County Government of Kirinyaga & another v Kinyua (Civil Appeal 77 of 2019) [2022] KECA 889 (KLR) (13 May 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 77 OF 2019

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

MAY 13, 2022

BETWEEN

COUNTY GOVERNMENT OF KIRINYAGA ..... 1ST APPELLANT

GOVERNOR KIRINYAGA COUNTY ..... 2ND APPELLANT

AND

JUDY WATHATA KINYUA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nyeri (Nzioki wa Makau, J) delivered on 18th February 2019inELRC Petition No. 11 of 2018)

JUDGMENT

1. The promulgation on 27th August 2010 of the Constitution of Kenya ushered in unprecedented and far-reaching constitutional and governance reforms, including the establishment of a devolved system of government comprised of the National and 47 County Governments of which the 1st appellant is listed in the First Schedule to the *Constitution* as County No. 20, whose county government is comprised of a county assembly and a county executive in accordance with Article 176(1) of the *Constitution*.

2. The transition from the hitherto central to the devolved system of government owe their emergent institutional and legislative frameworks to the *Constitution* and statute law, which were suitably designed to implement the 2010 Constitution and give effect to the emergent constitutional order of governance characterized by devolution of power and decentralization of services to the county level and other devolved units of service delivery.

3. Chapter 11 of the *Constitution* makes provision for the system of devolved government, whose objects and principles prescribed in Part 1 include inter alia the object of: promoting democratic and accountable exercise of power (Article 174 (a) of the *Constitution*); enhancing checks and balances and

the separation of powers (Article 174 (i)); and the democratic principles and the separation of powers (Article 175(a)) as between county assemblies and county executives.

4. According to Article 177(1) of the *Constitution*, a county assembly is comprised of, among others, the members elected by the registered voters of the wards and the Speaker of the Assembly as more particularly set out in paragraphs (a) to (d). In addition to exercising their legislative authority pursuant to Article 185(1), the county assembly may exercise oversight over the county executive committee and any other county executive organs, provided that such oversight is exercised with due respect for the principle of the separation of powers as required by Article 185(3).

5. On the other hand, a county executive is comprised of the governor, deputy county governor and members of the county executive appointed by the county governor with the approval of the assembly, from among persons who are not members of the assembly (Article 179(2). The executive authority of the county is vested in, and exercised by, the county executive committee. According to Article 179(6), members of the county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.

6. In order to give effect to Chapter 11 of the *Constitution* (the establishment of the devolved system of government) and the effective administration of county governments, Parliament enacted inter alia the *County Governments Act*, 2012. To this end, section 39(1) of the Act provides for the accountability of members of the executive committee in performance of their respective duties. It reads:

> " 39. Accountability of members of the executive committee (1)The members of the county executive committee are individually and collectively accountable to the governor in the exercise of their powers and performance of their duties and responsibilities."

7. The respondent (Judy Wathata Kinyua) was appointed by the 2nd appellant (the Governor Kirinyaga County) in accordance with Article 179(2) (b) of the *Constitution* as a member of the County Executive Committee (CEC) of the 1st appellant (the County Government of Kirinyaga) in charge of Gender, Culture and Social Services with effect from 12th October 2017. Upon her appointment, the respondent took her Oath of Office and an Oath of Commitment to Leadership and Integrity.

8. On being sworn in, the respondent assumed office with immediate effect and continued in service until 28th June 2018 when she received a letter from the 2nd appellant informing her that she had been suspended from office for a period of 1 month with effect from 1st July 2018 pending further investigation and determination of her suitability to hold office. According to the 2nd appellant, the respondent had been suspended on account of "... incompetence/underperformance in terms of delivery of her department's mandate as the overall senior-most officer".

9. By a letter dated 30th July 2018 addressed to the respondent by the 2nd appellant, the respondent was required to show cause, in writing, why her appointment should not be terminated. The show-cause letter stated that –

> " ... investigations had revealed the following:
>
> 1. Failing to implement any meaningful budgeted programmes and projects in FY 2017/2018.
>
> 2. The State of Kianyaga Children's Home was found to be in deplorable condition prompting the County leadership, including members of the County Assembly, to visit the home on diverse dates to ascertain how it was

being run. This followed persistent complaints from members of the public and unfortunately, the visit authenticated the complaints.

3. On 29th March 2018 you were requested by the County Secretary to address the deteriorating physical condition and poor management of the Home despite allocation of funds in FY 2017/2018 budget. You were then directed to give feedback within seven days and show evidence, including pictures to prove that all the critical matters had been addressed. This was not satisfactorily done.

4. Further, on 21st June 2018 the relevant County Assembly Committee found you unfit to hold office pursuant to section 40(1) (a) of the *County Governments Act*, 2012 due to laxity in policy formulation and programme implementation.

5. No significant and implementable project proposals were submitted by your department to the County Executive.

6. Given that one of the functions of the CECM is managing, coordinating and supervising the department to ensure effective and efficient delivery and with nothing significant to report in the departmental performance as at the end of the financial year 2017/2018, your incompetence vis a vis underperformance is significantly noticeable and raises doubt as to your competence to handle the docket as required.

In view of the foregoing and before exercising the powers conferred on the Governor by section 31 of the *County Governments Act*, 2012 you are required to show cause why you should not be dismissed from service.

Your written response, if any, should be received by the undersigned within seven days from the date hereof failing which the intended action will be taken without further reference to you. In the meantime, you remain suspended."

10. The respondent replied to the 2nd appellant's show-cause letter aforesaid vide her letter dated 3rd August 2018 in which she explained: that all the budgeted programmes and projects for the FY 2017/2018 were implemented (and gave examples of various programmes and projects implemented by her department); that her department had not underperformed within the 1 year; that appropriate action had been taken to address the issues raised in relation to the children's home; that she had submitted a comprehensive report dated 29th March 2018 to the County Secretary's office; that she did not get any communication from the County Assembly Committee relating to the alleged finding that she was unfit to hold office; that she was not called at any sitting of the committee to discuss policy and programme formulation; that she had presented programme and project formulation and implementation proposals in line with the 2nd appellant's advice, bringing unique and cutting edge projects for women; that she had raised some of the management and coordination issues with the departmental staff through written communication while others were under investigation; and that her department had been put in bad light due to unfortunate incidents of County leaders interfering with their department through the media. She concluded her response by expressing her wish to discuss face-to-face the issues raised, and to continue serving the County under the 2nd appellant's guidance and leadership.

11. By a letter dated August 20th, 2018, the 2nd appellant terminated the respondent's appointment with immediate effect. The letter stated that her appointment was terminated under section 31 of the *County Governments Act*, 2012.

12. Following termination of her appointment, the respondent filed the above-mentioned petition dated 3rd September 2018 praying for –

> "(a) a declaration that the act of the 2nd appellant in relieving the respondent of her duties was a breach of her constitutional rights under Articles 27(1), 41(1) and (2), and 236(1) (b) of the *Constitution*, and that the same was null and void for all intents and purposes;
>
> (b) an order of judicial review do issue to remove into the court and quash the decision of the 2nd appellant relieving the respondent of her duties as member of the CEC in charge of gender, culture and social services;
>
> (c) special damages under Article 23(3) of *the Constitution* of KShs.16,257,780 being compensation in respect of:
>
> i. projected salary the respondent would have earned for a period of 4 years, 3 months and 12 days from the date of suspension to the end of her term – KShs. 13,357,575;
>
> ii. service gratuity for 5 years at the rate of 31% of the basic remuneration deemed to be 60% of the gross monthly salary – KShs. 2,900,205;
>
> (d) general damages under Article 23(3) of *the Constitution* against the appellants for violation of the respondent's rights;
>
> (e) interest on all monetary awards at the court rates from the date of judgment until payment in full;
>
> (f) any other orders as the Honourable court may deem just and fit to grant; and
>
> (g) an order that the appellants bear the costs of the petition."

13. The appellants opposed the petition contending that the respondent was directly accountable to the 2nd appellant for the performance and exercise of her powers; that the respondent could be removed from office under sections 40 and 31 of the *County Governments Act* for inter alia incompetence, and where the second appellant considers it appropriate to do so; that, pursuant to Article 185(3) of the *Constitution*, the County Assembly of Kirinyaga County launched investigations on the respondent's performance in her docket and established that there was gross laxity in the formulation and implementation of policies and programmes during the financial year 2017/2018; that the 1st appellant also conducted its own independent preliminary investigations which prima facie established that the respondent's department had failed to deliver on its mandate to the appellants' expectations necessitating the 2nd appellant to suspend the respondent from office on grounds of incompetence and underperformance for a period of 1 month pending further investigations; that the respondent's suspension was undertaken in good faith and in furtherance of good administration; that the respondent was given the opportunity to defend herself and respond to the grounds advanced in her show-cause letter, which she did; and that the 2nd appellant considered and took into account the respondent's response and found that she had not satisfactorily addressed the grounds raised, invoked section 31 of the Act and dismissed the respondent from her employment.

14. Having heard the respondent's petition, the learned Judge delivered his judgment on 18th February 2019 allowing the respondent's claim in part and awarding her –

> "(a) 1 month's salary in lieu of notice – KShs. 259,875;
>
> (b) 12 months salary as compensation for unlawful dismissal – KShs. 3,118,500;
>
> (c) costs of the suit; and
>
> d) interest on the sums in (a) and (b) above at court rates from the date of judgment till payment in full."

15. Dissatisfied by the judgment and decree of the ELRC (Nzioki wa Makau, J), the appellants lodged this appeal on the grounds that the learned Judge erred in law –

> (a) in finding that the 2nd appellant must follow the provisions of section 40 of the *County Governments Act* in dismissing a CEC member notwithstanding section 31 (a) of the Act grants the 2nd appellant the powers to dismiss a CEC member irrespective of the provisions of section 40;
>
> (b) in failing to appreciate that sections 31 (a) and 40 establish two separate and distinct procedures for dismissing a CEC member;
>
> (c) in failing to appreciate that section 40 of the Act had no application to the circumstances of this case as the respondent was dismissed by the 2nd appellant pursuant to section 31 (a) of the Act;
>
> (d) in granting the relief sought by the respondent under Article 23(3) of the *Constitution* without any finding that the appellant violated the respondent's constitutional rights;
>
> (e) in granting the respondent 1 month's salary in lieu of notice notwithstanding section 31 (a) of the Act which the 2nd appellant invoked in dismissing the respondent from office did not require the 2nd appellant to give the respondent notice prior to dismissal; and
>
> (f) in failing to determine and/or direct whether the amount awarded to the respondent was to be paid by the 1st appellant or by the 2nd appellant, or jointly by the 1st and 2nd appellants."

16. In response to the appeal, the respondent filed a cross-appeal on the grounds that the learned Judge erred –

> "(a) by holding that the cross-appellant could not be granted anticipated salaries which she expected to earn during her term;
>
> (b) by holding that the law only provided for 1 month's salary in lieu of notice and 12 months' salary as compensation for unlawful dismissal of the cross-appellant by the appellants;
>
> (c) in failing to grant the cross-appellant appropriate remedy as prayed for even after finding that she had legitimate expectation; and

(d) in failing to find and hold that the suspension of the cross-appellant with no salary payment amounted to constructive dismissal and should have been duly compensated."

17. In her cross-appeal, the respondent prays that:

> " 1. The Cross-Appeal be allowed.
>
> 2. The order for payment of 12 months' salary as compensation for unlawful dismissal be substituted with an order for payment of anticipated salary till the expected expiry of the Cross- Appellant's term - Ksh13,357,575.
>
> 3. The Respondents be ordered to pay Service Gratuity for five years at the rate of 31 % of the basic remuneration deemed to be 60% of the gross monthly salary - Ksh2,900,205.
>
> 4. Interest on all monetary awards be at court rates from the date of the judgment on this Cross-Appeal till payment in full.
>
> 5. The cost of this Cross-Appeal and the Petition in the Employment and Labour Relations Court is borne by the Respondents.
>
> 6. Any other relief that this Honourable Court may deem just and fit to grant."

18. We need to point out at the onset that this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co*. [1968] EA p.123.

19. In Selle's case (ibid), the Court held:

> " An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. In our considered view, the appeal and cross-appeal stand or fall on five main issues of law, on which learned counsel for the parties submitted, and which may be summarized as follows:

(a) whether the provisions of sections 31 (a) and 40 of the *County Governments Act*, 2012 are open to concurrent application in disciplinary proceedings and removal from office of an officer to whom the Act applies;

(b) whether the 2nd appellant was entitled to undertake an inquiry into the respondent's performance and dismiss her pursuant to section 31 (a) of the

Act in the face of ongoing proceedings at the 1st appellant's Assembly to the same end;

(c) whether the learned Judge was correct in finding and holding that the respondent had been wrongfully dismissed and, if the answer is in the affirmative, what relief (if any) was available to her;

(d) if the respondent was entitled to compensation, under what head would such compensation be recoverable, and who as between the 1st and 2nd appellants was obligated to pay to the respondent the sums awarded;

(e) what orders and directions ought we to make on the appeal and cross appeal; and

(f) finally, who bears the costs of the appeal and of the cross-appeal?

21. The first and second issues are interrelated. Our holding on one would invariably lead to final determination of the other. Accordingly, we take the liberty to address the two issues simultaneously but, first, take the liberty to sum up the sequence of events leading to the respondent's dismissal, the suit in the ELRC, the impugned judgment, the appeal and the cross-appeal herein.

22. The sequence of events are that, on 21st June 2018, the Kirinyaga County Assembly House Committee on Gender, Culture, Children and Social Services met and passed a resolution to the effect that the respondent was incompetent. The Committee's resolution was passed pursuant to section 40(1) (a) of the *County Governments Act*, 2012.

23. Notably, the Committee passed its resolution without affording the respondent the benefit to state her case before it, and before her dismissal by the 2nd appellant, as contemplated in section 39(2) of the Act, which provides:

> " 39.
>
> (2) A committee of the county assembly may require a member of the executive committee to—
>
> (a) attend or appear before the committee; and
>
> (b) answer any question relating to the member's responsibilities."

24. Following the meeting and resolution of the House Committee, the Speaker of the County Assembly wrote to the 2nd appellant on 22nd June 2018 forwarding the resolution for the 2nd appellant's attention and consideration. The relevant part of that resolution read:

> "(b) Resolutions on Executive Committee Member for Gender, Culture, Children and Social Services – Dr. Judy Wathata and Director for Gender, Culture, Children and Social Services – Ms. Susan Wambura.
>
> The Committees find the executive Committee Member for Gender, Culture, Children and Social Services, and the Director for Gender, Culture, Children and Social Services, incompetent pursuant to section 40(1) (a) of the *County Governments Act*, 2012. This resolution arose from the Committee's observations of gross laxity in policy formulation and

programme implementation in the Financial Year 2017/2018 that is about to come to a close, by the said CEC member and the Director."

25. On 28th June 2018, the 2nd appellant wrote to the respondent informing her of her suspension for 1 month with effect from 1st July 2018 on account of incompetence/under-performance in terms of delivery of the respondent's mandate as the overall senior-most officer.

26. On 30th July 2018, the 2nd appellant wrote to the respondent requiring her to show cause in writing within 7 days from the date of the show-cause letter "... why she should not be dismissed from the service"

27. In her response vide a letter dated 3rd August 2018, the respondent addressed the issues raised, explaining that all the budgeted programmes and projects for the FY 2017/2018 had been implemented; that her department had not underperformed within the 1 year; that appropriate action had been taken to address the issues raised in relation to the children's home; that she had submitted a comprehensive report dated 29th March 2018 to the County Secretary's office; that she did not get any communication from the County Assembly Committee relating to the alleged finding that she was unfit to hold office; that she was not called at any sitting of the committee to discuss policy and programme formulation; that she had presented programme and project formulation and implementation proposals in line with the 2nd appellant's advice, bringing unique and cutting edge projects for women; that she had raised some of the management and coordination issues with the departmental staff through written communication while others were under investigation; and that her department had been put in bad light due to unfortunate incidents of County leaders interfering with their department through the media. She concluded her response by expressing her wish to discuss face-to-face the issues raised, and to continue serving the County under the 2nd appellant's guidance and leadership.

28. On 20th August 2018, the 2nd appellant wrote to the respondent terminating her appointment. In part, the letter read:

> " TERMINATION
>
> I refer to my letter of 30th July 2018 where you were asked to submit written responses, if any, to the issues raised thereof as to why you should not be dismissed from service in accordance with relevant legal provisions.
>
> While I have received your responses, I note that they are unsatisfactory.
>
> Accordingly, under the powers conferred on Governor by section 31 of the *County Governments Act*, 2012 inter alia, your appointment as the County Executive Committee Member for Gender, Culture and Social Services is terminated herewith with effect from today, 20th August 2018.
>
> You are required to hand over any County Government property that may be in your possession to the Chief Officer Gender, Culture and Social Services."

29. The appellants' case was that the respondent was directly accountable to the 2nd appellant for the performance and exercise of her powers, and that she could be removed from office under sections 40 and 31 of the *County Governments Act* for incompetence, among other grounds, and whenever the second appellant considered it appropriate to do so. They contended that the County Assembly had launched investigations on the respondent's performance in her docket and established that there was gross laxity in the formulation and implementation of policies and programmes during the

financial year 2017/2018. According to them, the 1st appellant had also conducted its own independent preliminary investigations which established that the respondent's department had failed to deliver on its mandate to the appellants' expectations necessitating the 2nd appellant to suspend her from office and subsequently dismissing her on grounds of incompetence and underperformance.

30. According to the appellants, the respondent's suspension was undertaken in good faith and in furtherance of good administration. They further contended that the respondent was given the opportunity to defend herself and respond to the grounds advanced in her show-cause letter, which she did; and that the 2nd appellant considered and took into account the respondent's response and found that she had not satisfactorily addressed the grounds raised.

31. On her part, the respondent denied the appellants' allegations of incompetence and laxity. Giving specific examples, she contended that all the budgeted programmes and projects for the FY 2017/2018 had been implemented. According to her, her department had not underperformed. She explained that appropriate action had been taken to address all the issues raised and a comprehensive report submitted to the County Secretary's office. Regarding the inquiry by the House Committee of the County Assembly, the respondent contended that she did not get any communication from the County Assembly Committee relating to the alleged finding that she was unfit to hold office. Neither was she called at any sitting of the committee to discuss policy formulation and programme formulation. According to her, she had presented programme and project formulation and implementation proposals in line with the 2nd appellant's advice. She concluded her response by expressing her wish to discuss face-to-face the issues raised, and to continue serving the County under the 2nd appellant's guidance and leadership.

32. In his judgment, the learned Judge held that the respondent's dismissal was not in accordance with the law. In his words:

> " Whereas the Governor has an undisputed right to dismiss a County Executive Committee member, in doing so, the Governor must follow the provisions of section 40 of the *County Governments Act*."

33. Prior to amendment in 2020, section 40 of the *County Governments Act*, 2012 laid down clear procedure for the removal of a CEC member and provided as follows:

> " 40.
>
> (1) Subject to subsection (2), the Governor may remove a member of the County Executive Committee from office on any of the following grounds –
>
> a. incompetence;
>
> .....
>
> (2) A member of the County Assembly, supported by at least one-third of all the members of the County Assembly, may propose a motion requiring the Governor to dismiss a County Executive Committee member on any of the grounds set out in subsection (1).
>
> (3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations—

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5)(b) is supported by a majority of the members of the county assembly—

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member."

34. In summary, section 40 of the Act required: that a motion be moved and passed to resolve that a CEC member was incompetent; that a select committee be appointed to investigate the matter and report to the Assembly; that on substantiation of the allegations, the member be accorded a hearing by appearance and defence at the select committee; that upon a finding that the allegations are substantiated, the Assembly votes whether to approve the resolution requiring the CEC member to be dismissed; and that if the resolution is supported by a majority of the members of the County Assembly, the Speaker of the Assembly delivers the resolution to the Governor who shall dismiss the member pursuant to subsection (1) (a).

35. It is noteworthy that section 40 applied in the foregoing terms until its amendment in 2020 to delete subsection (1) with the effect of leaving the section in force in terms of subsections (2) to (6). However, the section applied to the appellants and the respondent in 2018 before the amendment in 2020 and, accordingly, ought to have been applied to the letter. In any event, the very fact that inquiry by the County Assembly on the respondent's performance had commenced on 21st June 2018 or thereabouts precluded the 2nd appellant from taking adverse action to the respondent's detriment prior to the conclusion by the Assembly of the statutory steps required to be taken pursuant to section 40 of the Act.

36. In our considered view, the 2nd appellant ought to have let the process commenced in the Assembly run its full course and, if a final resolution was made to dismiss the respondent, then enforce the resolution by dismissing her in accordance with section 40(6) of the Act. It was not open to the 2nd appellant to

disregard the then ongoing inquiry before the assembly, which did not reach a resolution binding on the 2nd appellant in terms of section 40.

37. To our mind, the 2nd appellant's decision to dismiss the respondent purportedly in exercise of the powers of Governor conferred by section 31 (a) of the Act did not cure the impropriety of hijacking the process midstream so to speak. While the Governor had power under section 31 (a) of the Act to exercise the discretion to dismiss a CEC member at any time if the Governor considered that it was appropriate or necessary to do so despite section 40, the law did not intend that the two processes be applied concurrently. In our considered view, it had to be one or the other, which explains why the governor's power under section 31 (a) is discretionary while the steps required to be taken pursuant to section 40 are in mandatory terms.

38. Be that as it may, any exercise of administrative power by the Governor pursuant to section 31 (a) of the Act was subject to constitutional and procedural safeguards designed to guarantee good governance and fairness of process. Such power could not be exercised arbitrarily, capriciously or at the whims of the 2nd appellant, who was invariably accountable for the manner in which the statutory powers of Governor were exercisable.

39. Mindful of the extant constitutional and procedural safeguards, we do not agree with the appellants that the learned Judge was at fault in finding that the 2nd appellant was obligated to follow the provisions of section 40 of the Act in dismissing the respondent. The peculiar circumstances of this case precluded the 2nd appellant from exercising her powers as conferred by section 31 (a) of the Act in the face of the then ongoing inquiry by the Assembly pursuant to section 40 read with section 39(2) of the Act. Indeed, the learned Judge treated as distinct the two procedures, which could not by any means be applied concurrently.

40. Even if the 2nd appellant were to invoke the powers conferred by section 31, the exercise of such statutory powers are by no means absolute or unqualified. Such powers avail to a Governor acting in good faith and for good reason. Indeed, we take cognisance of those powers in respect of which this Court held as follows in *County Government of Nyeri and Another v Cecilia Wangechi Ndungu* [2015] eKLR:

> " We are of the considered view that Section 31 (a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously. "

41. We do not consider it reasonable for the 2nd appellant to arbitrarily override or take over an ongoing inquiry by the County Assembly and, in her own decision, dismiss the respondent apparently in exercise of powers founded on "the pleasure doctrine" as though those powers were unbridled and without restraint. In the afore-cited case of the County Government of Nyeri and Another vs. Cecilia Wangechi Ndungu, this Court went on to observe:

> " We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance [with] the principles of devolution ...".

42. In our considered view, the issue as to whether the 2nd appellant could dismiss the respondent from employment under the pleasure doctrine alluded to in section 31 (a) of the *County Governments Act* lay in a proper interpretation of that section. The interpretation has to conform to the spirit and letter

of the *Constitution*, which guarantees the right to fair labour practices in accordance with Article 41(1) and (2). To our mind, the events leading to the respondent's dismissal evidently established: breach of the respondent's rights to fair labor practices under article 41(1); breach of her right to fair administrative action under article 47 of the *Constitution*; and a breach of natural justice, which were tantamount to wrongful dismissal for which the respondent is entitled to redress.

43. Article 41(1) of the *Constitution* provides that "every person has the right to fair labour practices." The notion of fairness in the administration of labour relations, as a constitutional guarantee, calls to mind the right to "fair administrative action" as guaranteed under Article 47(1), which provides that "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." The question before us is whether the 2nd appellant's purported exercise of powers under section 31 (a) of the *County Governments Act* on which the pleasure doctrine is anchored was reasonable and procedurally fair. In our view, it was neither reasonable nor fair in the circumstances. Simply put, it ran against the grain of due process and good governance. Otherwise, a Governor would be entitled to hire and fire CEC members at will and without due process, which would be a recipe for lawless administration of the affairs of county governments.

44. As this Court held in the case of *County Government of Garissa & another v Idriss Aden Mukhtar & 2 others* [2020] eKLR –

> " 36. In a country like India where the pleasure doctrine is in force, the application of the doctrine has been specifically provided for in Article 310 of the India Constitution. As observed in the Richard Bwogo Birir decision, unlike the previous Constitution, the current Constitution of Kenya has not specifically entrenched the pleasure doctrine. In our view, this omission is not by accident or inadvertence, but a deliberate omission because the pleasure doctrine is not compatible with the spirit and letter of the current Constitution. The doctrine is inimical to the national values of human rights, good governance, transparency and accountability which are the hallmark of the delegated sovereign power and position of public trust. Therefore, the appointment of state officers must be insulated from political or any untoward interference. If Section 31(a) of the CGA was to be interpreted as giving the Governor unfettered discretion to dismiss a county executive member at any time, if he, the Governor, considers it appropriate or necessary to do so, the yardstick would be personal and without transparency or accountability and this would be contrary to the principles and values espoused in *the Constitution*...
>
> 41. This means that there must be reasons upon which it can be concluded that the powers of the Governor have been exercised in good faith and for proper reasons and not arbitrarily or capriciously. It cannot be as the appellants appear to contend, that the Governor is entitled to fire the respondents at will without any reason and without due process. That would be contrary to the respondents' constitutional rights to fair labour practices and the right to fair hearing. Thus, the appellants had to satisfy the court not only that the Governor had a good reason for the termination of the respondents' employment, but also that the reason for the termination was one which justified urgent action under Section 31(a) of the CGA. Secondly, the Governor had to satisfy the court that in taking the action, due process was followed and a fair hearing given to the respondents."

45. In *B.P. Singhal v Union of India & Another* [2010] INSC 365, the court held:

> " 50.
>
> (i) ....
>
> (ii) Though no reason need be assigned for discontinuance of the pleasure resulting in removal, the power under Article 156 (1) cannot be exercised in an arbitrary, capricious or unreasonable manner. The power will have to be exercised in rare and exceptional circumstances for valid and compelling reasons. The compelling reasons are not restricted to those enumerated by the petitioner (that is physical/mental disability, corruption and behaviour unbecoming of a Governor) but are of a wider amplitude. What would be compelling reasons would depend upon the facts and circumstances of each case."

46. It is instructive that the *County Governments Act* was enacted pursuant to article 200 of the *Constitution* to give effect to Chapter 11 of the *Constitution*, which provides for the system of devolved government. In particular, article 200 (c) placed an obligation on Parliament to enact legislation to make provision for inter alia "... the manner of election or appointment of persons to, and their removal from, offices in the county governments ...". The fact that such removal must accord with such procedural safeguards as are guaranteed by section 40 of the 2012 Act and the observance of the basic principles of procedural due process need not be over emphasised.

47. In view of the foregoing, we find and hold that the 2nd appellant's exercise of her discretionary powers under section 31 (a) to dismiss the respondent in the face of ongoing disciplinary proceedings under sections 39(2) and 40 of the Act was contrary to good governance, devoid of reason and fairness, and amounted to breach of due process of law for which the respondent was entitled to redress. Accordingly, we find nothing to fault the trial court's finding that the respondent's dismissal was wrongful. That settles the first two issues, and the first limb of the third issue before us.

48. Turning to the second limb of the third issue, the appellant's case is that the trial court erred in law "... in granting the relief sought by the respondent under article 23(3) of the *Constitution* without any finding that the appellants violated the respondent's constitutional rights". We find nothing on the record to suggest that the trial court awarded the respondent general damages for the constitutional breaches complained of.

49. Having carefully considered the impugned judgment, we agree with the respondent that, even though she had prayed for "general damages under article 23(3) of the *Constitution* against the respondents for violation of the [respondent's] rights,", the trial court did not award general damages on that head as sought. Instead, the court awarded the equivalent of 12 months' salary as compensation for wrongful dismissal, a head to which we will shortly return. Suffice it for the moment to observe that article 23 of the *Constitution* confers authority on courts to uphold and enforce the Bill of Rights as mandated under article 22 and, in doing so, may award compensation in proper cases. Article 23(3) reads:

> " (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
>
> (a) a declaration of rights;
>
> (b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

50. In addition to the foregoing, the appellants fault the learned Judge for "granting the respondent 1 month's salary in lieu of notice notwithstanding section 31(a) of the Act, which the 2nd appellant invoked in dismissing the respondent from office and did not require the 2nd appellant to give the respondent a notice prior to dismissal. In response, the respondent contends that unless an employee is summarily dismissed for lawful cause, the issuance of notice prior to dismissal is a mandatory pre-requisite. We agree with the respondent. Having found that the 2nd appellant's action to dismiss the respondent was unreasonable in the circumstances and in breach of due process, and amounting to wrongful or unfair dismissal, the main issue that remains for our determination in this regard is whether the sums awarded were correctly premised.

51. We take cognisance of the fact that, even though the respondent's appointment as a County Executive Committee member of the 1st appellant was governed by the *County Governments Act*, she was nonetheless entitled to the constitutional protections guaranteed under Article 41(1) (the right to fair labour practices) and Article 47 (the right to fair administrative action), the breach of which called for an award, by the trial court, of compensation pursuant to Article 23(3) (e) read with Article 22 of the *Constitution*. What then would constitute fair compensation?

52. In her petition to the ELRC and the cross appeal herein, the respondent prays for anticipated salary till the expected expiry of her term of service; service gratuity for 5 years at the rate of 31% of the basic remuneration deemed to be 60% of the gross monthly salary; interest on all monetary awards at court rates from the date of judgment; and costs of the cross-appeal and the petition in the ELRC. In answer to the respondent's claim, the appellants contend that –

> "the position the respondent held was an appointive position in public service that did not have any security of tenure until the next general election. Further, the respondent's Contract of Service does not provide that she is entitled to payment of salary for the unexpired term of office upon dismissal."

53. In support of their contention, the appellants rely on the Supreme Court decision in the case of *Kalpana H. Rawal vs. Judicial Service Commission and 3 Others* [2016] eKLR for the proposition that "promised compensation for services actually performed and accepted during the continuance of a particular agency may undoubtedly be claimed, both upon principles of compact and of equity ..." as enunciated by the Supreme Court of the United States in *Butler vs. Pennsylvania* 10 How. 402: 13L. ed. 472.

54. We take cognisance of the operative words here to wit "promised compensation" for "services actually provided and accepted" to guide us in determining the quantum of compensation due the respondent. Paragraph 3 of the 2nd page of her letter of appointment dated 12th October 2017 sets out the contractual terms of service, which include: a gross monthly salary of KShs. 259,875; and service gratuity at the rate of 31% of the basic remuneration package for the term served.

55. Our reading of the respondent's letter of appointment leads to the inescapable conclusion that the "promised compensation" was pegged on a specified "monthly gross salary" together with a "service gratuity" for "the term served," among other benefits accruing during the subsistence of her service. Accordingly, the sums recoverable by the respondent on termination of her employment would be in relation to such salary as may be due and payable for the services actually provided and accepted from month to month, together with gratuity for the term served.

56. In so far as the respondent's dismissal was wrongful as aforesaid, the appellants could not by any means avoid liability to redress her merely by virtue of the fact that she (the respondent) was a State officer to whom the pleasure doctrine applied in proper cases. In County Government of Nyeri & another v Cecilia Wangechi Ndungu (supra) this court held:

> " Article 260 of *the Constitution* defines a State Officer as a person holding a State Office. The said Article sets out the following offices as State offices: -
>
> "h. Member of a County Assembly, Governor, or Deputy Governor of a County, or other member of the Executive Committee of a County Government;"

57. The question remains as to whether the respondent's wrongful dismissal would not be redressed by reason that she was a State officer. Put differently, was the respondent not entitled to compensation for the wrongs complained of on account of the rights guaranteed under Articles 41(1) and 47 of the *Constitution*? We form the view that she was entitled to compensation. We so hold calling to mind the afore-cited provisions of Article 23(3) (e) read with Article 22 of the *Constitution*. The respondent's status as a State or public officer does not of itself oust or otherwise erode the constitutional, statutory or procedural safeguards due her Office as a County Executive Committee Member. Put differently, the 2nd appellant's powers exercisable pursuant to section 31(a) of the *County Governments Act* were not coupled with a license to act arbitrarily, capriciously or without regard to due process.

58. It is on the basis of these constitutional and statutory guarantees, perfected by the above-mentioned procedural safe guards, that call for the respondent's redress for wrongful dismissal. Indeed, they embrace and give meaning and effect to the celebrated maxim of equity: Ubi jus ibi remedium – "Equity will not suffer a wrong to be without a remedy." In other words, where there is a right there is a remedy, and no wrong should go unredressed. Indeed, where law has established a right, there should be a corresponding remedy for its breach.

59. In the same vein, *Justice John Marshall in William Marbury vs. James Madison, Secretary of State of the United States* 5 U.S. 137 1 Cranch 137 2 L.Ed. 60 stated:

> " It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded... In the third volume of his Commentaries, page 109, Blackstone states 'for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have remedy, and every injury its proper redress."

60. Having carefully considered the record of appeal; the respondent's cross-appeal; the written submissions of learned counsel for the appellants and learned counsel for the respondent; the Constitution and statute law applicable to this case; and relevant judicial authorities; several questions fall to be determined with regard to what relief (if any) avail in the respondent's favour. Simply put, what would properly redress the respondent in the circumstances? Was her dismissal tantamount to breach of any constitutional or other legal rights that would attract compensation under Articles 23(3), 27(1), 41(1) or 236(1) (b) of the *Constitution* as claimed in the petition? In addition, was the

respondent entitled to the judicial review orders and damages as sought in her petition? Finally, is she entitled to salary for the remainder of her term of service at the time of dismissal, or to five years' gratuity as prayed in her cross-appeal?

61. In our considered view, the respondent's dismissal was as a result of both constitutional and administrative breaches on the part of the 2nd appellant, who acted unreasonably and in disregard of procedural due process as commenced against the respondent in the County Assembly pursuant to sections 39(2) and 40 of the *County Governments Act*. According to Article 236 (b) of the *Constitution*, a public officer shall not be "... dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law."

62. In view of the foregoing, we find that the respondent's redress by way of pecuniary compensation would avail under the *Constitution* (Article 23(3) (e) or the *Fair Administrative Action Act*, 2015 or, in the alternative, under the *Employment Act*, 2007 (for wrongful dismissal). It is noteworthy that in her petition to the trial court, the respondent prayed for "a declaration that the act of the 2nd [appellant] in relieving the [respondent] of her duties [was] a breach of the [respondent's] constitutional rights under Articles 27(1), 41(1) and (2) and 236 (b) of the *Constitution*".

63. With regard to Article 27(1) of the *Constitution*, we do not consider the appellants as having acted in breach of the respondent's right to "equal protection and equal benefit of the law" guaranteed under Article 27(1). The terms "equal protection" and "equal benefit of the law" in Article 27 relate to the wider right to "equality and freedom from discrimination". We find nothing on the record before us to suggest that the 2nd appellant's action amounted to discrimination or unequal treatment of the respondent. Neither do we find anything to suggest that the respondent was denied equal benefit of the law within the meaning of Article 27 of the *Constitution*. Indeed, we are not told what the respondent viewed as amounting to violation on the appellants' part of her right to equal protection over and above her rights guaranteed under Articles 41(1) and 47 of the *Constitution*.

64. Considering the foregoing, we form the view that the 2nd appellant's action in taking over the then ongoing disciplinary proceedings or other inquiry against the respondent from the Assembly amounted to maladministration or breach of due process of law for which relief would avail pursuant to Article 23(3) (e). It is noteworthy that, in appropriate cases for enforcement of the Bill of Rights pursuant to Article 22 of then *Constitution*, Article 23(3) (e) would afford a successful claimant pecuniary compensation while paragraph (f) would afford him or her an order of judicial review. In any event, the learned Judge made no specific pronouncements on such breaches, and neither do we find any evidence on the record to support the alleged breaches on the appellant's part relating to the respondent's rights protected by Article 27 of the *Constitution*. Consequently, we find that the learned Judge was correct in declining to grant the respondent relief by way of general damages under this particular head.

65. With regard to the constitutional guarantees under Article 41(1) and (2) on which the respondent anchored yet another of her prayers in the petition to the trial court, suffice it to observe that the claim for the declaratory order mentioned above avails in her favour in so far as the 2nd respondent acted unreasonably and in breach of fair process, which goes to the root of the resultant breach of the respondent's right to fair labour practices. Even though the trial Judge did not make any specific mention of, or consider this prayer in the impugned judgment. Article 41(1) relates to labour relations, including the right to fair labour practices, which lends weight to the relief awarded in the impugned judgment.

66. Finally, we are left with the remaining question as to whether the respondent stood to secure no redress at all, or that the *Employment Act* did not apply to her. It is the appellant's case that the respondent was

not subject to the provisions of the *Employment Act* under which compensation was awarded in the impugned judgment. On her part, the respondent contends that the *Employment Act* applied to her. In their written submissions, learned counsel for the respondent (m/s. Kisuli and Wandati) contended that "... unless an employee is being summarily dismissed for lawful cause, the issuance of notice prior to dismissal is a mandatory pre-requisite demanded by the *Employment Act* before termination."

67. In so far as the respondent's dismissal was wrongful as aforesaid, we agree with the respondent's contention that the *Employment Act* applies in guiding the Court's determination of the appropriate relief for wrongful dismissal. In view of the foregoing, we find that the learned Judge was correct in awarding the respondent compensation under the *Employment Act*, 2007 in the following terms: 1 month's salary in lieu of notice; 12 months' salary as compensation for unlawful dismissal; costs of the suit; and interest on the sums awarded.

68. Having found and held that for every right there is to be a remedy; and that there can be no wrong without a remedy; and having further held that the 2nd appellant acted unreasonably and in breach of due process of law to the respondent's prejudice on account of wrongful dismissal, the trial court had authority to grant any order that was just and equitable in the circumstances, including an order for the award of costs or other pecuniary compensation. Accordingly, we find nothing to fault the learned Judge's award made in the respondent's favour. That brings us to the respondent's cross-appeal, which substantially revisits her prayers in the petition to the trial court, most of which we have exhaustively dealt with.

69. In her cross-appeal, the respondent prays that the order made in the impugned judgment for payment of 12 months' salary as compensation for unlawful dismissal be substituted for an order for payment of anticipated salary till the expected expiry of her term; the appellants be ordered to pay Service Gratuity for five years at the rate of 31% of the basic remuneration deemed to be 60% of the gross monthly salary; and costs and interest on the sums claimed.

70. We find no legal basis or evidence of any contractual obligation in the record of appeal, the cross-appeal or the submissions of learned counsel for the respondent to support the sums claimed in the cross appeal over and above the sums awarded by the trial court. Accordingly, we find that the same does not merit the orders sought, except for the pro-rated gratuity in respect of the period during which the respondent remained in service, less any sums already paid on account thereof. Our finding in this regard is based on the express terms of her appointment.

71. As we have already observed, the 3rd paragraph on page 2 of the respondent's letter of appointment dated 12th October 2017 provides for "monthly salary" for the "services provided and accepted" during the term of service and "service gratuity" for "the term served.". Having been appointed on 12th October 2017 and dismissed on 20th August 2018, the respondent was entitled to gratuity on the terms aforesaid for the period of 10 months and 8 days served. The then gross monthly salary being KShs. 259.875, the respondent is entitled to 31% of KShs. 155,925 (being 60% of KShs. 259,865) for each complete month served. This amount shall attract interest at court rates with effect from 18th February 2019, being the date of the impugned judgment. The last question is: who ought to pay this amount as between the appellants?

72. As to the fourth issue, suffice it to observe that the 1st appellant (the County Government of Kirinyaga) bears the burden of liability to the respondent. On the other hand, the 2nd appellant enjoys the shield of immunity against personal liability under and by virtue of section 133 of the *County Governments Act*, 2012. Section

133. of the Act reads:

> " 133. Protection against personal liability
>
> (1) No act, matter or thing done or omitted to be done by—
>
> (a) any member of the county government or its administration board or committee;
>
> (b) any member of the county assembly;
>
> (c) any member of staff or other person in the service of the county government; or
>
> (d) any person acting under the direction of the county government, shall, if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person personally liable to any civil liability."

73. In conclusion, and having carefully considered the record of appeal as lodged by the appellants, the respondent's cross-appeal, the impugned judgment and decree, the grounds on which the appeal and cross-appeal are anchored, the rival submissions of the parties, and the cited statutory and judicial authorities, we hereby order and direct that –

a. the appellants' appeal is hereby dismissed in its entirety;

b. the respondent's cross-appeal is hereby allowed in part, and to the extent only that the 1st appellant do pay to the respondent a sum of KShs. 1,606,027.5 on account of service gratuity for the term served, less any statutory deductions, together with interest thereon at court rates with effect from 18th February 2019 until payment in full;

c. The judgment and decree of the Employment and Labour Relations Court at Nairobi (Nzioki Wa Makau, J) delivered on 18th February 2019 in ELRC Petition No. 11 of 2018 is hereby upheld subject to the extent provided in (b) above

d. each party shall bear their own costs of the appeal and of the cross-appeal.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022

HANNAH OKWENGU

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is atrue copy of the original

Signed

DEPUTY REGISTRAR