



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. 9 OF 2014

CECILIA WANGECHI NDUN'GU.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

THE GOVERNOR, NYERI COUNTY.....2ND RESPONDENT

RULING

1. By a petition filed before this court on 26th June, 2014 the petitioner seeks among others, that pending the hearing and determination of the petition inter-partes, a conservatory order of stay do issue to halt the decision of the respondent dismissing the petitioner from office.
2. When the matter came up for hearing before me Mr. Ng'ang'a for the petitioner informed me that he served the petition on Mr. Wahome the day before at around 4 p.m. And that Mr. Wahome who had just come on record, served him with his grounds of objection while in court.
3. Mr. Wahome for his part admitted to what Mr. Ng'ang'a said and added that he was yet to get full instructions to respond appropriately to the petition.
4. Whereas it was apparent that both parties could not practically proceed with the petition in view of the short time of service and return to court, Mr. Ng'ang'a urged the court to grant interim conservatory order of stay pending the hearing of the petition. Mr. Wahome vehemently opposed this request and argued that there was no substantive interlocutory application upon which the court could grant conservatory order. Mr. Ng'ang'a however countered the argument by saying that the prayer for conservatory order was contained in the body of the petition and that under the Constitution of Kenya (Protection of rights and fundamental freedoms) practice and procedure rules 2013 (hereafter referred as "Mutunga Rules", a separate interlocutory application was not necessary. Mr. Ng'ang'a further submitted that even if the filing of an interlocutory motion was a requirement, the omission to do so was a mere technicality which the court ought not to pay regard to.
5. Despite the objection by Mr. Wahome on the issue of the absence of a substantive motion, I permitted Mr. Ng'ang'a to prima facie demonstrate to me why he thought the court should issue conservatory order and he stated that the petitioner was unprocedurally sacked in that she learned of her sacking in the media and was never given any opportunity to be heard and that no reasons were given for her dismissal.
6. Mr. Wahome for his part argued that the Governor had the power to dismiss member of a County Executive Board at will and that the position of the Governor was akin to that of the President who could

dismiss a Cabinet Secretary at will. I will stop there as getting further might run the risk of considering the merit or otherwise of the petition.

7. Regarding the issue of whether it is proper for the court to consider an application for conservatory order without a substantive motion, this court will consider the purpose and intention of the Mutunga Rules.

8. Rule 3(2) of Mutunga rules gives their overriding objective as to facilitate access to justice for all persons as required under article 48 of the constitution. Sub-rule 3 further provides that the rules shall be interpreted in accordance with article 259(1) of the Constitution and shall be applied with a view to advancing and realizing the rights and fundamental freedoms enshrined in the Bill of Rights; and values and principles in the Constitution.

9. Part II of Mutunga Rules provide for procedure for instituting court proceedings. The procedure is mainly by way of petition, however the court can admit an oral application, a letter or any other informal documentation. Rule 13 provides that a petition filed under certificate of urgency may be placed before a Judge for appropriate orders or directions.

10. My cursory glance at the Mutunga rules does not show me any provision for interlocutory applications. This therefore means that any interim reliefs with regard to petitions under Mutunga Rules can only be brought under certificate of urgency and placed before a Judge under rule 13.

11. Further, Mutunga Rules make no reference to Civil Procedure Rules which means they do not apply when it comes to petitions. To this extent the court reaches the finding and hereby finds that the petitioner is permitted by the rules to seek interlocutory conservatory orders without having to file an interlocutory Notice of Motion.

12. Concerning whether I should grant interlocutory stay order, the petitioner has alleged that her removal from office was not only unprocedural but against rules of natural justice which is a fundamental right. Mr. Wahome has further submitted that there cannot be a vacuum in the office the petitioner held hence someone must be appointed to act in that capacity. This therefore means that as much as the petitioner will be seeking vindication from the court, the functions of the respondent will be unaffected.

13. The purpose of any interim relief especially conservatory or injunctive orders is to preserve the subject matter of a dispute so that by the time the court renders its determination the same will not be academic and incapable of being enforced.

14. As much as the parties have indicated that they have not sufficiently received instructions or time to respond and or document the relevant issues in dispute in this petition, this court in order not render its ultimate decision nugatory is inclined to grant and hereby grants stay of the decision of the 2nd respondent dismissing the petitioner pending the hearing and determination of this petition.

15. It is so ordered.

Dated at Nyeri this 27th day of June, 2014.

ABUODHA N. J

JUDGE

Delivered in open Court in the presence of Ng'ang'a Advocate for the Applicant/Petitioner and in the presence of Wahome Advocate for the Respondents.

ABUODHA N. J

JUDGE