



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO.1 OF 2014

CECILIA WANGECHI NDUNGU.....PETITIONER

-VERSUS-

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

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

(Before Hon. Justice Byram Ongaya on Friday 5th December, 2014)

JUDGMENT

The petitioner filed the petition on 26.06.2014 through Ng'ang'a Munene & Company Advocates. The petitioner prayed for:

- a. A declaration that the act of the 2nd respondent in relieving the petitioner of her duties is a breach of the petitioner's constitutional rights under Article 27(1) (2) and (3), 28, 41 & 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.
- b. That pending the hearing and final determination of the application inter-partes, conservatory orders of stay do issue staying the decision of the 2nd respondent dismissing the petitioner.
- c. An order of judicial review to remove into the honourable court and quash the decision of the 2nd respondent relieving the petitioner of her duties as the county executive in charge of culture, gender and social development.
- d. An order of judicial review of prohibition to remove into this honourable court and prohibit the respondents from appointing any nominee for approval by the Nyeri County Executive in charge of culture, gender and social development.
- e. In alternative and without prejudice to prayer (d) above, an order of payment of all dues to the petitioner in the period she would have served between now and the end of her term.
- f. Any other relief or order the honourable court may deem fit to grant.

The petition was supported by the affidavit of the petitioner sworn on 25.06.2014 together with the exhibits attached on the affidavit.

The respondents appointed Wahome Gikonyo & Company Advocates to act for them in the petition. The respondents opposed the petition by filing the grounds of opposition on 27.06.2014. The respondents also filed on 12.11.2014 the replying affidavit of their county secretary one Wambui Kimathi together with the attached exhibits.

The facts in the petition are not in dispute. The petitioner was appointed by the 2nd respondent to the office of the county executive member in the county government of Nyeri with effect from 28.09.2013

and as per the letter dated 27.09.2013, exhibit C1.

By the letter dated 24.06.2013, the 2nd respondent wrote to the petitioner stating that under the powers conferred upon the 2nd respondent by section 40(1) of the County Governments Act, 2012, the 2nd respondent forthwith relieved the petitioner from her duties as a county executive secretary in charge of culture, gender & social development. The letter stated that the directive took effect immediately (on 24.06.2013). The 2nd respondent issued another letter dated 24.06.2014 titled **“Correction of Error in the Letter dated today”** stating that the 2nd respondent had relieved the petitioner in exercise of the powers conferred under section 31(a) of the County Governments Act, 2012. The 2nd respondent issued a further letter addressed to the petitioner dated 24.06.2013 thus,

“RE: CORRECTION OF TYPOGRAPHICAL ERRORS IN THE LETTER REFERENCED RELIEVE FROM EXECUTIVE DUTIES IN THE COUNTY

Please refer to the letter dated 24th June, 2014.

Paragraph 1 of that letter should have read as follows;

“Under the powers conferred upon me by Section 32 (a) of the County Governments Act, 2012, I hereby forthwith relieve you from your duties as a County Executive Secretary in charge of Culture, Gender & Social Development.”

Kind Regards.

Signed

H.E. HON. NDERITU GACHAGUA

GOVERNOR NYERI COUNTY”

The court has considered the pleadings, the evidence and the submissions on record. The court makes findings as follows on the issues in dispute.

The 1st issue is whether the 2nd respondent enjoyed the entitlement to terminate the petitioner’s service as a county executive member without assigning reasons and without due process but in exercise of the pleasure doctrine. It was submitted for the respondents that the petitioner held office at the pleasure of the 2nd respondent as the Governor for Nyeri **“...just like Ministers of the Crown (Executive) and cannot therefore question her dismissal from office under section 31(a) of the County Governments Act, Number 17 of 2012.”** It was further submitted that the said section 31(a) of the County Governments Act, Number 17 of 2012 was in *pari-materia* with Article 152 (5) (b) of the Constitution which provides that the President can dismiss a cabinet secretary. It was further submitted that under the said Article and the section, the President and the Governor were entitled to dismiss a cabinet secretary or an executive member of the county government, respectively, and they are not required to justify the dismissal decision. The respondents referred to the decision by Rika J. in **Tom Luusa Munyasya and Another – Versus- Governor, Makueni County and another Industrial Court of Kenya at Nairobi Cause No. 103 of 2014.** In the ruling delivered on 17.09.2014, in discussing the idea that crown servants were regarded as having no contract of service, the court stated, **“32. Section 31(a) of the County Governments Act, 2012, allows the Governor to dismiss a Member of the County Executive Committee, like the President is allowed to dismiss Cabinet Secretaries under Article 152(5), if the Governor considers it appropriate or necessary to do so. He is not required under this law, to justify his decision. The Governor shall also dismiss a Member of the County Executive Committee under section 31(b), if required to do so by a resolution of the County Assembly made under Section 40 of the Act.”** The respondents further submitted that the court be persuaded accordingly because Article 179 (7) of the Constitution provides that if a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2) (b) cease to hold

office.

For the petitioner it was submitted that the respondents were bound by Articles 3 and 10 of the Constitution to uphold, defend the Constitution and observe human rights, non-discrimination, equity, social justice, rule of law, good governance and integrity in the exercise of their functions. It was submitted that section 40(1) of the County Governments Act clearly stipulated the grounds upon which the petitioner could be removable from office and none of the grounds had been established to exist in the instant case. Further, the 2nd respondent was required to state the reasons for the removal of the petitioner from office but no reasons had been advanced. The petitioner relied on the holding in **Tower Hawlets of London BC–Versus- Chetnik Development Limited(1998) 1ALL E.R 965-966, (1985)AC 858 at 576** and referred to in **Republic –Versus- Registrar of Societies and 5 Others ex-parte Kenyatta & 6 Others (2008) 3 KLR (EP) 521 at 563 to 564** for the opinion that public bodies and private persons are both subject to the rule of law and a public body has no heritage of legal rights which it enjoys for its own sake, at every turn. The petitioner submitted that the court should follow the decision in **Stephen Nendela –Versus- The County Assembly of Bungoma [2014]eKLR** and proceed to quash the respondents' offending decision to remove the petitioner from the service of the county government of Nyeri as an executive member of the county executive committee.

The court has considered the rival submissions made for the parties. First the court finds that Article 179 (7) as invoked by the respondents did not have relevance in the present dispute because the Article refers to circumstances whereby there is a vacancy in the office of the Governor but which was not the case in the instant situation. Secondly, the respondent has not established any constitutional and statutory basis for the submission that the cited section 31(a) of the County Governments Act, Number 17 of 2012 was in *pari-materia* with Article 152 (5) (b) of the Constitution which provides that the President can dismiss a cabinet secretary; and that under the said Article and the section, the President and the Governor were entitled to dismiss a cabinet secretary or an executive member of the county government, respectively, and they are not required to justify the dismissal decision. As submitted for the petitioner, the President and the Governor are equally bound by Article 10 on the principles and values of governance and Article 3 (1) of the Constitution which requires every person to respect, uphold and defend the Constitution.

It was submitted for the respondents that the 2nd respondent appointed the petitioner to the office of executive member of the county assembly on account of the 2nd respondent's good will and once that good will lapsed and the petitioner stopped serving the interests of the 2nd respondent as the elected governor for the county of Nyeri, the 2nd respondent was thereby entitled to relieve the petitioner in the manner that it happened. The court finds that appointment based on the notions of the good will of the 2nd respondent were devoid of constitutional and statutory basis. There was no provision of the Constitution or the statute that was invoked to support such line of submission.

The court holds that elected and appointed leaders, state officers or public officers, do not hold individually generated goals that constitute political will and goals mysterious to the Constitution. The preamble to the Constitution is clear that the people of Kenya are committed to nurturing and protecting the well being of the individual, the family, communities and the nation; and the aspirations of all Kenyans is for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Constitution is replete with specific provisions that blend together towards the achievement of those provisions of the preamble. Article 1 vests all sovereign power in the people of Kenya to be exercised only in accordance with the Constitution. Article 10(1) provides that the principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Article 73(2) (b) and (d) provides that the guiding principles of leadership and integrity include objectivity and impartiality in decision making, and ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corruption; and accountability to the public for decisions and actions. Article 129 provides that executive authority derives from the people of Kenya, is to be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya and for their well being. All these provisions, in the opinion of the court, are not attainable in absence of giving of reasons and due process

as it happened in the present case.

The court therefore holds that any public authority must be exercised in accordance with the Constitutional tests including the power to remove a public or state officer from office like it was anticipated and legitimately expected by the petitioner in the present case. In making that holding, the court further holds that statutes or other written laws and policies need not repeat the cited constitutional tests whenever authority or power is vested or conferred upon a person or body. The cited constitutional provisions are of universal application and not mere flowers in the constitutional text that readily wither in our constitutional practices; in the opinion of the court, they are provisions that must bloom into seeds of vitality that enhance our constitutional practices and lifestyle.

The court upholds its opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** thus, **“To answer the 1st issue for determination being whether the pleasure doctrine applies in Kenya’s public service and particularly in this case, the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010. The court further finds that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the petitioner by the 2nd respondent as was purportedly advanced for the respondents. Finally, the court holds that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The court further holds that it is through the application of the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subdued by the people who are the holders of sovereign power in the new Republic.”**

Further,

“The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.”

And again the court upholds the opinion in **Birir’s case** on the demise of the pleasure doctrine and the doctrine of the servants of the crown, thus,

“...In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic’s constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.”

And further in discussing the provisions of the County Government Act, 2012 the court upholds its opinion in **Birir’s case** thus,

“The court has considered the provisions of the two sections and is of the opinion that both sections prescribe a disciplinary action in a due process that may conclude into imposition of the punishment of dismissal. Under section 31, the procedure is initiated by the governor and

concluded by the governor as an in-house executive process. Under section 40, the process is initiated by a member of the county assembly.

In the opinion of the court, the mischief is obvious; there may be instances of adverse circumstances against a given county executive committee member and the governor fails to invoke the executive disciplinary process under section 31(a) and in which event a county assembly member may invoke the oversight jurisdiction of the county assembly under section 40 to deal with the mischief. In the considered opinion of the court, that is where the difference in the provisions of the two sections ends. Otherwise they are both disciplinary proceedings that demand due process of law. The governor's executive disciplinary process under section 31(a) and the county assembly's process under section 40 of the Act must comply with the established rules of natural justice; the due process of law.

In particular, section 76 of the Act provides for prohibition of imposition of punishment contrary to the Constitution. Subsection 76(2) provides that no public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament. The court holds that the 1st and 2nd respondents were bound by the provision and it was not open for the 2nd respondent to dismiss the petitioner under a fictitious unchained discretion misconceived on the basis of section 31(a) of the Act. The dismissal was a punishment and could be imposed only after due process of law. The court holds that the step by step procedure for imposing dismissal under sections 31(a) and 40 of the Act is not provided for in the sections but is found in the relevant constitutional and statutory provisions such as Article 236 of the Constitution and section 41 of the Employment Act, 2007."

Accordingly, to answer the 1st issue for determination, the court finds that the 2nd respondent did not enjoy the entitlement, constitutional or statutory or otherwise, to terminate the petitioner's service as a county executive member without assigning reasons and without due process and exercise of the pleasure doctrine was not available for the 2nd respondent. The court holds that the pleasure doctrine does not exist in Kenya's constitutional or statutory framework or at all.

The 2nd issue for determination is whether the petitioner is entitled to the remedies as prayed for. The petitioner submitted that Articles 12(1), 20(2), 22(1) and 47 (1) entitled her to each and all fundamental rights and freedoms expressed and implied in the Constitution. The respondents' submission was that the petitioner was not entitled to the remedies because there was no contract of service and the pleasure doctrine applied. Section (3) (3) of the Employment Act provides that the Employment Act, 2007 binds the government and the employment of executive members of the county government or the cabinet secretaries is not amongst the exemptions in section 3(2) or other subsections of that section of the Act. The court upholds its opinion in the cited **Birir case** thus,

"The engagement of public and state officers in the new Republic does not rest and revolve upon the private consent of the persons who are involved to conclude the employment contract. The court holds that the persons involved conclude the contract for and on behalf of the people of Kenya within the stipulated constitutional and statutory safe-guards and the persons have no private consents that override the safe-guards. The conclusion of the arrangements that constitute the contract of public service is a public rather than a private action. Thus, if only for the dichotomy of private right and public law, the court has arrived at the compelling finding that in the new Republic, public and state officers are employed upon a framework beyond their private consents but predetermined and regulated by constitutional and statutory prescriptions; essentially, largely public and remotely private realms."

Taking into account all the findings and holdings by the court as set out in this judgment, the court finds that the petitioner is entitled as prayed for and all letters as addressed to the petitioner by the 2nd respondent on 24.06.2013 are liable to quashing by the prerogative order of certiorari. It is the opinion of the court that consequential to the order of certiorari, there would be no vacancy in the office held by the petitioner and accordingly the petitioner will continue to serve in the office and the order of prohibition as prayed for will not be necessary.

In conclusion, judgment is entered for the petitioner against the respondents for:

- a. **The declaration that the act of the 2nd respondent in relieving the petitioner of her duties is a breach of the petitioner's constitutional rights under Article 27(1) (2) and (3), 28, 41 & 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.**
- b. **The order of judicial review of certiorari is hereby issued to remove into the honourable court for quashing the decision of the 2nd respondent relieving the petitioner of her duties as the county executive in charge of culture, gender and social development and as conveyed by each and every letter issued by the 2nd respondent and addressed to the petitioner on 24.06.2014 including the one erroneously dated 24.06.2013.**
- c. **The petitioner is entitled to remain in the service of the respondents and to be allowed by the respondents to continue in the respondents' service forthwith as the Nyeri County Executive Member in charge of culture, gender and social development, and to perform the attached duties in accordance with the relevant provisions of the Constitution, statutes or as lawfully assigned, unless the petitioner otherwise lawfully ceases to hold the office.**
- d. **The respondents to pay costs of the suit.**

Signed, dated and delivered in court at Nyeri this Friday, 5th December, 2014.

BYRAM ONGAYA

JUDGE