



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CONSTITUTIONAL PETITION NO. 24 OF 2016
IN THE MATTER OF ARTICLES
1,2,3,10,19,20,21,22,23,24,38,47,48,52,73,74,75,76,77,80,125,165,183,201,228,258,259 & 260 OF THE
CONSTITUTION OF KENYA

-AND-

GROSS VIOLATION OF S. 62 OF THE ANTI CORRUPTION AND ECONOMIC CRIMES
ACT, 2012

- MOSES MUTEITHIA.....1ST PETITIONER
- FRANCIS CURUKA.....2ND PETITIONER
- ALLAN KINYUA.....3RD PETITIONER
- BENARD KITHINJI.....4TH PETITIONER
- PHILEMON KIOGORA.....5TH PETITIONER
- MARTIN MWENDA.....6TH PETITIONER

-AND-

- JACOB MUTHOMI KIRERA.....1ST RESPONDENT
- HON PETER MUNYA.....2ND RESPONDENT
- ETHICS AND ANTI CORRUPTION COMMISSION.....3RD RESPONDENT
- CONTROLLER OF BUDGET.....4TH RESPONDENT
- COUNTY GOVERNMENT OF MERU.....5TH RESPONDENT

-AND-

SALARIES AND RENUMERATION COMMISSIONINTRESTED PARTY

JUDGMENT

[1] Before me is a Notice of Motion Application dated 25th August 2016 brought pursuant to provisions of Articles 22 and 23 of the Constitution of Kenya 2010, and Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013) and any other enabling provisions of the law in which the Applicant seeks the following orders:

1.spent

2. That pending the hearing of this application inter partes, this honourable court be pleased to issue a temporary order suspending the 1st Respondent from office on half pay and therefore prohibiting him from performing the duties of County Executive Committee Member, for Finance, Meru County or any other duties or functions performed by him by virtue of his position as the County Executive Committee Member, Finance, Meru County.

3. That at the inter partes hearing of this application, this honourable court be pleased to issue an interlocutory order suspending the 1st Respondent from office on half pay and therefore, prohibiting the 1st Respondent from performing the duties of County Executive Committee Member, for Finance, Meru County or any other duties or functions performed by him by virtue of his position as the County Executive Committee Member, Finance, Meru County pending the hearing and determination of the petition filed herein.

4. That pending the hearing of this application inter partes, this honourable court be pleased to issue a temporary order stopping the 4th respondent from authorizing release of any pending cash request prepared by the 1st Respondent acting on behalf and or for the benefit of the 5th Respondent.

5. That at the inter partes hearing of this application, this honourable court be pleased to issue an interlocutory order prohibiting the 4th Respondent from authorizing release of any cash request prepared by the 1st Respondent acting on behalf and or for the benefit of the 5th Respondent pending the hearing and determination of the petition filed herein.

6. That upon the orders of this honourable court issuing as prayed, the same be served on the Meru County Police Commandant to ensure peaceful compliance and

7. That the honourable court be pleased to set an urgent date for hearing of this application inter partes and the Respondent be served into this application.

8. That costs hereof be provided for.

9. Such further and or other orders be made as the court may deem fit and expedient.

[2] The gist of the Application is inter alia that on 15th July 2016, the 1st Respondent, was charged together with Patrick Mwamba and Francis Atanasio both members of the Meru County Public Service Board with graft charges in a Meru Anti Corruption Court and that on 4th July 2016, the 1st Respondent knowingly and blatantly reported to his office and has to date continued to discharges his official duties in violation of Article 10 (2) (c) of the Constitution of Kenya on good governance, integrity, transparency and accountability, Section 62 of the, Anti-Corruption and Economic Crimes Act (hereafter ACECA) and Sections 10,11,12,16,29,30,38 of the Leadership and Integrity Act 2014.

[3] It was further contended that the 2nd Respondent has knowingly and blatantly continued to assign duties to the 1st Respondent to illegally continue discharging his duties as the Meru County Executive Committee Member for Finance, in violation of Articles 10 (2) of the Constitution of Kenya on good governance, integrity, and accountability, Section 62 Anti Corruption and Economic Crimes Act, Sections 31 (a), 40 (1) (b) and (c) of the County Government Act 2012, and Sections 10.11,12,16,29,30,38 of the Leadership and Integrity Act 2014, and that the 3rd Respondent had knowingly and blatantly refused to

advise the 2nd, 3rd, 4th and 5th Respondents on the ongoing violations of Section 62 of the Anti Corruption and Economic Crimes Act.

Suspension is punishment

[4] The Application was opposed by the 1st, 2nd and 5th Respondents via Grounds of Opposition filed in court on 5th October 2016, where they contended that the Application was an abuse of court process, misguided, illegal, unlawful, unreasonable and procedurally unfair and that the orders sought were legally untenable. The 3rd Respondent on the other hand via a Replying Affidavit filed in court on 11th November 2016, denied having failed to advise the 2nd, 3rd and 5th Respondents of the obligations imposed them by section 62 of the Anti Corruption and Economic Crimes Act and contended that following the charging of the 1st Respondent, the 3rd Respondent wrote to the 2nd and 5th Respondents requesting them to suspend among others the 1st Respondent as by law required and annexed a letter to that effect.

Submissions by the Petitioners

[5] It was submitted for the Petitioners that that the 1st Respondent was a Public Officer according to the provisions of Article 260 of the Constitution, Section 2 (1) of the Anti Corruption and Economic Crimes Act, 2003, Section 2 of the Public Officer Ethics Act 2003 and Section 3 of the Interpretation and General Provisions Act and that under Section 62 (1) of the Anti Corruption and Economic Crimes Act, a Public Officer who is charged with corruption or economic crimes shall be suspended at half pay with effect from the date of the charge and that the same had been grossly violated by the Respondents.

Submissions by the Respondents

[6] The 1st, 2nd and 5th Respondents submitted that under Article 50 of the Constitution they were presumed innocent until the contrary is proven in a fair trial; it was inimical and unethical for the 1st Respondent to be punished by way of suspension from their employment before hearing and determination of the criminal charges against them.

DETERMINATION

[7] I have carefully considered this application and the rival submissions by the parties. From the outset, let it be known that the 2nd Respondent is no longer in office. There is no indication whether or not the 1st Respondent is still in office following the General elections held on 8th August 2017. He may not be such officer at the moment. That notwithstanding, this application raises pertinent issues of the law and Constitution which I will nonetheless determine for posterity. The 1st Respondent was at the material time, the County Executive Committee Member for Finance of the 5th Respondent. Doubtless, the 1st Respondent was a Public Officer according to the Article 260 of the Constitution, Section 2 (1) of the Anti-Corruption and Economic Crimes Act, 2003, Section 2 of the Public Officer Ethics Act 2003 and Section 3 of the Interpretation and General Provisions Act. It is not in doubt that, on 15th July 2016 the 1st Respondent who at the time the County Executive Committee Member for Finance of the 5th Respondent was charged together with Patrick Mwambia and Francis Atanasio with graft charges at the Anti Corruption Court in Meru. No doubt, by virtue of his position at the time, and as a public officer, the 1st Respondent was subject to Section 62 of the Anti Corruption and Economic Crimes Act No. 3 of 2003. For the sake of clarity, the section provides as follows:

Suspension, if charged with corruption or economic crime (1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:

[8] According to the said section, plainly, the 1st Respondent ought to have been suspended at half pay

until conclusion of the criminal case. The section also creates a statutory obligation on the employer to suspend the concerned public officer. the appropriate persons in this case were the 2nd Respondent and 5th Respondent. The said obligation should follow as a matter of law and does not need any prompting by Ethics and Anti-corruption Commission. Although, however, it is prudent for EACC to write to the employer of the concerned public officer on section 62(1) of the ACECA. EACC in this case wrote to the 2nd and 5th Respondent to that effect. They therefore discharged their obligation in law and are not to blame in these proceedings. In sum, the 2nd and 5th Respondents ought to have suspended the 1st Respondent as a matter of law or after receipt of the letter by EACC. The 2nd and 5th Respondents did not deny that the 1st Respondent was still in office and they made no reference to these allegations against them in their reply and submissions in court. But perhaps before I close I should lay the basis for the position I have taken.

[9] I note section 62(1) of ACECA has been attacked on constitutional fronts. I should state my thought on the matter. I wish to cite the words of Majanja J in the case of *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR PETITION NO. 153 OF 2013*, that:

***“The section 62 must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted the full benefits are restored. If the person is convicted, then the suspension merges into a penalty.*”**

[10] The reasoning by Majanja J in the above case is quite apt and resonate well with the constitutional reality. First of all, the suspension has been provided for in law and is a permissible act within the Constitution, the realm of employment laws and other laws which deal with matters of integrity such as ACECA. Suspension at half pay pending conclusion of the case is not really a violation of the right to be presumed innocent until proven guilty which is guaranteed in the Constitution. In any event, sufficient safeguards against prejudice have been provided thereto in that, if the case terminates in his favour, he will be entitled to his full benefits and emoluments. Such suspension cannot be said to be a cruel subjection to or punishment or dis-proportionate to the objective intended to be achieved by the law. Therefore, I am not able to find any violation of right to be presumed innocent until proven guilty, when a person charged with offences to do with corruption, economic crimes and integrity is suspended at half pay pending conclusion of his case. As I have already stated, section 62(1) of ACECA imposes a statutory obligation on the 2nd and 5th Respondent to suspend at half pay any public officer who has been charged under ACECA. Accordingly, the 1st Respondent ought to have been suspended at half pay pursuant to the provisions of Section 62 of ACECA as no prejudice would have been suffered by the 1st Respondent. The 2nd and 5th Respondent therefore failed in this duty. I should state once again that, should the proceedings terminate in favour of the 1st Respondent, he will be entitled to his full benefits. In my opinion suspension does not amount to an indictment on part of the 1st Respondent. The section must be understood within the inviolable wider objects of the Constitution to foster integrity for leadership in public service. Taking into totality all the circumstances in this case I find the instant Application to be meritorious and prayers 2 and 3 could have been granted were it not that the 1st Respondent has ceased be an officer of the County Government of Meru. And as such, the Constitution requires this court to fashion appropriate reliefs. Needless to state that it will be futile to order suspension of the 1st Respondent who has ceased to be a public officer of the County Government of Meru. But for posterity, I find the application to have merit and prayers 2 and 3 would have been apt were it not the changed circumstances. The application succeeds in so far as formulation of the law based on the facts therein is concerned. This being a case of public interest, I would make no order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 31st day of October 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora advocate for petitioner

Mr. E. Kimathi for Kibanga advocate for respondent

F. GIKONYO

JUDGE