



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL PETITION NO. 4 OF 2015

IN THE MATTER OF ARTICLE 258 AND ARTICLES 2(1), (2)10, 20(1),23, 27, 73 AND 174

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM
UNDER ARTICLE 27 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2(1), (2)10, 20(1), 22(1), 22, 73
AND 174**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NUMBER 17 OF 2012

AND

**IN THE MATTER OF THE MILEAGE ALLOWANCE FOR NOMINATED MEMBERS OF THE
COUNTY ASSEMBLY OF LAIKIPIA SERVICE BOARD**

BETWEEN

- 1. HON. DAISY KIRIGO MAITHO**
- 2. HON. JOHN NDIRITU GITONGA**
- 3. HON. ROSE WANGU KARURI**
- 4. HON. CATHERINE WANJIKU WARUGURU**
- 5. HON. ELIZABETH PARAITON KIPUSH**
- 6. HON. JANE RENNU MESHAMI**
- 7. HON. ALICE WAHITO NDEGWA**
- 8. HON. ROSE NYAMBURA MAITAI**

(LAIKIPIA NOMINATED MEMBERS OF COUNTY ASSEMBLY)

Versus

1. COUNTY GOVERNMENT OF LAIKIPIA 1ST RESPONDENT

2. SERVICE BOARD & SALARIES REMUNERATION

COMMISSION 2ND RESPONDENT

3. THE SPEAKER COUNTY GOVERNMENT

OF LAIKIPIA 3RD RESPONDENT

JUDGMENT

1. The eight petitioners brought this petition seeking three prayers viz:

1. A permanent injunction to stop and /or postpone the intended mileage allowance pay out to elected members of the County Assembly in as far as it is drawn from development account or misappropriation funds from other accounts that are not meant to pay up for mileage.

2. An order to compel the 1st respondent to pay the Nominated Members of County Assembly extra mileage allowances like all other MCA's.

3. A declaration that the directive by the 2nd respondent is null and void to the extent that the same is discriminatory against the petitioners and unconstitutional.

The petitioners are eight **nominated members** of the **County Assembly of Laikipia**. They have brought this action seeking orders to nullify the directive of **Salaries and Remuneration Commission (SRC)** which directed the County Government of Laikipia and more particularly the speaker of that government not to pay the petitioner extra mileage allowance.

2. **Background**

SRC on 27th November 2013 communicated to all the clerks of the county assemblies a breakdown of the remuneration benefits for the Members of the County Assembly (MCA). One of those benefits related to mileage claim. In that regard SRC communicated that all members of the County Assembly were entitled to be paid a monthly mileage allowance of Kshs. **39,528**. For the elected MCA they were in addition to that entitled to get reimbursed extra mileage claim when they travelled to their area of representation which was to be at AA rate which would be subject to a maximum of 52 weeks per year. It is that latter claim that these petitioners allege discriminated against them as nominated MCA's of Laikipia County Assembly.

According to the petition the said payment discriminates against them and yet they represent special groups in the assembly. Their submission is that they too incur transport expenses which sometimes is in excess of 300 kilometres. It is in those circumstances that the petitioners seek a declaration that the directive not to reimburse their travel costs be declared null and void. The petitioners submitted that the said directive is unconstitutional and discriminate towards them because it denies them the right to meet their respective groups of interest to collect their views which views would assist them participate and contribute to the issue at the county assembly.

3. **Petitioners' Submissions**

The petitioners did not advance their argument any further by their written submissions filed in court. They simply repeated the depositions in their affidavits that SRC directive was unconstitutional and discriminatory to them and the groups that they represent.

4. **SRC Submissions**

SRC by their submissions stated that it is one of the **Independent Commissions** established under **Article 230** of the constitution and that its mandate under the constitution is two folds namely:-

- **To set and regularly review the remuneration and benefits of all state officers and;**
- **advise the National and County Governments on the remuneration and benefits of all public officers.**

SRC argued that the petitioners by this action were inviting the court to curtail and/or direct SRC in its functions which according to their argument would offend the doctrine of separation of powers. Further SRC submitted that the petition is not anchored on any specific infringement of violation of the constitutional rights.

5. SRC further submitted that the petition is misconceived or is misleading the court in seeking the orders before court. It clarified that its direction relating to two types of mileage claims. The first is commuted mileage allowance which all members of the county assembly both elected and nominated are granted at the rate of Kshs.39528 per month. Secondly the radius mileage allowance which is earmarked for elected members of the county assembly which is assessed at AA rate of kshs.109.80 per kilometre up to maximum of 90 kilometres return. SRC submitted the purpose of latter allowance is to re-imburse elected MCA, their travel expenses to the areas of the wards where they represent their electorate.

According to SRC the latter allowance is intended to be facilitative as opposed to remunerative and is intended to assist elected MCA' s to fulfil their constitution obligation such as the making of laws in their counties oversight of functions of the county government and representative function all of which necessitate their visits to their respective wards.

In this regard it was submitted that the petitioners did not have any ward to represent and they accordingly were not entitled to radius allowance. Finally SRC submitted there was no discrimination towards the petitioners.

6. **Submissions of the County Government and Speaker of County Assembly of Laikipia**

Their submissions were to the effect that SRC is an Independent Commission created under Article 230 of the constitution and whose functions are spelt out in section 11 of the Salaries and Remuneration Act Cap 5F. To that extent they submitted it was only SRC which is constitutionally mandated to set to review and advise on the remuneration and benefits of state officers. Further that the county government and speaker of Laikipia County were bound to effect SRC's directive regarding radius allowance to MCAs. That for the petitioners to seek the prayers they now seek is to invite the court to violate the constitution. In this regard they cited the case of **OKIYA OMTATAH OKOITI & 3 OTHERS VS ATTORNEY GENERAL & 5 OTHERS (2014) eKLR .**

7. **Analysis and Determination**

There are two issues the determination of which will assist this court to reach a just decision in this matter. They are:-

- a. **To what extent can the court intervene in the exercise in the functions of the SRC.**
- b. **Were the petitioners discriminated by SRC or was the directive relating to the radius allowance unconstitutional.**

On the first issue it is important to note as has been stated before that SRC is established under Article 230 of the constitution. The power and functions of SRC are set out in Article 230(4)

which are

- a. **Set and regulate, review the remuneration and benefit of all state officer; and**
- b. **Advise the Nation and County Governments on the remuneration and benefit of all public officers.**

It goes without saying that the directive which is the subject of this petition relates to a benefit of a public officer that is MCAs.

8. It is important to consider what Article 249(2) of the constitution provides. It provides that the holder of independent offices of commission such as SRC are firstly subject only to the constitution and the law and secondly are independent and not subject to directions or control by the person authority. In considering the first issue identified above it is important to bear these restrictions in mind.

9. **Article 230 (5)** provides what SRC should take into account when performing its functions. Under that sub article SRC should ensure that the total public compensation bill is fiscally sustainable; should ensure the public services are able to attract and retain the skills required; should recognise productivity and performance; and should have transparency and fairness.

10. In my considered view since **Article 249** provides that SRC like other commissions is subject to the constitution and the law and because **Article 230(5)** provides what SRC should ensure to meet in carrying out its functions, this court could only intervene in its functions where its functions would be contrary to the constitution or the law. This indeed was the finding of the case of OKIYA OMTATA OKOITI (supra) where three judges of the high court had this to say:

“Our response to these opposing arguments is that it is not the mandate of this court to enter into the merits of the decision made by the SRC, for to do so is to interfere with the constitutional mandate of the SRC. Unless there is placed before the court clear evidence of violation of the constitution or of statute, or of such unreasonableness in its decision making as would justify interference by this court, it is not the duty of the court to inquire into the methods or modalities used by the SRC to arrive at its decision in setting the remuneration of members of the National Assembly.”

11. With that understanding I will proceed to consider the second issue identified above, that is, was SRC directly discriminative to the petitions or to put in another way was it unfair or lacking in transparency?

12. To determine this it is first necessary to note that the directive of SRC that the nominated MCA's just like the elected MCAs do receive kshs. 39,528 per month to cater for their motor vehicle maintenance and fuel. What the petitioners as directed by the SRC do not receive is the reimbursement of the fuel claim payable to the elected MCA when they use their vehicle to travel to their wards to meet their electorate. The role of MCA is spelt out in **section 9 (1)** of the County Government Act No. 17 of 2012 which section provides as follows:

“(1) A member of a county assembly shall:-

- a. **Maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly;**
- b. **Present views, opinions and proposals of the electorate to the county assembly;**
- c. **Attend sessions of the county assembly and its committees;**
- d. **Provide a linkage between the county assembly and the electorate on public service delivery; and**
- e. **Extend professional knowledge, experience or specialise knowledge to any issue for discussion in the county assembly.”**

13. Every ward in Laikipia county has an elected MCA to represent it at the county assembly. That representation by that elected MCA is for all persons within the ward which includes persons from special groups who are represented by nominated MCA such as the petitioners. It follows that the special groups represented by the nominated MCA have their interests catered for by the elected MCA. The nominated MCA as submitted previous do not have any ward representation to justify their being facilitated to meet their electorate at the ward level. Nominated MCA as provided in **Article 177 (1)(b) (c)** are intended to ensure that no more than 2/3 of the members of the assembly are from the same gender and secondly they are to represent members of the marginalised groups which includes persons with disabilities. The presence of the nominated MCA as provided under that article is intended to ensure that the interests of the special groups will be represented by the specific nominated MCA in the assembly which interests would be over and above the representation already offered by the elected MCA who represent the whole ward. It follows that since the elected MCA represent the whole ward the nominated MCAs need not travel to the ward to meet any resident of that ward. The presence of nominated MCAs in the county assembly is intended that the particular nominated MCA would represent the interest of special group they represent when legislation or other functions of the assembly are undertaken. This I believe was the wisdom that led SRC to make a distinction in respect of the reimbursement of travel allowance to the elected MCAs. In my view SRC in reaching that decision did not discriminate against the petitioners at all. It is in my view a valid consideration by SRC that the interest represented by the petitioners have adequate representation by the elected MCAs. The petitioners need not travel to the wards to represent those interest because in my view the drafter of the constitution intended that the nominated MCA representing the special group would bring on board the special knowledge that the nominated MCA has to the assembly. The presence in the assembly of those nominated MCA is critical and hence why the constitution made provision for them. The SRC decision was not arbitrary nor unfair in my view based on the above consideration. There is therefore no basis for this court to intervene in the decision or the direction of SRC as sought by the petitioners.

15. Having found that there is no basis for the prayers sought by the petitioners this petitions is dismissed and the costs thereof are awarded to the respondents.

DATED AND DELIVERED THIS 31st DAY OF MAY 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant:.....

Petitioners:

1st and 3rd Respondents:

2nd Respondent

For Petitioners:

For 1st and 3rd Respondents:

For 2nd Respondent

COURT

Ruling read in open court.

MARY KASANGO

JUDGE