



**Ong’era v County Government of Kisii & 2 others (Petition
E005 of 2024) [2024] KEELRC 1033 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1033 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E005 OF 2024**

S RADIDO, J

MAY 8, 2024

**IN THE MATTER OF: ARTICLES 1(1), 2(1) (2) (5) & (6), 3(1), 10, 19, 20, 22 (1), 35, 41,
47, 73, 75, 165 (3) (B), 235, 236, 258, 259 (1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ARTICLES 22 (1) & 165 (3) (B) OF THE 2010 CONSTITUTION
ON THREATENED AND ACTUAL VIOLATIONS OF THE BILL OF RIGHTS**

AND

**IN THE MATTER OF: SECTIONS 3 (L), 31 AND 40 OF THE
COUNTY GOVERNMENTS ACT, NO. 17 OF 2012 AS READ WITH
SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2016**

AND

**IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES
10, 20, 73, 75, & 236 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 28,
35, 41 & 47 OF THE BILL OF RIGHTS IN THE CONSTITUTION**

BETWEEN

DR. ALFRED NDEMO ONG’ERA PETITIONER

AND

COUNTY GOVERNMENT OF KISII 1ST RESPONDENT

GOVERNOR KISII COUNTY 2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT



JUDGMENT

1. Dr Alfred Ndemo Ongera (the Petitioner) was appointed on 15 November 2022 as the County Executive Committee member for Trade, Tourism, Industry and Marketing by the Governor, County of Kisii (the Governor).
2. On 1 December 2023, the Governor wrote to the Petitioner informing him that he was being sent on compulsory leave to facilitate investigations into allegations of gross misconduct, abuse of office, gross violation of the Constitution, and other written laws. The Governor cited sections 39 and 76(6) of the County Governments Act for the decision. The Governor extended the compulsory leave on 28 December 2023 for 6 weeks.
3. The Petitioner wrote to the Governor on 2 January 2024 seeking particulars of the alleged violations and abuse of office. The Petitioner indicated in the letter that if there was no response within 7 days, he would move to Court.
4. The Governor did not respond and the Petitioner lodged a Petition with the Court on 6 February 2024, alleging that the compulsory leave was illegal and amounted to unfair termination of employment, and violated the national values and principles, rights to access information, fair labour practices, fair administrative action and protection from arbitrary dismissal.
5. The Petitioner sought the following remedies:
 - i. A declaration that the 2nd Respondent's decision to send the Petitioner on compulsory leave and or suspension without any elaborate reasons to back up the alleged violations of the Constitution was unlawful.
 - ii. A declaration that the extension of the compulsory leave and or suspension for an indefinite period and without reasons is unconstitutional and unlawful.
 - iii. A declaration that the decision of the 1st and 2nd Respondents to send the Petitioner on compulsory leave for a month and thereafter for an indefinite period violated Articles 10, 20, 73, 75 and 236 of the Constitution of Kenya.
 - iv. A declaration that the decision of the 1st and 2nd Respondents to send the Petitioner on compulsory leave for a month and thereafter for an indefinite period violated Articles 35, 41 and 47 of the Bill of Rights under Chapter IV of the Constitution of Kenya.
 - v. An order of compensation against the Respondents for the violation of the rights of the Petitioner.
 - vi. An order of *certiorari* quashing the decision of the 2nd Respondent to send the Petitioner on an indefinite compulsory leave.
 - vii. A declaration that section 76 (6) of the County Governments Act is unconstitutional.
 - viii. A mandatory order compelling the 1st and 2nd Respondents to reinstate the Petitioner to the position of County Executive Committee Member (CECM).
 - ix. In the alternative to (v) above, a declaration that the conduct of the 2nd Respondent to send the Petitioner on compulsory leave is tantamount to constructive dismissal.



- x. An order of compensation by way of twelve (12) months' salary to the Petitioner by the Respondents for unlawful termination.
 - xi. In addition to (vi) above, an order compelling the Respondents to pay the Petitioner all his terminal dues being salary in lieu of notice, accrued leave days and service pay.
 - xii. The costs of this Petition be borne by the Respondents.
6. Filed at the same time was a Motion seeking interim conservatory orders.
 7. The Respondents filed Grounds of Opposition on 12 February 2024, contending that the Petition was an abuse of the court process because the Petitioner had filed another Petition on the same subject matter; the Court's jurisdiction had been invoked wrongly; the orders issued by the Court had paralysed investigations; the Petitioner had approached the Court with unclean hands; the action was not ripe; the Petitioner's rights had not been violated; and that a case for grant of conservatory orders had not been made.
 8. The acting County Secretary filed a replying affidavit on behalf of the Respondents in opposition to the Petition on 22 February 2024.
 9. In the affidavit, it was deponed that the Petitioner was sent on compulsory leave after the Governor received complaints against the Petitioner and that the compulsory leave was extended to allow the completion of investigations; the Petitioner had defied instructions to report to the Governor weekly during the compulsory leave; the Petitioner was advised that he would be given particulars of the allegations once the investigations were completed; the Petitioner filed this Petition while another Petition was pending wherein he had failed to secure interim orders and without disclosing the existence of the other Petition; the dispute was not ripe for determination as the Petitioner was still in employment on full remuneration; none of the Petitioner's rights had been violated; the Respondents had not declined the Petitioner's request for access to information; the compulsory leave was not unconstitutional; and that the Petition had not been pleaded with precision.
 10. The Petitioner filed a supplementary affidavit and submissions on 18 March 2024.
 11. In the supplementary affidavit, the Petitioner asserted that he withdrew Kisumu Petition No. E004 of 2024 because it was defective as the supporting affidavit had not been commissioned. He also stated that the Petition was withdrawn before the instant Petition was filed.
 12. The Petitioner isolated the issues for determination in his submissions as:
 - i. Whether the application for conservatory orders is merited?
 - ii. Whether the dispute is ripe for determination?
 - iii. Whether the purported compulsory leave was lawful?
 - iv. Whether the Respondents violated the *Constitution*?
 - v. Whether section 76(6) of the *County Governments Act* is unconstitutional?
 - vi. Whether the Petitioner is entitled to the orders sought?
 13. Pursuant to leave, the Petitioner filed further submissions on 23 April 2024, and the Respondents filed their submissions on 7 May 2024 (should have been filed and served before 19 April 2024).
 14. The Respondents identified the Issues in contention as:



- i. Whether the instant Petition and application are an abuse of the court process for material non-disclosure?
 - ii. Whether compulsory leave amount to unfair termination?
 - iii. Whether the Petitioner has specifically pleaded and proven any violations of the Constitution?
15. The Court has considered the Petition, affidavits, Grounds of Opposition and submissions.

Propriety of conservatory orders

16. The Petitioner sought conservatory orders in the Motion filed together with the Petition in order to preserve the *status quo* of his holding public office and further to advance the rule of law.
17. In the Court's view, this question is no longer live for determination in this judgment as the Court addresses its mind to the substance of the Petition.

Ripeness of the Action

18. The Respondents took objection to the ripeness of the Petition on the basis that they had not started a process to remove the Petitioner from office. It was contended that the Petitioner was still enjoying the full benefits of office including remuneration.
19. Citing National Assembly of Kenya & Ar v Institute for Social Accountability & 6 Ors (2017) eKLR and Wanjiru Gikonyo & 2 Ors v National Assembly of Kenya & 4 Ors (2016) eKLR, the Respondents argued that the Petitioner was calling upon the Court to determine hypothetical questions, which were not justiciable.
20. In rebuttal, the Petitioner countered that he was alleging that by placing him on compulsory leave, the Respondents had violated Articles 10, 28, 35 and 47 of the Constitution and that section 76(6) of the County Governments Act relied on by the Respondents was unconstitutional.
21. It is not in dispute that the Governor sent the Petitioner, a member of the County Executive Committee on compulsory leave, and it is that decision that the Petitioner is primarily challenging.
22. The question of whether the compulsory leave is unlawful is, therefore, neither hypothetical nor an idle question.

Constitutionality of Section 76(6) of the County Governments Act

23. The Governor made a reference to sections 39 and 76(6) of the County Governments Act to send the Petitioner on compulsory leave.
24. The appointment and removal of a member of a County Executive Committee is set out in Part V of the County Governments Act. Section 40 of the County Governments Act expressly sets out the process of removal of a member of the County Executive Committee.
25. Section 76 of the Act which the Governor relied on is in Part VII and provides for the county public service.
26. The county public service is defined in section 2 of the County Governments Act as:

means the collectivity of all individuals performing functions within any department of the county government or its agency, but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly;



27. The definition is clear beyond peradventure that a member of the County Executive Committee is not part of the county public service.
28. The challenge to the constitutionality of section 76(6) of the *County Governments Act* was therefore misplaced and a misapprehension of the law on the part of the Petitioner as it does not apply to members of a County Executive Committee.

Whether the Compulsory Leave was Unlawful

29. The Governor relied on the provisions of sections 39 and 76(6) of the *County Governments Act* to send the Petitioner on compulsory leave.
30. The Respondents also asserted that the compulsory leave was to facilitate investigations into complaints against the Petitioner and that since the Petitioner continued to enjoy full remuneration and benefits during the period of the compulsory leave, then in light of the judgment of the Court of Appeal in *Milcab J. Mutwol v Moi University* (2022) eKLR, the decision was lawful.
31. The Court held therein:

We associate ourselves with the position of Onyango J in the *Thomas Kerongo case (supra)*. In our view, we are not persuaded that there must be provision in the contract of employment providing for compulsory leave before an employee can be sent on such leave. The flip side of it is that there is no law that prohibits the placement of an employee on compulsory leave. It is our further view that it was necessary to have the appellant sent on compulsory leave to enable the Respondent carry out meaningful investigations. It is not possible for an employer to carry out investigations against an employee who in spite of accusations of wrong doing, continuous to occupy his/her office..
32. The Petitioner took a contrary view. He contended that compulsory leave was not provided for under the employment law of general application in Kenya, it was not lawful, and that by dint of Article 47 of the *Constitution* which guarantees the right to fair administration, he should have been given reasons.
33. According to the Petitioner, by sending him on compulsory leave, a practice not provided for in the contract or the Respondents' Human Resources Disciplinary Manual, then the Respondents were purporting to rewrite the contract.
34. The Petitioner urged the Court to endorse and apply the holdings in *Chiloba & Ar v Chebukati & 6 Ors; Attorney General (Interested Party)* (2022) KEELRC 14636 (KLR) and *John Mwaniki v Joshua Irungu & Ar* (2017) eKLR that where there is no contractual foundation to sending an employee on compulsory leave, then the position obtaining under the common law should apply.
35. The Court has already reached a conclusion that section 76(6) of the *County Governments Act* does not apply to members of a County Executive Committee. The Governor could therefore not purport to use the provision to send the Petitioner on compulsory leave.
36. The Court has considered the judgment of the Court of Appeal in the *Mutwol case*. The dispute concerned ordinary employment and not the holder of a statutory office.
37. The collective bargaining agreement in place clothed the employer with the power to suspend an employee to enable investigations. The *Mutwol case* is therefore distinguishable.
38. The Petitioner here is no ordinary employee. He is an office holder. The position of member of a County Executive Committee is recognised by Article 179 of the *Constitution*.



39. Section 40 of the [County Governments Act](#) sets out elaborate criteria and provisions for the removal of a member of a County Executive Committee.
40. The criteria include the County Assembly voting on a removal motion and the setting up of a Select Committee of the County Assembly to investigate any allegations of incompetence, abuse of office, gross misconduct, gross violation of the [Constitution](#) or any other written law, physical or mental incapacity or failure to attend meetings of the County Executive.
41. Like other public officers, a holder of the office of a member of a County Executive Committee is also protected from adverse action by the due process outlined in Article 236 of the [Constitution](#).
42. The allegations or complaints the Governor received against the Petitioner fell within the grounds set out in section 40 of the [County Governments Act](#).
43. The architecture of the removal of a member County Executive Committee under the section demands that complaints or allegations should be channelled or should find its way before the County Assembly for investigations. The said legal framework does not contemplate a Governor suspending or sending on compulsory leave, a member of the County Executive Committee.
44. The complaints received by the Governor related to allegations of gross misconduct, abuse of office, gross violation of the [Constitution](#), and other written laws. These allegations fell within the ambit of conduct that could lead to the removal of the Petitioner from the office of County Executive Committee member.
45. The Governor, therefore, should have been processed the complaints through the County Assembly, for it is a function of the County Assembly and not the Governor to conduct the investigations to establish whether a member of a County Executive Committee should be removed from office.
46. The Governor as a Governor does not have the instruments to conduct an investigation. Indeed, the Governor in the present case did not disclose the instrumentalities he was using to carry out the purported investigations. The office of a Governor is not suited to conduct investigations, whether disciplinary or otherwise.
47. The Court has no hesitation in holding that the Governor did not possess any lawful authority to send the Petitioner on compulsory leave or conduct investigations into the allegations against the Petitioner under the provisions he cited or any other law, and the Court so finds.

Constructive Dismissal

48. The Petitioner made a case for constructive dismissal. The Petitioner is still in office and enjoying payment of remuneration and other benefits.
49. Constructive dismissal arises when the employee resigns because of a hostile work environment. The Petitioner has not resigned and consequently, constructive dismissal is yet to be implicated.

Conclusion and Orders

50. In light of the above, the Court finds and declares:
 - i. A declaration is hereby issued that the 2nd Respondent's decision to send the Petitioner on compulsory leave was unlawful.
 - ii. An order of *certiorari* is hereby issued quashing the decision of the 2nd Respondent to send the Petitioner on compulsory leave.



- iii. A mandatory order is hereby issued compelling the 1st and 2nd Respondents to reinstate the Petitioner to the position of County Executive Committee Member (CECM).

51. The Petitioner has succeeded. He is awarded costs against the Respondents.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF MAY 2024.

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RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner Ekuru Aukot & Co. Advocates

For Respondents Sagana, Biriq & Muganda LLP

Court Assistant Chemwolo

