



**Rono v County Government of Kericho & 2 others (Civil Appeal
215 of 2018) [2023] KECA 310 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 310 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 215 OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
MARCH 17, 2023**

BETWEEN

HELLEN CHEPKURUI RONO APPELLANT

AND

COUNTY GOVERNMENT OF KERICHO 1ST RESPONDENT

**PAUL KIPRONO CHEPKWONY-GOVERNOR COUNTY GOVERNMENT OF
KERICHO 2ND RESPONDENT**

HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

*(An Appeal from the Judgment of the Employment and Labour Relations Court at
Kericho (D.K. N. Marete, J.) dated 9th October, 2018 In ELRC Petition No. 3 of 2018)*

JUDGMENT

1. Before us is an appeal filed by Hellen Chepkurui Rono (the appellant) against the judgment of DKN Marete, J of the Employment and Labour Relations Court (hereinafter ELRC) at Kericho in Petition No 3 of 2018. The appellant had before the trial court filed a Petition challenging the decision by the 2nd respondent, Paul Kiprono Chepkwony, who was the then Governor of the County Government of Kericho, dismissing her from serving as a member of the County Executive Committee (CEC).
2. As can be gleaned from the appellant's pleadings, the Petition before the trial court was premised on the grounds that the appellant was appointed as the Executive Committee Member in the County Government of Kericho in charge of Health Services on June 24, 2013. She was redeployed to the docket of Information, Communication, E-Government, Sports and Youth Affairs on December 9, 2016. Her case was that following the re-election of the 2nd respondent in the general election held on August 8, 2017, she retained her position as a CEC Member. According to the appellant, on May 4,



2018, the 2nd respondent wrote to her a letter asking her to hand over her docket which amounted to removal from office. The letter is what triggered her litigation at the trial court.

3. In her Petition, the appellant had sought six orders namely a declaration that her dismissal from office was unconstitutional and unlawful on account of violation of the Constitution and statute; an order of certiorari to bring into the court for purposes of being quashed the decision of the 2nd respondent removing and dismissing her from office; a declaration that the appellant remained a lawful holder of the position of the CEC Member of the County Government of Kericho; a finding that the decisions, actions and omissions of the 2nd respondent violated the Constitution; an order for compensation for violation of her rights; and, the costs of the Petition.
4. In opposition to the Petition, the 1st and 2nd respondents herein, who were also the 1st and 2nd respondents at the trial, filed replying affidavits. Their case was that the appellant had served as the CEC for Medical, Public Health and Pharmaceutical Services from the year 2013 but had not been successful in her application for a CEC post for the term beginning 2017 as she was rejected by the County Assembly of Kericho. They also argued that in 2017, the appellant was only appointed to act as the CEC Information, Communication, E-Government, Sports and Youth Affairs although she had applied to be the CEC Member for Trade, Industrialization, Cooperative Management, Tourism and Wildlife.
5. The 1st and 2nd respondents also averred that the appellant had integrity issues when she was the CEC for Health Service thereby violating Chapter 6 of the Constitution and the Leadership and Integrity Act. The 1st and 2nd respondents supported their averment by referring to a report of Kericho County Referral Hospital dated June 7, 2018. In summary, it was their case that the 2nd respondent was acting within his powers, the law and in the public interest when he discharged the appellant notwithstanding the fact that she had not been appointed as a CEC Member in 2017.
6. In his judgment, the learned Judge dismissed the Petition and directed the parties to bear their own costs. In dismissing the appeal, the Judge found that:

“...that the letter dated May 4, 2018 was a proper executive action geared at appropriate management of her functions as dictated by the law. It cannot be faulted in the circumstances of this case. If so, mala fides should be established by the contesting party. The petitioner has not met this. Firstly, the argument by the parties on the validity of the removal/dismissal of the petitioner by the 2nd respondent in toto fall by the way side. So is their emphatic justification of and against a case of removal or dismissal in the circumstances. This is because the circumstances of this case do not arouse a case of removal or dismissal, or at all. The petitioner only had an elongated stint at this portfolio in an acting capacity. She was never an appointee as such.”

7. In her memorandum of appeal, the appellant has raised 10 grounds as follows:
 - i. The Learned Trial Judge of the Employment And Labour Relations court misdirected himself In law and fact in his finding that the Appellant was not a County Executive Committee Member, Kericho County as at May 4, 2018.
 - ii. The Learned Trial Judge of the Employment and Labour Relations court erred in fact and law in his finding that the 2nd Respondent prudently and lawfully exercised his powers under Section 31[a] of the County Governments Act, 2012, Laws of Kenya in removing and/or or dismissing the Appellant.



- iii. The Learned Trial Judge of the Employment and Labour Relations court erred in fact and law in his finding that the letter dated 4th May, 2018 dismissing and/or removing the Appellant from her position was a proper executive action without interrogating evidence before him.
 - iv. The Learned Trial Judge of the Employment and Labour Relations court erred in law and fact as he misconstrued and misdirected himself when called upon to determine whether the 2nd Respondent applied the doctrine of pleasure as juxtaposed with doctrine of service to the people; in removing the Appellant from office.
 - v. The Learned Trial Judge of the Employment and Labour Relations court erred in law by misconstruing and misdirecting himself in his decision on the applicability of the provisions of sections 31 and 42 of the [County Governments Act, 2012](#), Laws of Kenya.
 - vi. The Learned Judge of the Employment and Labour Relations court erred in law and fact by misdirecting himself and delving into the terrain of un-pleaded issues touching on integrity of the Appellant, a preserve of other forums where the petitioner would have an opportunity to respond and defend herself.
 - vii. The Learned Judge of the Employment and Labour Relations court erred in law and fact by failing to take into consideration the materiality of the claim before as well as the able response of the Appellant contained in her Replying Affidavit dated August 7, 2018.
 - viii. The Learned Judge of the Employment and Labour Relations court erred in law by departing from sound legal principles espoused in the written submissions before him by the Appellant and failed to follow and apply binding decisions of this Appellate Court hence departed from the precedent set in past decisions by the Court of Appeal.
 - ix. The Learned Judge of the Employment and Labour Relations court erred in law in failing to accord the Appellant right to fair trial and by failing to make a ruling on a Notice of Motion Application brought by the Appellant for his recusal which he had directed was to be heard and determined as of course.
 - x. The Learned Judge of the Employment and Labour Relations court erred in law and fact in failing to interpret the facts of the case before him and correctly apply the doctrine of estoppel and the principle of legitimate expectation.”
8. The appellant has asked us to set aside the impugned judgment in its entirety; order the issuance of a certificate of service to her; direct the 1st and the 2nd respondents to pay her full salary and/or terminal dues for May, 2018 to August, 2022; order payment of twelve months' gross salary to her for unfair termination; and, award her costs for the appeal.
9. This appeal was canvassed through written submissions. The 3rd respondent did not participate in the appeal. In her submissions dated November 18, 2022, the appellant identified three issues for our determination. On the first issue as to whether the appellant was the CEC Member in charge of Information, Communication, e-Government, Sports and Youth Affairs for the County Government of Kericho, counsel submitted that in accordance with Section 42(2) of the [County Governments Act](#), the appellant became the CEC Member by operation of the law upon the lapse of 21 days from



- the date of the swearing in of the members of the County Assembly. According to counsel, Section 42(2) of the *County Governments Act* is couched in mandatory terms and the appellant therefore became a substantive office holder upon the expiry of 21 days. Counsel further contends that the 1st and 2nd respondents acknowledged the appellant as the valid holder of the position in question by allocating her duties which she executed diligently until May 4, 2018 when she was discharged. Counsel invoked Section 120 of the *Evidence Act* and submitted that the burden of disproving the appellant's assertion that she was appointed a CEC Member after the 2017 general election fell upon the 1st and 2nd respondents.
10. The second issue addressed by counsel was whether the appellant was irregularly and illegally removed from office as a CEC Member by the 2nd respondent. Counsel submitted that the appellant's removal did not conform to the provisions of Sections 40 and 31(a) of the *County Governments Act*. Counsel relied on the decisions in *County Government of Nyeri & Another v Cecilia Wangechi Ndungu* [2015] eKLR and *Richard Bwogo Birir v Narok County Government & 2 others* [2014] eKLR in support of her proposition that the pleasure doctrine is not applicable in Kenya and that the powers donated by Section 31(a) of the *County Governments Act* should be exercised reasonably and for the public good.
 11. Counsel further submitted that the appellant's removal violated Article 47 which protects the right to fair administrative action and Article 41 provides for fair labour practices. In support of the argument that procedural fairness must be infused into administrative actions, counsel relied on the cases of *David Dunsmuir v New Brunswick* [2008] 1 SCR 190 and *Selvarajan v Race Relations Board* (1976) 1 ALL ER 12.
 12. Finally, counsel submitted that the appellant is entitled to the prayers sought as they fell within the remedies provided under Article 22 of the *Constitution*. Counsel stressed that the appellant was entitled to the reliefs sought because her removal was illegal and infringed on her constitutional rights.
 13. The advocate for the 1st and 2nd respondents filed submissions dated 18th November, 2022 and submitted on two issues. First, it was submitted that the appellant was lawfully and procedurally removed from office. Counsel conceded that the appellant was indeed appointed as a CEC Member in 2013 but that her service was marred with integrity issues. It was also submitted that the 2017 general election paved way for administrative changes in the governance of the affairs of the 1st respondent as provided by Section 42(1) of the *County Governments Act*. Counsel asserted that the appellant's name was not in the County Assembly Report which the 2nd respondent used to appoint CEC members after the 2017 general election. Counsel further submitted that the intent of the 2nd respondent's letter dated May 4, 2018 was meant to hand over the reins of that docket to a qualified person. To buttress this line of argument, counsel referred to the decision in the case of *Narok County Government & another v Richard Bwogo Birir & another* [2015] eKLR where the factors to be considered in the dismissal of CEC members were set out.
 14. The second issue submitted on by the 1st and 2nd respondents was whether the appellant was entitled to the reliefs sought. According to counsel, the appellant was not entitled to the orders sought for the reason that she did not specify the loss or damage suffered as a result of the alleged dismissal. Counsel relied on the case of *Ronald Kimatu Ngati v Ukulima Sacco Society Ltd* [2011] eKLR where the Court declined to award compensation as the claim was neither pleaded nor supported by evidence to assist the court determine the appropriate compensation. We were consequently urged to dismiss the appeal with costs.
 15. The appellant having invoked our jurisdiction, it is important to state that the mandate of this Court as a first appellate court is anchored on Rule 31(1) of the *Court of Appeal Rules, 2022*. Pursuant to the rule, our mandate is to independently re- appraise the evidence and draw our own conclusions. In



the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, this mandate was expressed as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. In line with this mandate, we have reviewed the record of appeal, the submissions of the parties as well as the cited authorities. In our view, this appeal raises three major issues for our determination, namely, whether the appellant was a substantive CEC member as at May 4, 2018; whether the appellant was unfairly dismissed; and, whether the appellant is entitled to the reliefs sought. The issue of costs will, as is expected, pop up at the tail end of this judgment.
17. The first issue we address is whether the appellant was a substantive CEC Member as at 4th May, 2018. We note that through a letter appearing at page 54 of the record of appeal and dated June 24, 2013, the appellant was appointed as Kericho CEC Member in charge of Health Services with effect from June 7, 2013. At page 55 of the record of appeal is a letter dated December 9, 2016 appointing the appellant as the in charge of the Department of Information, Communication and E- Government.
18. As a starting point, the provisions of article 235 of the *Constitution*, clearly sets out the manner in which a County Government should be staffed. It states:
 - “A County government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for-
 - a. establishing and abolishing offices in its Public Service;
 - b. exercising disciplinary control over and removing persons holding or acting in those offices.....”
19. In order to comply with the *Constitution*, Parliament enacted the *County Governments Act, 2012*. Section 42 of the Act provides that:
 - “42 (1) When a general election is held for a county government, the outgoing county executive committee shall remain in office until a new executive committee is constituted after the election.
 - (2) the *Constitution* of a new executive after an election under subsection (1) shall be finalized within twenty-one days of the swearing in of the members of the county assembly.”
20. Our understanding of Section 42(1) is that the tenure of an existing CEC member terminates upon appointment of new members following a general election. The import of Section 42(2) is that the appointment of the new CEC members following a general election should be finalized within 21 days after the swearing in of the members of the county assembly. It therefore follows that after a general election, a Governor, is required to appoint new CEC members to help in the running of the affairs of the County.



21. How then is an appointment conducted? Section 2 of *Public Appointments (County Assemblies Approval) Act, 2017* defines an appointment to include,

“any re-appointment to the same body, whether or not in the same capacity.”
22. Section 4 of the *Act* further provides:

“An appointment under the *Constitution* or any other law for which the approval of a County Assembly is required shall not be made unless the appointment is approved by the relevant County Assembly in accordance with this Act.”
23. From the provisions of *Public Appointments (County Assemblies Approval) Act, 2017* as well as Section 42 of the *County Governments Act*, the appellant could only continue serving as a County Executive Committee member upon re-appointment. In this case, and in compliance with the law which we have restated above, there is a report by the Kericho County Assembly at page 84 of the record of appeal in which the County Assembly declined to approve the nomination of the appellant as a CEC member. This being the case, we find that there is no way the appellant could have been appointed as a CEC member after the 2017 general election. Further, the appellant did not tender any evidence before the trial court to support her claim that she was appointed after the 2017 general election.
24. The appellant contends that her appointment was by the operation of law. She argues that after the lapse of the 21 days provided for under Section 42(2) of the *County Governments Act*, she automatically became a substantive CEC member. As we have already stated above, the law requires that certain steps must be taken before an appointment is confirmed. In the absence of those pre-requisite steps in the journey to appointment, the lapse of the 21 days period could not confer on the appellant a substantive appointment. On this, Section 4 of the *Public Appointments (County Assemblies Approval) Act, 2017* is clear that no appointment requiring the approval of a county assembly shall be made unless the appointment is approved by the relevant county assembly in accordance with the Act.
25. What emerges from our analysis above is that the learned Judge properly considered this issue when he ruled that this is not a case of removal or dismissal. The appellant could only have been serving in an acting capacity for the period after the 2017 general election as per the provisions of Section 42(1) of the *County Governments Act*. Therefore, the 2nd respondent correctly exercised his mandate in asking the appellant to hand over her office. We are therefore convinced that the learned Judge properly addressed himself to this issue.
26. Before we depart from this issue, perhaps it is relevant to point out that the two cases relied upon by the parties herein, namely, *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR and *Richard Bwogo Birir v Narok County Government & 2 others* [2015] eKLR majorly dealt with dismissal of persons whose appointments were valid and in existence. They were also concerned with the exercise of discretion under Section 31(a) of the *County Governments Act* which would require one to have been validly appointed. These decisions are therefore distinguishable from the circumstances of the present appeal where the appellant was not a substantive CEC member at the time of her alleged dismissal by the 2nd respondent.
27. Based on our finding above, it is irrelevant to engage in an assessment as to whether the appellant was diligently discharging her mandate as the CEC Member prior to her removal. Consequently, we do not find the basis for addressing the 4th and 5th grounds of appeal since those were not issues raised before the trial court for determination. Similarly, we do not find it judicious to address the issue whether the appellant’s dismissal was legal as we have found that she in fact was yet to be appointed a CEC member.



28. In view of our findings above, the next issue we are bound to address is whether the appellant is entitled to the reliefs sought. We have no difficulty agreeing with the learned Judge that once it was found that there was no unfair dismissal as there was no appointment, there was no basis for awarding the reliefs sought. It is therefore our finding that the appellant is not entitled to any relief as she did not prove any infringement of her rights or an act of unconstitutional nature which was to the detriment of her interests and wellbeing.
29. We do not deem it prudent to engage in the semantics as whether there exists any evidence the basis on which we can qualify and quantify the awards. We would only be bound to belabor that point if it was proved that the appellant was a substantive CEC member and that her removal was illegal and unfair. Consequently, we find that the appellant was not entitled to the reliefs sought. This appeal therefore fails in its entirety.
30. The next issue is who should bear the cost of this appeal. The award of costs is a discretionary matter for consideration by the court seized of a matter. The learned Judge ordered the parties to bear their own costs. No reasons have been adduced before us to warrant interference with the Judge's exercise of discretion. We will therefore leave that decision as it is.
31. With regard to the costs of this appeal, we note that this Court is clothed with discretionary jurisdiction in determining the issue of the costs of this appeal. This is provided for under Rule 33 of the Court of Appeal Rules, 2022. In exercising our discretion, we wish to rely on the statement of the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR that:
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
- (22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”
32. With the above dictum in mind, we note that this appeal has failed. We are also cognizant of the fact that the 1st respondent is a constitutional body whose coffers are deep and is financed by the public. Further, the record of appeal shows that the 1st and 2nd respondents were represented by the same counsel, probably appointed by the 1st respondent during the tenure of the 2nd respondent as the Governor of the 1st respondent. We are also aware that the appellant stopped being a CEC member in 2018. It is our view therefore that the highlighted circumstances of this matter warrant a deviation from the general rule that costs follow the event. The appropriate order on costs is therefore to direct the parties to meet their own costs of the appeal.



33. The upshot of the foregoing is that this appeal is without merit and is hereby dismissed. The parties to bear their own costs of the appeal.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF MARCH , 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

