



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

JUDICIAL REVIEW APPLICATION NO. 2 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF THE REPORT OF THE AD HOC COMMITTEE OF THE COUNTY ASSEMBLY OF VIHIGA

BETWEEN

COUNTY PUBLIC SERVICE BOARD,

VIHIGA COUNTY GOVERNMENT.....APPLICANT

AND

THE COUNTY ASSEMBLY OF VIHIGARESPONDENT

JUDGMENT

1. The applicant herein filed an application dated 29th September 2018 seeking for the following orders:

1) That this court be pleased to issue an order of certiorari to remove into this court and quash the record, proceedings, observation and recommendations of the Respondent's Ad Hoc Committee report titled 'Report of the Ad Hoc Committee investigating the nature and propriety of financial transactions and employment of the Vihiga County Executive during the periods between 1st April to 30th September 2017.

2) An Order of Prohibition be issued against the Respondent precluding it, its officers, servants and or agents from freezing the recruitment of staff to the County Government of Vihiga.

3) An Order of Prohibition be issued against the Respondent precluding it, its officers, servants and or agents from engaging any firm to audit the tenure of the applicant.

2. The application is premised on grounds on its face and supported by the affidavit of its Clerk and Accounting officer, **Carolyne Rebecca Alieli Enane**.

3. The background that led to the application is that the respondent herein in its mandate to oversight the applicant's functions set up an ad hoc committee to investigate the financial and employment conduct of the applicant. The committee made recommendations, inter alia, that:-

(a) A special audit to be conducted by a reputable Audit firm competitively sourced within the next 60 (sixty) days upon the approval of this report by the County Assembly with a view of shedding light on among others:-

(i) The definite and substantive staff establishment of Vihiga County Public Service.

(ii) Establishing to what extent the Board executed its role and mandate as provided for in the County Government Act, No. 17 of 2012 during their tenure in office.

(iii) Examining and establishing gaps in the Human Resource management of the County Executive.

(b) That the members of the County Public Service Board should remain in office during the next 60 days pending receipt of the findings of the special audit as stated in recommendation one above.

(c)

(d) That the status quo at the County Public Service should remain pending the completion of the special audit, this includes a freeze on all forms of employment in the County Public Service by any agent on the CPSB.

4. The recommendations were adopted by the respondent. The applicant was aggrieved by the said recommendations and filed the instant application. They contend that the respondent exceeded its mandate in making the recommendations. That prior to the recommendation and subsequent adoption of the report, the applicant had advertised and completed short listing of candidates for interviews. That as a result of the recommendations the applicant's operations have been adversely disrupted by the decision to stop the applicant from carrying out its core mandate of recruitment of persons required in the service of the Executive of Vihiga County Government. That the executive is unable to offer critical services to the public because the positions affected by the respondent's decision are key to the public service delivery. That the decision is also prejudicial to persons who had applied for the advertised vacant positions and have a legitimate expectation to know the outcome of the process. That the decision to freeze employment was contrary to the principle of separation of powers and hence a nullity. That the respondent has no authority to manage, control, dictate or supervise the functions of the applicant and by extension the executive while purporting to execute its oversight role. That the decision implies that there could be dismissal of members of the board after 60 days contrary to Article 251 (1) of the Constitution of Kenya 2010 and 58 (5) (a) and (b) of the County Governments Act, 2012.

5. The application was opposed by the respondent through the replying affidavit of its Clerk and Accounting officer, **Mr. Ambaka Kilinga**. It was the contention of the respondent that it acted within its mandate. That the County Public Service Board is answerable to the County Assembly in the discharge of its mandate as envisaged under section 8 (1) (b) of the County Governments Act, 2012 as read with Article 185(3) of the Constitution. That no evidence was adduced to demonstrate that the respondent intends to remove members of the County Public Service Board from office in a manner that conflicts with the provisions of Section 58 (5) of the County Governments Act, 2012 as read with Article 251 (1) of the Constitution. That it is their mandate to oversight the respondent and the County Executive and other organs of Vihiga County Government. That the referred to report was binding on the applicant.

6. The advocates for the respondent, **Waudu & Co. Advocates** submitted that courts of law have powers to intervene in actions of legislative bodies in very limited situations where-

(a) it is demonstrated that the constitution has been violated or is threatened with violation.

(b) it is demonstrated that the legislature has conducted its affairs in a manner that was contrary to its own Standing Orders.

7. It was submitted that Article 185(3) of the Constitution of Kenya 2010 as read with section 8(1)(b) of the County Governments Act, 2012 empowers the Respondent to exercise oversight over the county executive organs that includes power to conduct an inquiry as the one conducted by the relevant ad hoc committee. That the said committee was established in accordance with the Respondent's Standing Orders. That it has not been demonstrated that the committee conducted the relevant inquiry in a manner that was contrary to the applicable laws and the said Standing Orders or that in conducting the inquiry the committee violated the rules of natural justice. That to grant the orders sought in the absence of any evidence that Respondent has exceeded or abused its legislative mandate would be a violation of its constitutional and statutory mandate.

8. The advocates for the Respondent relied on the cases of: **Republic Vs National Water Conservation & Pipeline & 11 Others (2015) eKLR, Pastoli Vs Kabale District Local Government (2008) 2 EA 300, Municipal Council of Mombasa Vs Republic & Umoja Consultants and Republic Vs Agriculture, Fisheries and Food Authority & 3 Others Ex parte West Kenya Sugar Company Limited (2015) eKLR**. They prayed that the application be dismissed with costs.

9. The advocates for the applicant, **M. Ananda & Co. Advocates**, submitted that the mandate for the applicant herein expired in June 2019 and a new Public Service Board put into place. Therefore that the application has been overtaken by events. The advocates further submitted that members of public service Board can only be removed under Article 251 (1), (2) and (3) of the Constitution as read with section 58 (4) of the County Governments Act, 2012. That in so far as the Respondent's report recommended removal of county public officers, the contents of the report are null, void and unconstitutional. They prayed that the application be allowed with costs.

10. The main issue for determination is whether the applicant has provided this court with sufficient grounds to warrant granting of the Judicial Review orders of Certiorari and Prohibition sought.

11. The grounds under which judicial review orders can issue are as were stated in the case of **Republic Vs Cooperative Tribunal & 2 Others Ex parte Jackson Wekesa Abala (2019) eKLR** where the court observed that:-

“The broad grounds for the exercise of judicial review jurisdiction were stated in the case of Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala,

miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

20. *In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:*

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

21. *It was also emphasized by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act."*

See also **Webb Fontaine Group FZ – LLC Vs Public Procurement and Administrative Review Board & 3 Others (2020) eKLR.**

12. It has to be emphasised that judicial review is not concerned with the merits of the decision but by the decision making process. In **Republic –Vs- Public Procurement Administrative Review Board & 2 Others Ex parte Sanitam Services (E.A) Limited (2013) eKLR** the court held:-

"Thus, the starting point in judicial review proceedings is that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. The purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question."

13. The applicant contends that the Respondent acted *ultra vires* as they did not have power under the law to make the impugned recommendations. The question then is whether the County Assembly had powers to freeze recruitment of persons by the board to the service of Vihiga County Government and to recommend removal of members of the Public Service Board.

14. It is the constitutional duty of this court to interpret the constitution and determine whether anything done under the authority of the constitution or any other law is within the law. This was emphasized by the court in **Martin Nyaga Wambora & 4 others -v- Speaker of the Senate & 6 others (2014) eKLR** where it was held that:

"199The court being the only arm of government vested with the power to interpret the Constitution, and to safeguard, protect and promote its provisions has the duty and obligation to intervene in actions and other arms of government and state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation"

15. Though courts have such wide powers they can only intervene in matters involving legislative bodies where it is shown that the bodies conducted their proceedings in a manner that amounted to an abrogation of the constitution. In the case of **Coalition for Reform and Democracy (CORD) & 2 Others -V- Republic of Kenya & 10 others (2015) eKLR**, the court while recognising the jurisdiction of courts to intervene where there has been a failure by legislative bodies to abide by standing orders, cautioned for exercise of restraint and only intervene in appropriate instances while bearing in mind the specific circumstances of each case.

The court will bear in mind the above principles when determining his application.

16. The applicant argues that the County Assembly has no power to supervise it. The county public services boards are established under sections 56 and 57 of the County Governments Act (CGA), 2012. Their functions are set out under section 59 of the Act which include -

(d) to prepare regular reports for submission to the county assembly on the execution of the functions of the board.

(f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Article 10 and 232 (of the constitution) are complied with in the county public service.

Article 10 is in respect to national values and principles of governance that include integrity, transparency, accountability, non-discrimination and protection of the marginalised. Article 232 is in respect to values and principles of public service that include transparency and provision to the public of timely, accurate information; fair competition and merit as the basis of appointments and promotions and representation of diverse communities.

17. The powers of a county assembly are set out under section 8 of the CGA, 2012 among which are to perform oversight role as stipulated under Article 185(3) of the constitution. The said article provides that -

“A county assembly, while respecting the principle of separation of powers, may exercise oversight over the county executive committee and any other county executive organs”.

18. Section 14 of the CGA provides that a county assembly may-

“(a).....

(b) subject to standing orders made under paragraph (a), establish committees in such manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee established”.

19. A public service board is one of the organs of a county government. It is then clear that it is one of the entities that falls under the oversight of a county assembly.

20. The Vihiga County Assembly constituted a committee to investigate the financial and employment conduct of the applicant. The question is whether this was in tandem with its oversight role.

21. The meaning of the words to “oversee” and “investigate” were considered in the case of **Owen Baya v County Government of Kilifi (2015)eKLR** where the court held as follows-

“Now to “oversee” as before mentioned is to supervise. But can investigation be part of the respondent’s supervisory role? I would state in the positive. The word “investigate” is defined by the Concise English Dictionary, 12th as follows: To carry out systematic or formal inquiry into (an accident or allegation) so as to establish the truth. Make a search or systematic inquiry. If the respondent sets up a committee to investigate so as to establish the truth, then it is well within its mandate.....I would find that it has a very wide role under Article 185 of the constitution...”

I would similarly find that the establishment of the committee was within the mandate of the respondent. The applicant is a creation of the law. It cannot act outside the law. It was the duty of the respondent to keep it in check. I find that the respondent did not exceed its mandate in freezing recruitment by the applicant for a period of 60 days pending investigations on the applicant’s conduct on employment. The applicant has not established that the decision was tainted with illegality, irrationality or procedural impropriety.

22. The other question is whether the respondent recommended removal of members of the applicant from office. The General Provision for removal of members of a commission is stipulated in Article 251 (1) of the Constitution of Kenya 2010 that provides that:-

“1. A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—

(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;

(b) gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;

(c) physical or mental incapacity to perform the functions of office;

(d) incompetence; or

(e) bankruptcy.

2. A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.”

23. This provision of the Constitution with respect to members of County Public Service Boards was operationalized vide Section 58 (4) of the County Government Act 2012, which provides that a member of the board may be removed:-

“..... On grounds set out for the removal of members of a constitutional commission under Article 251(1) of the Constitution; and by a vote of not less than seventy five percent of all the members of the County Assembly.”

24. In the case of **Meru County Public Service Board Vs Clerk County Assembly, Meru & 2 Others (2019) eKLR** Gikonyo J. considered the procedure of removing members of County Public Service Board and held that:-

“18. Section 58 provides for the composition of the County Public Service Board whereas Section 58 (5) provides for removal of the members of the board. See the section below

(1) The County Public Service Board shall comprise—

(a) a chairperson nominated and appointed by the county governor with the approval of the county assembly;

(b) not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and

(c) a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.

(5) The members of the Board may only be removed from office—

(a) On grounds set out for the removal of members of a constitutional Commission under Article 251(1) of the Constitution; and

(b) By a vote of not less than seventy five per cent of all the members of the county assembly.

251. (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—

(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;

(b) gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;

(c) physical or mental incapacity to perform the functions of office;

(d) incompetence; or

(e) bankruptcy.

19. According to the law highlighted above especially Section 58 of the County Government Act the members of the County Public Service board are nominated and appointed by the County governor with the approval of the County Assembly. But their removal is by the County Assembly. These proceedings challenge the procedure, process and grounds for the removal or attempted removal of the members of the public service board. Of importance is the reference in section 58 of the County Governments Act of article 251 of the Constitution. This is important as shall be borne out later.

20. On procedure, this is my considered thought: constitutionally-backed prudence dictates that a proper petition should be filed in the county assembly for consideration by the county assembly in accordance with the rules of the house. Due process must also be observed in considering the petition in order to attain fair hearing and fair administrative action requirements. The petition should also clearly set out the grounds for removal in accordance with article 251 of the Constitution. I am aware that the County Government Act does not prescribe a specific format which the petition ought to take. I am also aware that according to the Black’s Law Dictionary 9th Edition Pg. 1261 a petition is described as;

a formal written request presented to a court or other official body.

21. Be that as it may, it bears repeating that the petition must clearly set out the grounds in a manner that it conveys the substance of the grounds for removal. This enables the person to be removed to know the case he is faced with and therefore make appropriate response thereto.

22. On this I am content to cite the case of Mundia Njeru Gateria v Embu County Government & 5 others [2015] eKLR where the Court held;

“The person desirous that the chairperson is removed from the office must satisfy the substance and the procedure first, alleging the details of the grounds that satisfy any of those enumerated in the constitution and secondly, submitting the appropriate petition to the county assembly for the assembly’s consideration and resolution. There is no exception of the

application of the procedure where the removal is to be desired by the county governor.”

25. This position was reiterated by Nduma J. in the case of **Daniel Omondi Ogada & 6 Others –Vs- County Assembly of Homabay & 2 Others (2019) eKLR**.

26. It is then clear that the procedure for removal of members of a county public service board are as stipulated in Article 251(1) of the constitution as read with section 58(4) of the County Governments Act, 2012. The supporting affidavit of the clerk to the applicant indicates that they were only apprehensive that the report recommends their removal from office. My reading of the report does not in any way recommend removal of the said members from office. It is therefore my finding that the application was based on apprehension and was thereby premature. Orders of certiorari cannot issue on mere fact of apprehension. It also has to be noted that the report has not been enforced. The application has failed to demonstrate how the respondent was removing members of the board from office as alleged in the application. In the premises, I find no grounds to warrant the granting of the prayers sought.

27. The upshot is that the application is bereft of merit and as such ought to be dismissed. The court takes note of a letter by the applicant's advocate dated 3rd February, 2020 indicating that the application has been overtaken by events as a new board has been put into place. The application is dismissed with no order as to costs.

Delivered, dated and signed at Kakamega this 12th day of June, 2020.

J. N. NJAGI

JUDGE

Representation:

No appearance for Applicant

No appearance for Respondent

Applicant - Absent

Respondent – Absent

Court Assistant - Polycap

30 days right of appeal.