Kisumu, indicating that he has cleared his undergraduate studies and is awaiting graduation. Also attached are his undergraduate transcripts from 1st to 4th year but the transcript for 4 year indicating that he has to resist the exams as the courses were taken.

In his Replying Affidavit of 28/10/14 Gabriel Ochieng, the 5th Respondent herein deponed that on 14.10.14 the Speaker of the Assembly left without adjourning the session as per the hausard Appendix G01.

He further avers that on 15th October 2014 the members of staff of the Assembly were ready at the Assembly to proceed with the days activities just to find the mace missing and even reported the same to the police – APP G02. He avers that the Assembly met informally and agreed unanimously that he chair the meeting and they resolved to recover the mace on 16.10.14. The members also decided to discuss the conduct of the Speaker. On 21.10.14, the Assembly met and elected another member, Hon Ombogo to chair the proceedings of the Assembly as Acting Speaker. A motion for removal of the Speaker was also presented to the Assembly as by law. During the proceedings Mr. James Omollo moved a motion to allow 2nd Petitioner to defend herself but she never appeared. It is that the 2nd Petitioner was impeached by a motion supported by more than 75% of the members.

3rd and 4th Respondents filed a Replying Affidavit to the amended Notice of Motion and Petition dated 24.10.14 on 29.10.14. The Affidavit was also sworn by the 3rd Respondent Eliud Ojuok and 4th Respondent Nicholas Okola. They deponed that they were former employees of Kisumu County Council and were deployed by the County Government of Kisumu to work at the Kisumu County Assembly as per Exh E001 (a) and (b) as Ag Clerk and Ag Assistant Clerk to the Assembly. They further averred that the previous Ag Clerk and his Assistant (Interested Parties) were redeployed elsewhere. That this deployment was made by the Committee of the Whole House as opposed to the 1st Petitioner who has been unable to carry out its function to employ anyone due to their own internal issues and a court order in Kisumu Industrial Court Case No. 60 of 2014. They admit receiving a notice of Motion by one James Omollo on 17.10.14 addressed to the Speaker giving her reasons for proceedings to remove her. They forward it to the house for debate. They denied locking the Speaker's office. They also depone that the Speaker was served with this Notice on 17/10/14 and she had ample time to prepare a response and appear before the house on 21.10.14 at 2.30 p.m to defend herself. On 21.10.14, at 12 noon she was sent an email and a text to remind her to appear before the whole house. They deny that the 2nd Petitioner was denied entry in the Assembly on 21.10.14, as captured in annex – AAA – 5.

It is their position that when the 2nd Petitioner arrived at the Assembly on 21.10.14, the deponents and the Sgt at Arms went to receive her but she declined to come in and this is when the Assembly proceeded to impeach her. They also deny receiving a court order on 21.10.14 as the Petitioner opted to serve the former office holders the Interested Party herein. Their position is that the impeachment was above board and that there are no constitutional issues, being raised and so they want the Petition to be dismissed.

Other Affidavits relied upon by the Respondents are those filed on 31.12.14 by the 3rd Respondent and one filed by Gabriel Ochieng where they reiterate contents of their previous Affidavits.

6. Submissions by the Petitioners

As per the timelines given by this court, the Parties filed their respective submissions. The Petitioner has submitted that various Provisions of the Constitution have been infringed upon amongst them Article 3, 10, 22, 23, 25(a), 27(1) and (2), 28, 29, 31, 38(3 & c), 41, 47, 50(1), 165, 236, 258(1) and 175 on separation of powers. They submitted that it was wrong in recognition of the principal of separation of powers for the County Assembly the 1st

Respondent herein to assume the roles of the 1st Petitioner, the County Assembly of Kisumu as it did on 15.10.2014 and passed resolution on humans resources issues and seeking the same to be implemented by the County Assembly – the 2nd Respondent on their behalf and in the process eliminating and ignoring the power of the 1st Petitioner, the County Assembly Service Board. The Petitioner submitted that the Assembly in making resolutions against the 1st Petitioner, an independent statutory body, did so in violation of Article 47 of the Constitution and this action infringed on the rights of the employees of the 1st Petitioner. It is their submission therefore that the County Assembly cannot operate outside and/or derogate the bill of rights in carrying out the Constitutional or Statutory mandate and cannot purport to exercise a power which it does not have or possess and neither can it purport, through resolutions passed at informal meetings, to exercise non-existent power in a manner that violates human rights and fundamental freedoms, and without regard to Provision of the Constitution.

The Petitioner has submitted that the 1st Petitioner is a statutory body established pursuant to the Provision of Section 12 of the (County Government Act No 17 of 2012). That is a body corporate with perpetual succession and a common seal. It is this body that has power to constitute offices within the County Assembly Service and is also responsible for appointing and supervising office holders including the Clerk and Assistant Clerk of the County Assembly. The Petitioner therefore submitted that the 2nd Respondent, the County Executive of Kisumu has no mandate or role in the appointment or removal of the clerk and Assistant clerk of the County Assembly of Kisumu whether on a permanent or acting basis. It is therefore their position that the 1st and 2nd Interested Parties could not be removed as members of the County Assembly Service Board as was done on 15/10/14 without reasons, notice or due process as envisaged under Section 125 of County Government Act 2012.

The Petitioners have also submitted that the 5th Respondent could not act as officer of the County Assembly by communicating on behalf of the County Assembly as this is prohibited under Section 9(2) of the County Government Act. Such duties are only carried out by the office of the clerk as created under Section 13 of the County Government Act 2012.

The Petitioner cited *Elizabeth Nzissa Masaku V County Government of Nakuru and Another (2014) eKLR* where Learned J – Ongaya held that the County Assembly did not have powers to make recommendation against the Petitioner in purporting to exercise disciplinary power vested by the Constitution and statutes in the Public Service Commission and the County Public Service Board.

The 2nd Petitioner submitted that her purported removal as County Assembly Speaker was done in Contravention of the provision of the law and without being accorded a reasonable opportunity to respond to any allegations against her.

It is also the 2nd Petitioner's submission that having been elected under Article 38(3) of the Constitution as a political right, an obligation was placed on the County Assembly to provide to the public information under Article 35 of the Constitution, reasons justifying removal from office which information was never availed to the public through an open public hearing. The Petitioners have submitted that Section 11 of the County Government Act and Standing Order No 58 are unconstitutional for contravening the provisions of Article 21(1) of

the Constitution and should be declared so on the process leading to the impeachment of the 2nd Petitioner. The Petitioner has submitted that the proceedings of 21st October 2014 were presided upon by one Samuel Ombogo, a member of the County Assembly and not the Deputy Speaker hence a person appointed and selected contrary to the provisions of Article 178(1) and 178(2) of the Constitution and 59(4) and 13 of the County Government Act. It is therefore the Petitioner's submission that the whole process was illegal and undertaken without following the law and in violation of the constitution and cannot stand. It is also the Petitioner's position that on 21.10.14 the Petitioners moved to court in these proceeding and secured conservatory orders which were extracted and served on the 3rd Respondent, 4th Respondent and 5th Respondent but who in contempt of the said order willfully disobeyed without notice the law and the standing order. It is therefore the Petitioners' submission that the proceeding of the Assembly were null and void and of no effect and undermines the authority of the court under Article 159 and 160 of the Constitution.

On the Notice of Motion to remove the 2nd Petitioner, the Petitioner has submitted that it offends Section 11(2) of the County Government Act as it was signed by one member and not as 1/3rd of 49 members, and so it could not form the basis of removal of a person elected pursuant to Article 178(1) of the constitution as read with Section 21(1) of the Election Act.

Further, the Petitioner submits that the notice was never delivered to her and nor was it sufficient.

The Petitioner has also submitted that there is no provision in law for election of an Ag Speaker. The Petitioner submitted that the Deputy Speaker was never allowed to preside over the proceeding of the Assembly between 1st November 2014 to 21st November 2014 and she has not been removed from office.

7. Submission of the Respondents

The 1st and 5th Respondents filed their written submissions on 10.12.14 through their counsel Rodi Orege and Company Advocates. They submitted that the 2nd Petitioner was legally impeached by the 1st Respondent after being accorded a chance to be heard on accusations levelled against her, but declining to appear. They also submitted that no rights of the parties in the petition were infringed upon as claimed by the 2nd Petitioner as all Provision of the law were observed in dealing with the parties.

Other submissions were factual in nature where the Respondents submitted that the order of court of 21.10.14 was not served on the respondents and was only stumbled upon on 23.10.14.

The 2nd Respondent submitted that the 1st Petitioner is not a person who can lounge a petition under Article 22 of the Constitution. They cited J. Mumbi Ngugi's *County Government of Meru V The Ethics and Anti-corruption Commission (2014) eKLR* where the learned Judge held as such.

The 3rd and 4th Respondents also submitted that the 1st Petitioner does not have locus to sue alleging violation of its fundamental rights by the respondents. Other submissions overlap those already submitted by the other respondents.

9. Issues for determination

Having considered all the averments of the parties and upon consideration of their evidence through various Affidavits and their written submissions, the issues for determination are as follows;-

1. *Whether the 1st Petitioner has locus to sue alleging violation of her fundamental rights under Article 22 of the Constitution.*
2. *Whether the sitting of the County Assembly of Kisumu on 14th and 16th October 2014 were within the confines of the law.*
3. *Whether the 2nd Petitioner was legally, lawfully and constitutionally removed or impeached on 21/10/14.*
4. *Whether constitutional rights of the Petitioners were infringed upon by the action of the respondents.*
5. *Whether Section 11 of the County Government Act and Standing Order No 58, 47 63 and 83 are unconstitutional as infringing Article 21(1) of the Constitution.*
6. *What remedies can be granted on the circumstances.*

On the 1st issue, the 1st Petitioner is the Kisumu County Assembly Service Board. The County Assembly Service Board, CASB is established under Section 12 of the County Government Act 2012. Under Section 12(2)

“The County Assembly Service Board, shall be a body corporate with perpetual succession and a common seal”. The section proceeds to list the membership and qualifications of the CASB. As a body corporate with a common seal, the CASB has power to sue and to be sued. The Respondents have submitted that the 1st Petitioner herein did not have locus to sue in this matter under Article 22 of the Constitution not being a person.

Article 22 of the Constitution provides that

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened”.

Article 22 also envisages a situation where other than a person acting in their own interest, the person can act for another, or as a member or in the interest of a class or group of persons and also in the public interest or as an association acting in the interest of one or more of its members.

Article 260 of the Constitution defines a person as follows:

“Person” includes a company association or other body of persons whether incorporated or unincorporated.”

It therefore follows that a person goes beyond a natural human being and includes corporate bodies. Under Article 22(3) of the Constitution the Chief Justice has in exercise of the powers thereto made the “the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 – commonly referred to as the “Mutunga Rules”

Under these Rules a person is also defined as follows:-

“ “Person” includes an individual organization, company, association or any other body of persons whether incorporated or unincorporated”.

It has been submitted by the Respondents that the 1st Petitioner not being a natural person does not have locus to bring a Petition claiming that Constitutional rights have been infringed. The Respondents cited *County Government of Meru Vs The Ethics and Anti-corruption Commission (2014) eKLR* in making this submission. However, going by the letter of the law and in recognition of the fact that the 1st Respondent is a body corporate who also have members with rights, it is my finding that the 1st Petitioner has locus to bring this Petition and that submission is without merit.

On the second issue, from the evidence adduced, on the 14th of October, 2014, the committee of the whole house held a meeting at 9.30 a.m several resolutions were arrived at including a resolution to suspend the interim clerk and the Assistant Clerk and appointment of a new Ag Clerk. Other resolutions included a censor motion to discuss the conduct of the Speaker and probing of the absence of the Deputy Speaker from the house. The Speaker – the 2nd Petitioner chaired the session to the end. The house rose at 2.58 p.m after the members shouted at the Speaker to go away after she overruled a member who wanted to introduce a motion unprocedurally.

There seems to have been no sitting on 15/10/14 or if there was any sitting, the hansard report was not brought to the attention of the court.

On 16th October 2014 the hansard report records that the house sat from 5.10 p.m. One Samuel Ombogo was now the Speaker. It is not indicated how he was elected Speaker but the proceedings are recorded.

During the proceeding Appendix GO at Pg 28, one MCA, Kelvin Odhiambo rose to raise a notice of motion which he stated was a motion of censor but which was not put on the order paper. He proceeded to explain that the Motion was to censor the Speaker. The Censor Motion proceeded where the Speaker (2nd Petitioner) was censored for various acts of misconduct. The house rose at 8.35 p.m and was to stand adjourned until 23.10.2014 at 2.30 p.m

As indicated above, the house sat on 14.10.2014 in the presence of the elected Speaker the 2nd Petitioner. This was within the confines of the law. However on 16.10.14 when the house sat, there was no mention of the Speaker (2nd Petitioner) nor her deputy or why someone else

had to be the Speaker nor how the new person Samuel Ombogo was elected to be the Speaker. Under Article 178(1) of the Constitution;

“Each County Assembly shall have a Speaker elected by the County Assembly from among persons who are not members of the Assembly”

Under Article 178(2) –

“A sitting of the County Assembly shall be presided over by

a) The Speaker of the Assembly or

b) In the absence of the Speaker, another member of the Assembly elected by the Assembly”.

The Procedure if any followed in electing the said Samuel Ombogo as Speaker which gave him mandate to preside over the proceedings of the Assembly on 16.10.14 is not explained. It is therefore the finding of this court that the sittings of the Assembly on 16.10.14 were not within the confines of the law if any. The Election Act - 2011 at Section 21 also details out how such elections are to be held as per the 1st schedule and the Standing Orders of the County Assembly. There is no indication that this was adhered to. In his own Affidavit, the 5th Respondent also denies being elected as Speaker.

On the 3rd issue, the law on elections and removal of a Speaker of a County Assembly is set out in the Elections Act, the Constitution and the County Government Act. Section 11 of the County Government Act 2012 provides as follows:-

“1) A Speaker of a County Assembly may be removed from office by the County Assembly through a resolution supported by not less than seventy five percent of all the members of the County Assembly.

2. A Notice of the intention to move a motion for a resolution to remove the Speaker shall be given in writing to the clerk of the County Assembly, signed by at least one third of all the members of the County Assembly stating the grounds for removal.

3. A Motion for a resolution to remove the Speaker shall be presided over by a member of the County Assembly elected under Section 9(4).

4. Before the debate and voting on a Motion under Subsection (3), the Speaker shall be accorded an opportunity to respond to the allegations on the floor of the County Assembly”

In the case of the 2nd Petitioner herein, the proceeding to impeach her took place on 21.10.14. They were presided over by Samuel Ombogo who again, this court is not told how he was elected as Speaker. No proceeding of the elections were adduced before this court. The persons who were Clerk to the Assembly Owen Ojuok who is the 3rd Respondent also has his position waiting. To start with the Speaker, he has already stated in his Affidavit, that he was not elected as Speaker. He stated that the members informally decided to have him chair the proceedings.

As for the 3rd Respondents, his position as clerk is also precarious, his qualifications have been brought into question. His appointment is also in question as he was appointed by an unauthorized person being the County Executive in contravention of issue no 1 discussed above on separation of powers.

In a related before the Industrial Court at Kisumu – Pet No. 286/2014 this Court delivered a Ruling on 26.11.14 where the 3rd respondent was found guilty of contempt of Court by purporting to act as Clerk of the County Assembly against this court's order.

As per his qualification, he was a law student who had not even graduated from the University. His transcript of 4th year indicated that he had done less papers, and there was need for a resit.

Section 13(2) of the County Government Act 2012 provides that

“A person shall not be qualified for appointment as a Clerk of the County Assembly unless such person.

a) Is a Citizen of Kenya

b) Holds a degree from a University recognized in Kenya or its equivalent.

c) Has had at least five years relevant professional experience

d) Meets the requirement of leadership and integrity”

The 3rd Respondent did not meet these qualifications. He didn't have a degree as he had not even completed his studies nor graduated. Assuming he had the degree though not graduated, he had not had relevant professional experience of 5 years as envisaged by law. It is therefore this court's finding that the meeting of the Assembly that convened on 21.10.14 to impeach the 2nd Petitioner was improperly constituted and presided over by stranger in form of a Speaker and Clerk.

The law envisages that a notice was also to be served on the 2nd Petitioner before her removal and the notice was to be signed by at least a 3rd of all the members of the County Assembly. The notice that has been produced in court and that which was sent to the 2nd Petitioner's email on 21.10.14 was signed, only by one person one Hon Nereah Okombo – MCA – Manyatta “B”. This was therefore in contravention of the law and makes the notice inadequate and invalid. The question of whether this notice was served on the 2nd Petitioner is also raised and it is not controverted.

The need for a hearing or due process is also envisaged under Section 11 of County Government Act 2012 before the impeachment process. The 1st real encounter of the 2nd Petitioner with the motion was on 21.10.14 through an email which is not denied by the 2nd Petitioner.

Under the law, the notice should be given at least 48 hours before the Motion is debated. This right was not accorded to the Petitioner. This was also in contravention of Article 50(1) of the Constitution which provides for a right to be heard.

Assuming that the right motion had been given and served on 2nd Petitioner, her right to defend herself on the floor of the house was also flouted. Exh DK1 and DK2 produced by Denis Kongo photojournalist is proof that the 2nd Petitioner was denied entry into the Assembly on the day the motion was debated and she was abused, insulted, ridiculed by MCA to the point of great embarrassment.

The decision to impeach was also arrived at after 6 p.m on 21.10.14 after the High Court had already stopped the process.

It is therefore the finding of this court that the 2nd Petitioner was not legally, lawfully or constitutionally removed as she was not given due process and the Assembly was presided over by strangers making any decision arrived at annulity.

On 4th issue, this court has already discussed the illegality meted on the Petitioners. These illegalities were an infringement upon her rights as provided for under Article 47 of the Constitution on unfair administrative action, Article 10 by being treated in an inhuman manner, Article 41, on unfair labour practices amongst many other provision or Regulations as enumerated above.

The interested Parties were also unfairly treated by being removed as Clerk and Deputy Clerk without being accorded any hearing and by being deployed by unqualified persons.

On issue no 5 – Section 11 of County Government Act provides for the procedure to be adopted before the removal of the Speaker from office. The procedure is as follows:

"(1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.

(2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.

(3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9 (4).

(4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly".

Article 21(1) of the Constitution on the other hand deals with the manner in which the rights and fundamental freedoms are to be implemented. These rights shall be fulfilled by the state and every state organ with respect and the organ shall protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

The Petitioners submitted that Section 11 of County Government Act and Standing Order No 58 are unconstitutional vis a vis Article 21(1) of the Constitution.

The Petitioners have not demonstrated the unconstitutionality of Section 11 of County Government Act in as far as Article 21(1) of the Constitution stands. Section 11 of County Industrial Petition 297 of 2014 | Kenya Law Reports 2015

Government Act is very elaborate on the procedure for removal of Speaker of the County Assembly and the procedure includes subsection to due process which is envisaged under the Constitution. It is therefore this Court's finding that Section 11 of the County Government Act 2012 is not unconstitutional as submitted.

The Petitioner sought various orders and having discussed as above, I find for the Petitioner and enter Judgment for the Petitioners against the Respondents as follows:-

- 1. A declaration that the 1st Respondent through its purported committee of the whole House does not have power to suspend, dissolve or carry out the statutory functions of the 1st Respondent except as bestowed by law and the Constitution.**
- 2. A declaration that the purported committee of the whole House of 1st Respondent does not have powers and/or jurisdiction to constitute offices in the County Assembly Service Board or to appoint or supervise office holder and a decision made by the 1st Respondent in this respect to appoint or deploy clerk or Deputy clerk of the Assembly is hereby quashed and declared null and void.**
- 3. A declaration that the proceedings and resolution for removal of the 2nd Respondent before the Kisumu County Assembly conducted on 21.10.14 were held in violation of and disregard of the law and court order and were thus null and void and of no effect and undermines the authority of the court under Article 159 and 160 of the Constitution.**
- 4. A declaration that the proceedings before the Kisumu County Assembly conducted on the 21st October 2014 for removal of the 2nd Respondent as Speaker of the County Assembly gravely violated the provisions of Article 178 of the constitution, Section 11 of the County Government Act 2012, principles of natural justice and is thus null and void.**
- 5. An order of certiorari to remove into the court the proceedings and resolution of the Kisumu County Assembly dated 21.10.14 purporting to remove the 2nd Respondent from the office of Speaker and quailing the same.**
- 6. A declaration that the 2nd Respondent remains the Speaker of the County Assembly of Kisumu unless and until lawfully removed as prescribed by the constitution, written law and the Standing Orders.**
- 7. A declaration that the County Secretary of the 2nd Respondent and/or the 2nd Respondent, the County Government of Kisumu does not have jurisdiction and/or power to constitute offices of the County Assembly Service and/or to deploy and/or appoint such office holder and/or the 2nd and 3rd Interested Parties and order quashing and nulling the decision to do so contained in the two letters dated 15.10.14.**
- 8. A declaration that the appointment of the 3rd Respondent Eliud Owen Ojuok as Ag Clerk and the 4th Respondent, Nicholas Steven Okola as Assistant clerk on 15.10.14, either by the purported committee of the whole house of the 1st Respondent and/or the County Secretary of the 2nd Respondent is unconstitutional, illegal, null and void and a**

violation of the law and principle of separation of powers and an order quashing the said purported appointments.

9. A declaration that the 3rd Respondent who has purportedly been appointed in an Ag capacity in violation of Section 64(1) and (2) as read with Section 13 of the CGA 2012 is not qualified to so act in these positions.

10. A declaration that in purporting to disband, dissolve and/or suspend the 1st Petitioner and its membership as presently constituted, the 1st Respondent through its purported committee of the whole House abused its constitutional and statutory mandate and powers falsely assumed and usurped powers in unconstitutional, unlawful manner and amounts to an act of impunity.

11. A declaration that the 1st Respondent, as a County Assembly can only perform the roles and duties and functions as spelt out under Article 185 of the Constitution of Kenya and Section 8(1) of the County Government Act 2012 and that in purporting to carry out and perform the powers as purported in the resolution dated 15.10.14, acted *ultra vires* and in the process violated the provision of Article 47 of the Constitution of Kenya 2010.

12. A declaration that the 2nd Petitioner's fundamental rights and freedoms as contained in the bill of rights Articles 25(a), (c), 27(1) (2), 28, 29(c) (d), (f) 38 (3) (c), 47, 50(1) (2), 41 and rights given under Article 236(a) and (b) of the Constitution were infringed and threatened with continued violations and she thus deserved protection under the constitution.

13. A declaration that members of the 1st Respondent, and other respondents in view of the acts complained of in relation to acts of violation of rights and contravention of the law against the petitioner, have contravened the constitution and the written laws.

14. A declaration that the proceedings to censor the 2nd Petitioner as Speaker, County Assembly of Kisumu conducted on 16.10.14 violated the 2nd Petitioner's fundamental right to a hearing, natural justice and violated Standing Order No 83(1) of the Interim Standing Orders and the same is hereby quashed.

15. An order of compensation against the acts of violation of rights complained in the proceedings in favour of the 2nd Petitioner.

16. Costs of these proceedings shall be borne by the Respondents.

HELLEN WASILWA

12/1/2015

JUDGE

Appearances:-

Aron for Petitioner & Interested Parties present

Rodi for 1st and 5th Respondents present

Olel for 3rd and 4th Respondents present

Okeyo for 2nd Respondent h/b P.J Otieno present

Langat for A.G present



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