



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 141 OF 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**PERMANENT SECRETARY, OFFICE OF THE DEPUTY PRIME MINISTER  
 MINISTRY OF LOCAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT  
 PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT  
 ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF GARISSA.....INTERESTED PARTY**

**EX-PARTE**

**JOHN MUTINDA KUNGA**

**RULING**

1. Through the notice of motion application dated 18<sup>th</sup> November, 2014, the Applicant, John Mutinda Kunga prays for orders as follows:

**“1. THAT the Chairman and Secretary Public Service Commission, the Principal Secretary, Ministry of Devolution and Planning, the Governor and Secretary County Government of Garissa and or the Respondents be committed to civil jail for disobeying the Orders and Decree of this court issued on 14<sup>th</sup> June 2013.**

**2. THAT costs of this application be provided for.”**

2. The Permanent Secretary, Office of the Deputy Prime Minister and Ministry of Local Government is the 1<sup>st</sup> Respondent whereas the Public Service Commission and the Attorney General are the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

3. The Applicant’s case is supported by the grounds on the face of the application as follows:

**“(a) The County Government of Garissa has refused to reinstate the applicant to employment. By refusing to reinstate him it has shown disrespect towards the court.**

**(b) The Public Service Commission has failed to reinstate the applicant or to advise the Ministry and the County Government of Garissa.**

**(c) The dignity and authority of this court must be preserved at all times and by all persons.**

**(d) Unless parties respect decisions of our courts the country is likely to degenerate into anarchy.”**

4. The application is also supported by an affidavit sworn by the Applicant on 18<sup>th</sup> November, 2014. Through the said affidavit the Applicant narrates his case as hereunder.

5. He avers that on 17<sup>th</sup> March, 2007 he was suspended from employment as the Clerk, Ijara County Council pending investigations. He subsequently filed a judicial review application (**Nairobi H.C. Misc. Application No. 418 of 2007**) challenging his suspension. His application was allowed leading to the quashing of the suspension through a judgement delivered on 1<sup>st</sup> August, 2008.

6. On 26<sup>th</sup> November, 2008 he was transferred to Ijara Country Council to serve as a clerk. On 27<sup>th</sup> March, 2009 he was transferred from Ijara County Council to Rachuonyo County Council to serve in the same position. The transfer was swiftly followed by a letter dated 23<sup>rd</sup> April, 2009 suspending him. He later received a letter dated 22<sup>nd</sup> February, 2011 terminating his services.

7. The Applicant subsequently commenced these judicial review proceedings and on 19<sup>th</sup> April, 2013 this court quashed the decision terminating his employment.

8. It is the Applicant’s case that after the delivery of the judgement he has consistently asked the respondents to reinstate him without success. He now seeks that the respondents be punished for disobeying the court order.

9. The respondents opposed the application through a replying affidavit sworn on 12<sup>th</sup> August, 2015 by Alice A. Otwala, the Secretary of the Public Service Commission (PSC).

10. Through the said affidavit, the PSC discloses that immediately the judgment was brought to its attention, it wrote a letter dated 29<sup>th</sup> October, 2013 to the Ministry of Devolution and Planning directing it to implement the same. The Ministry in turn wrote to the County Government of Garissa conveying the decision of the PSC.

11. Through a letter dated 22<sup>nd</sup> April, 2014, the Ministry conveyed to the PSC the decision of the County Government of Garissa declining to reinstate the Applicant claiming that he was never in the establishment it inherited from the defunct Ijara County Council. The PSC wrote back on 13<sup>th</sup> May, 2014 reiterating its position that the County Government of Garissa be advised to reinstate the Applicant.

12. It is the PSC’s case that at the time of the constitution of the County Government of Garissa, the Applicant had a case in court challenging his dismissal from the service of Ijara County Council, now under County Government of Garissa. The PSC contends that it has made all efforts to comply with the judgment and the County Government of Garissa should be directed to reinstate the Applicant as he is their employee as per Section 138(1) of the County Governments Act, 2012.

13. The County Government of Garissa responded to the application as an Interested Party. It opposed the application through the replying affidavit of its County Secretary and Head of County Public Service,

Mohamud H. Mursal. The response of the County Government of Garissa is that the last employment and pay station of the Applicant was Rachuonyo County Council and there was thus no employer-employee relationship between the County Government of Garissa and the Applicant.

14. Further, that the County Government of Garissa did not participate in these proceedings from the time the matter was filed on 9<sup>th</sup> June, 2011 and allowing the application would amount to condemning a party without a hearing.

15. The County Government of Garissa contends that the deployment of employees from the national government to county governments is the mandate of the Transition Authority which is similarly not a party to these proceedings.

16. It is also the County Government of Garissa's case that at the time of his dismissal, the Applicant was an employee of the PSC and is therefore an employee of the national government and not a county government.

17. It is therefore the case of the County Government of Garissa that it is a stranger to these proceedings and therefore lacks power to comply with the judgement and decree of this court.

18. The Applicant swore a further affidavit on 3<sup>rd</sup> September, 2015 in which he averred that he never reported to Rachuonyo County Council upon his transfer from Ijara County Council. He averred that upon receiving the transfer letter dated 27<sup>th</sup> March, 2009 he was advised to wait to hand over to the person who was to replace him. His replacement delayed for one and a half months and he continued working at Ijara County Council up to mid May 2009 when he was summoned to the office of the Provincial Local Government Officer where he was served with a letter dated 23<sup>rd</sup> April, 2009 suspending him from service.

19. Since the fourteen days within which he was required to respond to the letter had lapsed, he was instructed by the Provincial Local Government Officer to report to the head office at Jogoo House, Nairobi. Upon reporting at the head office, he was given another suspension letter dated 25<sup>th</sup> May, 2009 hence he could not report Rachuonyo County Council as per the transfer letter.

20. Looking at the affidavits filed by the parties it is clear that there is an agreement that the judgment delivered by the court on 19<sup>th</sup> April, 2013 must be implemented. The said judgment quashed the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to dismiss the Applicant from employment.

21. The only issue is who is to implement the decision. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that it is the County Government of Garissa which is supposed to implement the order and they have advised the said Government to implement the decision without success.

22. On its part the County Government of Garissa asserts that it cannot be punished for contempt as it was not party to these proceedings from the beginning and in any case the Applicant was not on the payroll of the defunct Ijara County Council as he had been transferred to Rachuonyo County Council by the time the County Government of Garissa was constituted.

23. It is thus important to first determine the Applicant's last working station. The Applicant revealed that he received two suspension letters; one dated 23<sup>rd</sup> April, 2009 and another one dated 25<sup>th</sup> May, 2009. He averred that by the time he received the two letters he had not reported to Rachuonyo County Council where he had been transferred to on 27<sup>th</sup> March, 2009.

24. His averment has not been disputed nor rebutted by the County Government of Garissa. The County Government of Garissa has not produced any letter to show that the Applicant was released to proceed to Rachuonyo County Council.

25. The Applicant's assertion that he had not left Ijara County Council by the time of his suspension is strengthened by the fact that the 1<sup>st</sup> and 2<sup>nd</sup> respondents who should be fully conversant with the Applicant's personal file have indicated that the Applicant's last station was Ijara County Council. This explains their insistence that the County Government of Garissa should implement the judgment.

26. I therefore find and hold that at the time the Applicant was suspended and eventually dismissed from the public service he was stationed at Ijara County Council. In accordance with Section 138 of the County Governments Act, 2012 the Applicant was deemed to have been on secondment in the service of the County Government of Garissa.

27. The County Government of Garissa is the successor of all the local authorities that fell within its jurisdiction. There is no dispute that the defunct Ijara County Council fell within the jurisdiction of the County Government of Garissa.

28. The argument by the County Government of Garissa that it cannot implement the judgment because it was not a party to the proceedings is untenable. It is before this court as a successor of Ijara County Council and other local authorities that existed within its current boundaries. It therefore has a duty to comply with any orders that are issued in respect of the employees of the defunct local authorities that fell within its jurisdiction.

29. The Applicant's case is however unique. He was out of the public service having been dismissed in 2011. When the court issued the order on 19<sup>th</sup> April, 2013, the County Government of Garissa was already in existence following the 4<sup>th</sup> March, 2013 general election. It would therefore be absurd to say that the Applicant was in the payroll or service of Ijara County Council when the County Government of Garissa was constituted. The position would be different had the Applicant been on suspension.

30. In the circumstances of this case, the order quashing the decision to dismiss the Applicant meant that the Applicant was to report to the Ministry for redeployment. After all, it is the Permanent Secretary who created all the mess by acting in blatant disregard of the judgment delivered on 1<sup>st</sup> August, 2008 by George Dulu, J. The Ministry of Devolution and Planning, being the successor of the 1<sup>st</sup> Respondent, will therefore implement the judgement of this court by reinstating the Applicant to the job he held (or a similar position) at the time of his dismissal.

31. At this point, it would be unjust to hold any of the respondents in contempt of this court's judgement. There appears to have been genuine confusion as to who between the 1<sup>st</sup> Respondent and the County Government of Garissa was to implement the order.

32. In the circumstances, I direct the Ministry of Devolution and Planning to absorb the Applicant within sixty days from today's date. In case of non-compliance, the Applicant is at liberty to apply for summons to issue to the Permanent Secretary of the said Ministry to appear in court and show cause why he/she should not be punished for contempt. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of Feb., 2016.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**