



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. E053 OF 2021**

**MWITA JOHN DAVID**

**JOBANDO LARRY NEVILE**

**PHILIP OUMA ODERO**

**MUSA OLWALO.....PETITIONERS/APPLICANT**

**VERSUS**

**MIGORI COUNTY PUBLIC SERVICE BOARD...1<sup>ST</sup> RESPONDENT**

**MIGORI COUNTY SECRETARY .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before court is an application dated 17<sup>th</sup> September, 2021 and filed on 20<sup>th</sup> September, 2021. The Applicants seek orders that:

i. Spent

ii. Spent

iii. Pending the hearing and determination of the petition herein, a conservatory order do issue to stay the implementation of the 1<sup>st</sup> Respondent's letter dated 6<sup>th</sup> September, 2021 that deemed the services of the Petitioners as Municipal Managers of the County Government of Migori dismissed on 28<sup>th</sup> March, 2019 by operation of the Urban Areas and Cities Act, 2019.

iv. An order that costs of and occasioned by this Motion be paid by the Respondents.

2. The application is supported by the grounds on the face thereof and a supporting Affidavit sworn by Mwita John David, the crux of which is that the 1<sup>st</sup> Respondent, without considering that the Applicants were employed under the former Urban Areas and Cities Act, 2011 and without affording them a hearing deemed their services dismissed on 28<sup>th</sup> March, 2019 by operation of law with the entrant of the new Urban Areas and Cities Act, 2019.

3. The application was placed before this court under Certificate of Urgency and the court issued interim conservatory orders.

4. The Application is opposed vide the Respondents' Replying Affidavits sworn by Jared Odhiambo Opiyo the Chairperson of the 1<sup>st</sup> Respondent and Christopher O. Rusana, the 2<sup>nd</sup> Respondent.

5. The application was heard interparties on 3<sup>rd</sup> November, 2021, in the presence of Counsels for both parties. Both parties had prior to this hearing, filed submissions in the matter.

### **The Applicants' Submissions**

6. The Applicants' case is that they were employed by the 1<sup>st</sup> Respondent as Municipal Managers of the County Government of Migori on permanent and pensionable terms of service.

7. The Applicants' further case is that on 6<sup>th</sup> January, 2021, they sought to be re-designated as the IPPD system that is in place does not define their position to enable them obtain personal numbers.

8. The Applicants state that the 1<sup>st</sup> Respondent responded to their request on the 6<sup>th</sup> September, 2021, where they notified them of the changes introduced in the amended Urban Areas and Cities Act, 2019 that required more qualifications for the Applicants to continue holding their positions as Municipal Managers.

9. The Applicants state that the 1<sup>st</sup> Respondent deemed their services dismissed on 28<sup>th</sup> March, 2019, by operation of law without affording them an opportunity to be heard hence this application and petition.

10. The applicants submitted that they have a *prima facie* case. They sought to rely on the holding of the court in the case of *Mrao Ltd v First American Bank of Kenya Limited & 2 others (2003) eKLR* where the court defined a prima facie case to mean a genuine and arguable case.

11. The Applicants' further submit that their application for conservatory orders, meets the grounds set out in the famous case of *Giella v Casman Brown (1975) E.A 358* for grant of injunctive reliefs, in that they have a *prima facie* case, will suffer irreparable harm, and the balance of convenience tilts in their favour.

12. The applicants further argue that their Constitutional and statutory rights were infringed upon when they were denied audience before arriving at the decision to terminate their services.

13. It is Applicants' argument that the Respondents' decision is premised on their interpretation of the law which might be wrong and thus their case does raise triable issues that require an input on finality of the interpretation of the law.

14. The Applicant's argue that the law does not apply retrospectively and that the Respondents have not shown that the Applicants are in breach of their contract of service, hence any attempt to remove them from office is illegal.

15. The Applicants further argue that the fact that Respondents have expressly indicated that they do not have vacancies to redeploy the them, amounts to issues for this court to determine and warranting the granting of conservatory orders.

### **The Respondents' Submissions**

16. The Counsel for the Respondents submitted that Applicants were employed under the previous Urban Areas and Cities Act, 2011, which has since been amended vide the Urban Areas and Cities Amendment Act, 2019. It is their case that by dint of the amendment, the Applicants are no longer qualified to hold the positions of Municipal Managers which they were appointed under the old Legislation.

17. It is the Respondents' submission that for reason that the amended law does not have a transition clause, it follows that Municipal Managers who did not have the requisite qualification, stood terminated by operation of the law.

18. It is the Respondents' position that arising from the advisory received from the Office of the Attorney General on the matter, Board members are not classified as employees of the institution they serve, but instead, the positions they hold are a creation of the law and which positions can be taken away by changes in that law.

19. It the Respondents further argument that the amended Urban Areas and Cities Act does not apply retrospectively, but instead, takes effect retroactively on the 28<sup>th</sup> March, 2019, being its commencement date. They argue that a retroactive provision in a law enacted by Parliament is neither unlawful nor unfair.

20. The Respondents' Counsel further argues that the orders sought are in direct conflict with the express provision of statute and are inconsistent with the law.

21. The Respondents pray that the interim orders now in force be vacated and the application herein dismissed.

### **Determination**

22. I have considered the application subject of the ruling herein, the responses thereto, the submissions made on behalf of the parties and the authorities cited. I am guided by both the Constitution and the law that mandates this court to grant conservatory orders.

23. The issue for this court to determine at this interlocutory stage, is whether the conservatory orders sought should issue pending the determination of the main petition.

24. It is now settled that in considering an application for conservatory orders, the Court is not called upon to make any conclusive findings, either of fact or Law as this is the mandate of the court that will determine the substantive petition. (*See Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others {2017} eKLR*)

25. The jurisdiction of this Court at this point, is limited to examining and evaluating the material placed before it to determine whether the Applicants have made out a *prima facie* case to warrant grant of conservatory orders as guided by the holding in the case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011; {2011} eKLR*.

26. It has been variously held that a *prima facie* case is not necessarily one that must succeed, but it should also not be one that is frivolous (*See Kevin K. Mwiti & Others v Kenya School of Law & Others*)

27. It is not disputed that the Applicants herein were appointed to the positions of Municipal Managers on permanent and pensionable terms of service. The Respondents' stand point is that the Applicants were appointed under a now amended legislation whose qualifications for the positions, has since been varied by the Amendment Act of 2019.

28. The issue for this court to determine is whether the interpretation of the Amended Urban Areas and Cities Act, 2019, translates to termination of the Applicants by operations of law and which determination can only be made on hearing of the main petition.

29. The Applicants are currently in office on account of interim conservatory orders issued by this court. The Respondents' case is that the Applicants are not their permanent employees for reason that the positions they hold are a creation of law and since the law establishing the positions has since changed, they stand dismissed. The Applicants on their part, have exhibited letters of appointment, which letters are prove that they were indeed appointed on permanent and pensionable terms of service.

30. The Respondents have also indicated that they do not have vacancies to re-deploy the Applicants. This compounds the risk the Applicants will face should this court not grant them the orders sought.

31. The Applicants in the opinion of this court have on a balance of probability, demonstrated that their petition is *prima facie* and runs the risks of being rendered nugatory should the conservatory orders not be granted.

32. The upshot is that the application dated 17<sup>th</sup> September, 2021 is merited, and I hereby order that pending the hearing and determination of the petition herein, a Conservatory Order do and is hereby issued to stay the implementation of the 1<sup>st</sup> Respondent's letter dated 6<sup>th</sup> September, 2021 that deemed the services of the Petitioners as Municipal Managers of the County Government of Migori dismissed on 28<sup>th</sup> March, 2019 by operation of the Urban Areas and Cities Act, 2019

33. The costs of the application shall be costs in the cause.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Awinda h/b for Mr. Odeny for the Applicants

Mr. Mango h/b for Mr. Otieno for the Respondents

Christine Omollo – C/A



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)