



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**MISCELLANEOUS CIVIL APPLICATION CASE NUMBER 64 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF WEST POKOT.....1<sup>ST</sup> RESPONDENT**

**POWON KAPELLO.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

Following an Exparte Chamber Summons dated 14<sup>th</sup> October, 2015 and of which was considered by the court on 22<sup>nd</sup> October, 2015 an order was issued to the effect that:-

- 1. Leave be and is hereby granted to the Exparte applicant to apply for an order of certiorari to remove into this Honourable Court and quash the decision of the County Government of West Pokot embodied in a letter dated 8.10.2015 signed by the Deputy County Secretary and which by the Exparte applicant has been dismissed from the post of County Executive Committee Member in Charge of Health and Sanitation with effect from 9<sup>th</sup> October, 2015.**
- 2. That grant of leave shall operate as stay of the purported dismissal of the exparte applicant embodied in the letter of 8<sup>th</sup> October, 2015, written by the County Government of West Pokot and signed by Powon Kapello.**
- 3. The main application to be filed and served within 14 days from the date hereof.**

On 5<sup>th</sup> November, 2015, under certificate of urgency, the respondent filed a Notice of Motion of which is the subject of this ruling seeking orders that:

- 1. This application be certified as urgent deserving priority hearing and ex-parte in the first instance.**
- 2. The Honourable court be pleased to stay the exparte order issued on 22<sup>nd</sup> October, 2015 until hearing of this application interpartes or further orders of the court.**
- 3. The exparte order issued on 22<sup>nd</sup> October, 2015 be set aside.**

4. Having set aside *ex parte* orders issued on 22<sup>nd</sup> October, 2015, the application dated 14<sup>th</sup> October, 2015 be set down for hearing on merits before grant of leave or further orders.
5. The Honourable Court be pleased order the Respondent herein to furnish appropriate security for costs in the sum of kshs.3,000,000/- and other terms as the court may find appropriate.
6. Costs of the application be provided for.

The grounds on which the application is founded are that:-

- a. The orders have been overtaken by events in the sense that the *ex-parte* respondent has been removed from the pay roll which closed on 15<sup>th</sup> of every month.
- b. The order would amount to re-employment of the *ex parte* applicant. The position was filled when the *ex parte* applicants' deserted duty on 8<sup>th</sup> July, 2015. The 1<sup>st</sup> respondent is therefore unable to comply with the order.
- c. The position held by the *ex-parte* applicant has already been abolished and merged with another Ministry.
- d. The issued *ex parte* orders are too drastic and have the effect of causing prejudice to the public interest.
- e. The operations of the 2<sup>nd</sup> respondent/applicant will be adversely affected as a result of the said *ex parte* orders.
- f. The *ex parte* applicant was accorded an opportunity to defend himself but spurned it and the instant application is an abuse of court process.
- g. The *ex parte* applicant filed the application too late in the day after his removal from the payroll which makes the 1<sup>st</sup> respondent unable to comply with the order.
- h. (is a repetition)
- i. The *ex parte* applicant has set the stage for citing the respondents for contempt.
- j. It is in the interest of justice to stay the order and hear the application first.
- k. The *ex parte* application is a misuse of the court process.
- l. The applicant's conduct is inequitable and the court has valid reasons, key among them, public policy and balance of convenience, to stay the orders.

The respondent opposed the application. She argues that the stay orders of 22<sup>nd</sup> October, 2015 were properly granted within the applicable laws. It was important for the court to do so for if the stay was not granted the application would be rendered nugatory and at the end of the day serve no purpose. The stay can only be set aside in a rare and clear circumstances. The respondent doubts that the position has been filled. There is no evidence that it was advertised for, applicants shortlisted, interviews conducted and appointment done.

The stay orders granted the respondent on 22<sup>nd</sup> October, 2015 were meant to preserve her position as the County Executive Committee member in charge of Health and Sanitation, pending the hearing *inter partes*, of the chamber summons filed on 15<sup>th</sup> October 2015. In that application the main issue for the court to determine is whether the decision of the County Government of West Pokot, to dismiss the applicant from

the post of the County Executive Committee member in charge of Health and Sanitation with effect from 9<sup>th</sup> October, 2015 was done with the law. The court do not act in vain and do not therefore make orders which cannot be observed or met.

The application dated 2<sup>nd</sup> November, 2015 is based mainly on the ground that the stay order is overtaken by events. The respondent is no longer in the pay roll, her position was abolished and or merged with another Ministry, and occupied by someone else. There is no evidence showing that this is not the position prevailing as of now.

The question on whether the manner in which this was done was proper or not can only be determined in the main application. The court has powers to reverse the entire process if found to have contravened the law. Given the said scenario the stay orders granted on 22<sup>nd</sup> October, 2015 can hardly be observed, serve any meaningful purpose and the right thing for the court to do is to set them aside to pave way for the hearing of the application dated 14<sup>th</sup> October, 2015. The application is therefore allowed to the said extent. Cost be in the cause.

Ruling read and signed in the presence of Mr. Kiarie for the exparte applicants, Mr. Barongo holds brief for Mr. Gitonga for the Respondents this 10<sup>th</sup> day of March, 2016.

**S. M. GITHINJI**

**JUDGE**

**10.3.2016**