



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISCELLANEOUS (JR) APPLICATION CASE NO. ELRC JR/11/2021

REPUBLIC.....APPLICANT

VERSUS

THE GOVERNOR VIHIGA COUNTY... RESPONDENT

EXPARTE

1. DR. AMOS KUTWA KOLUWA

2. PAMELLA MBAGAYA KIMWELE

3. ENG. KENNETH ELVUNA KESEKO

4. PAUL JISEVE MBUNI

JUDGMENT

## INTRODUCTION

1. By their Notice of Motion dated 25<sup>th</sup> August, 2021, the *ex parte* Applicants, seek Orders THAT:

- i. An Order of **CERTIORARI** to remove to this court and quash the proceedings, directions and decision of the Respondent dismissing the Applicants from employment as County Executive Committee Members, Vihiga County as contained in the letters dated 18<sup>th</sup> June, 2021.
- ii. An Order of **PROHIBITION** restraining the Respondent from nominating and/or appointing any other persons in place of the Applicants as County Executive Committee Members of Vihiga County.
- iii. An Order of **MANDAMUS** to compel the Respondent to reinstate the Applicants to their respective positions and offices as County Executive Committee Members, Vihiga County Government
- iv. An Order of **MANDAMUS** to compel the Respondent to accord and/or ensure that the Applicants are accorded all the benefits accruing to the them as County Executive Committee Members as per the applicable Salaries and Remuneration Commission's Circulars.
- v. An order for compensation to the Applicants for unpaid salaries together with damages resulting from the illegal and/or unlawful dismissal
- vi. The costs of this application be borne by the Respondent.

## **The Applicant's Case**

2. The Motion is supported by the grounds on the face of the application and the supporting affidavit of Pamela M. Kimwele sworn on 25<sup>th</sup> July, 2021 and the submissions of counsels during the interparties hearing.

3. According to the Applicants, they are duly appointed County Executive Committee Members of the Vihiga County Government. They aver that they were illegally and unlawfully dismissed pursuant to an impeachment process that has been stayed by a court of competent jurisdiction.

4. The Applicants state that on the 21<sup>st</sup> June, 2021, the High Court in Vihiga **High Court Constitutional Petition No. E.006 of 2021** made several orders, which in part read as follows:

**“8. Upon counsel for the Governor informing the court that the proceedings are overtaken by events, it is hereby ordered:**

**i. Any impeachment proceedings that are before either this court and/or the ELRC on the question of their validity and/or fairness of procedure are stayed pending hearing of petition.**

**ii. Any steps taken in pursuing an outcome in these impeachment proceedings is improper charge on the public purse and the officials involved therein shall be personally liable for costs incurred.**

5. The Applicants case is that despite these orders, the Respondent has refused, ignored and /or otherwise neglected to reinstate the Applicants as County Executive Committee Members. The Applicants further aver that the Respondent’s action of dismissing them amounts to an illegal, unfair and unlawful dismissal contrary to the principles of natural justice.

6. The Applicants’ case is that the issue for the court to determine in this application, is their unlawful, unfair and wrongful dismissal which is the exclusive jurisdiction of this court.

7. The Counsels’ submissions before court in support of the application, asserted that the basis of the application is the dismissal letters dated 18th June, 2021. They aver that by dint of the stay of the orders of impeachment, the Respondent ought to have reinstated the Applicants as their dismissal was premised on the impeachment process.

8. It is their submissions that this court is the one clothed with jurisdiction to determine issues of dismissal and not the High court, where the impeachment petition was filed. They aver that the earlier suit before ELRC in Nairobi, was stayed due to the impeachment matter at Vihiga.

9. Counsel submitted that contrary to the Respondent assertion that the institution of multiple suits is an attempt at splitting jurisdiction, states that the issues in the various suits are different. It is their position that the issue before the High Court at Vihiga is only in relation to impeachment as the Applicants had not been dismissed yet.

#### **The Respondent’s Case**

10. The Respondent opposed the application vide a Replying affidavit sworn by Mr. Ezekiel Ayiego on the 6<sup>th</sup> October, 2021. He deposes that the Applicants were dismissed following an impeachment process that adhered to all the necessary procedures and carried out by the County Assembly of Vihiga.

11. The Respondent’s case is that the Applicants filed multiple suits (Petitions Nos. E005, E006 & E007) and which are still pending determination, where the issues for determination are whether the impeachment proceedings against the *ex parte* Applicants were procedural and whether the dismissal of the *ex parte* Applicants is lawful. The Respondent avers that by reason of pendency of similar suits by the same parties, the instant application offends the sub judice rule and hence is not properly before this court.

12. The Respondent avers that he did not single handedly dismiss the Applicants as the County Assembly of Vihiga carried out the impeachment process and all he did was effect the decision of the Assembly pursuant to Section 40 of the County Government Act. The Respondent states that to order that he reinstates the Applicants would amount to condemning the decision of the Assembly without giving it an opportunity to be heard as the Assembly is not party to this suit.

13. Counsel for the Respondent submitted that before the High Court at Vihiga determines the contempt application, parties herein cannot engage in any other proceedings. He asserts that the instant application is depended on the decision on whether the Governor is guilty of contempt or not.

14. The Respondent’s Counsel submitted that the Applicants are only splitting suits and filing them at different courts in a forum shopping exercise and for reason that similar suits exists on the same subject in others courts, matter this application is incompetent and should be struck out.

#### **Determination**

15. I have considered the pleadings and the oral submissions by the parties.

16. The issue for determination is whether the Ex Parte Applicants have met the threshold for grant of the orders of Certiorari, Prohibition and Mandamus as sought in the application dated 25<sup>th</sup> August, 2021.

17. The Court of Appeal in the case of **Kenya National Examination Council v. Republic Ex Parte Geoffrey Gathenji Njoroge, N S, J W, R N, G W, A W, C W, B W, S N & J B** (1997) JELR 100019 (CA), addressed the scope of application of an order of Mandamus and referring to *HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89*. The learned judges had this to say: -

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

18. From the holding herein above, an order of Mandamus will compel the performance of a public duty which is imposed on a person or body of persons by statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. In **Shah vs. Attorney General (No. 3) Kampala HCC No. 31 of 1969 [1970] EA 543** Goudie, J stated:

**“Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy.”**

19. The court in the instant application is being asked to issue an order of Mandamus to compel the Respondent to reinstate the Applicants to their respective positions and offices as County Executive Committee Members, Vihiga County Government. The question for the court to answer is whether by reinstating the Applicants, the Respondent will be performing a public duty, whether the duty is one imposed by statute, the Constitution or an order of the court. There is no doubt in my mind that such a prayer seeks to enforce a private right and not a public duty.

20. Secondly, the prayer for reinstatement is not one imposed on the Respondent by Statute or the Constitution and the court order purported to have stayed the impeachment process, does not in my view amount to an order for reinstatement. Moreover, in the opinion of this court, there are more appropriate remedies for the Applicants other than the judicial review orders of Mandamus, Certiorari and Prohibition that the Applicants are seeking.

21. The court finds and holds that the remedies of Prohibition and Mandamus are not the appropriate ones to grant in the circumstances of this case.

22. The Applicants in this Application have filed multiple suits all in relation to the same subject matter and the same parties. The reinstatement of the Applicants which is the order of interest to the Applicants herein, is the subject matter in Petition Nos. E005, E006 AND E007 OF 2021. In Petition No. E006/2021 In the High Court At Vihiga for example, prayer number 3 of the Notice of Motion Application dated 5<sup>th</sup> July, 2021, reads as follows:

**“that in the alternative, the Governor be accorded an opportunity to forthwith purge the willful contempt of the said orders by reinstating the Petitioners to their portfolios within the County Executive Committee in the County Government of Vihiga.”**

23. This prayer is similar to the prayer for orders of Mandamus to compel the Respondent to reinstate the Applicants in the instant JR application. For this reason, the court returns that the application as filed offends the *sub judice* rule, is bad in law, frivolous and an abuse of the court process.

24. The upshot is that the Judicial Review Application dated 25<sup>th</sup> August, 2021, is dismissed.

25. The *Ex parte* Applicants shall bear the costs of the Application.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11<sup>TH</sup> DAY OF NOVEMEBR, 2021**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

N/A for the Applicants

Mr. Mukabi Present for the Respondent

Ms. Christine Omollo C/A