



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**MISC. APPLICATION NO. 48 OF 2015**

**REPUBLIC .....APPLICANT**

**VERSUS**

**SIMON KITALEL KACHAPIN .....1ST RESPONDENT**

**THE COUNTY GOVERNMENT OF**

**WEST POKOT.....2ND RESPONDENT**

**THE HON ATORNEY GENERAL.....3RD RESPONDENT**

**JOEL P. ARUMONYANG .....EXPARTE**

**JUDGMENT**

This judicial review application by the applicant herein dated 20/7/2015 prays for the following reliefs;

**(1) That this court be pleased to issue an order of Certiorari to remove into this court and quash the decision of the Governor County Government of West Pokot embodied in a letter dated 8/7/2015 and which by the exparte application has been dismissed from the post of County Secretary.**

**(b) Costs be provided.**

The application is supported by the verifying affidavit and the statements thereof dated 20/7/2015.

The applicant avers that he was appointed the County Secretary on 13/3/2014 as per the attached letter from the County Public Service Board . That on 8/7/2015 without any notice or warning the 1<sup>st</sup> respondent the County Governor wrote to him a dismissal letter alleging several reasons which inter alia included gross mismanagement of County Bursary and Development fund and other litany of reasons. He argued that the said dismissal was in breach of Section 31 of the County Government Act, Article 47 of the constitution and the Fair Administrative Action Act.

It was mutually agreed by the parties herein that the decision herein shall apply in equal force to application in files No 45, 46 and 47 of 2015. The respondents on their part did not file any response despite being served neither did they file any written submission as ordered and I shall therefore proceed under the premise that they did not oppose the application. The only opportunity they had was when they raised a preliminary objection on a point of Law which the court has rendered a decision.

Having stated above it is not in dispute that the appellant was duly employed by the respondent in particular the 2<sup>nd</sup> respondent.

As stated above the only document before me from the respondent is the said letter of dismissal. The averments in the supporting affidavits and the statement are not contested.

The province of judicial review deals basically with the procedure pursued by such administrative bodies or quasi judicial entities. In this case Section 31 of the County Government Act No. 17 of 2012 clearly empowers the Governor to dismiss members of the executive committees. The same state as follows:-

31 the Governor

**(a) May, despite Section 40, dismiss a County executive committee member at any time if the Governor considers that it is appropriate or necessary to do so.”**

Sub section (b) empowers the governor to dismiss a member if there is a resolution from the County Assembly pursuant to Section 40.

My view therefore is that there are two situations provided to the governor allowing him to dismiss the executive committees member, namely, that provided under Section 31 and Secondly as provided Under Section 40. Section 40 only comes into effect when it is instituted by a member of the County assembly and supported by at least one -third of all the County assembly members through a motion and the grounds are clearly spelt under Subsection 1 thereof.

The second instance is Section 31 which the governor seemed to have applied in the instant case. It appears on the face of it that the governor is not entitled to consult anybody including the applicant prior to reaching this decision and this seemed to have been the intention of the drafters of this Act.

But where does this leave Article 47 of the constitution? The said Article provides that;

**47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or it is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

This Article was actualised by the enactment of the Fair Administrative Action Act 2015, in which Section 4 thereof provides that every person has the right to be given written reasons for any administrative action that is taken against him and that adequate notice shall be given for any proposed administrative action.

The court in *Judicial Service Commission vs Mbalu Mutava & Another (2015) eKLR Civil Appeal No. 52 of 2014* stated as follows;

**“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the mentioned values in Article 10 such as the rule of Law, human dignity, sound justice, good governance, transparency and accountability. The administrative actions of Public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of Constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.”**

In the instant case the 1<sup>st</sup> respondent simply wrote the dismissal letter to the applicant. Although he cited Section 44 of the County Government Act, the same cannot be read in isolation. In fact Section 31 of the said Act cannot be read in isolation but ought to be read in tandem with Article 47 of the Constitution and more particularly Section 4 of the Fair Administrative Action Act 2015. The cumulative effect of the said portion of the law required that the adversely affected parties must be given adequate notice and or warning and a chance to defend himself. Otherwise anything short of this shall be termed unfair and unprocedural and is bound to face the wrath of the courts.

In *Halburys laws of England Judicial Review (Volume 61 (2010) 5<sup>th</sup> Edition para 639* it is stated as follows

**“ The rules that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (*the and alteram partem rule*) is a fundamental principle of justice. This rule has been defined and adopted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.**

**Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interest of an individual may suffice in itself to attract a duty to comply with this rule ..... However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice.**

**The circumstances in which the rule will apply cannot be exclusively defined, but they embrace a wide range of situations in which acts or decision have civil consequences for individuals by directly affecting their interest or legitimate expectations.”**

I think the above authorities and quotations clearly goes to show the need for all administrative organs and quasi judicial bodies to act fairly. In this case I shall not hesitate to conclude that the action of the 1<sup>st</sup> respondent though perhaps merited was not procedural. The applicant was not granted a chance and neither given any notice as expected. His legitimate expectation to work and earn for the period expected to serve was curtailed.

As earlier intimated this court shall not inquire into the reasons as that is for another forum; suffice to state that the decision to dismiss was unprocedural.

Consequently the application is therefore allowed with costs to the applicant.

This judgment shall apply to files Nos 45, 46 and 47 of 2015 *Mutalis Mutandis* and equal force.

Delivered this 31<sup>st</sup> day of January, 2017.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of;**

**Kiarie for the Applicant**

**No appearance for the Respondents**

**Court Assistant: Kirong/Silvia**