



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CIVIL APPEAL NO. 139 OF 2017

BETWEEN

KISUMU COUNTY

PUBLIC SERVICE BOARD.....1<sup>ST</sup> APPELLANT

THE GOVERNOR, KISUMU COUNTY,

PROF. PETER NYONGO.....2<sup>ND</sup> APPELLANT

AND

SAMUEL OKURO.....FIRST RESPONDENT

SAMWEL ONDOLA.....SECOND RESPONDENT

JACOB MUGA.....THIRD RESPONDENT

GEORGE AKONGO.....FOURTH RESPONDENT

CEPHAS KASERA .....FIFTH RESPONDENT

DEREK OBURA .....SIXTH RESPONDENT

GEORGE KOYIER ..... SEVENTH RESPONDENT

SELINE ODHIAMBO BONYO ..... EIGHTH RESPONDENT

*(Being an appeal against the judgment of the Employment and Labour Relations Court at Kisumu (Maureen Onyango J.) delivered on 7<sup>th</sup> November 2017)*

in

PETITION NO. 36 OF 2017)

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JUDGMENT OF THE COURT

[1] Kisumu County Public Service Board (County Board), and the Governor Kisumu County Professor Peter Nyong’o (Governor) are the appellants before us. They are dissatisfied with the judgment of the Employment & Labour Relations Court (Maureen Onyango, J.) delivered against them on 7<sup>th</sup> November 2017. The judgment was the culmination of a petition lodged against the County Board and the Governor, by Samwel Okuro and seven (7) others (hereinafter referred to as the respondents).

[2] The respondents were all chief officers of the County Government of Kisumu, employed through respective individual contracts for a fixed term of five (5) years. The respondents petitioned the High Court seeking declaratory orders that the appellants had through letters dated 26<sup>th</sup> September, 2017 addressed to each respondent prematurely terminated the employment of each respondent in breach of **Articles 27(1)(2)&(3), 28, 35, 41, 47 and 50** of the Constitution. The respondents sought orders for judicial review quashing the decision of the County Government of Kisumu to terminate their respective contracts of employment.

[3] In their response to the petition, the appellants admitted that the respondents were each employed on a five year renewable contract, but maintained that the contracts were tailored to fit the five year term of the appointing governor; that there was an exit clause that allowed an incoming governor to terminate the contracts of the respondents; and that if the respondents were aggrieved by the termination, there was a procedure under the **County Government Act (CGA)** to deal with such grievance.

[4] In her judgment the learned judge identified the main issues for determination as, whether the term of the respondents' employment expired with the term of office of the governor who appointed them, and whether the respondents' terms of contracts were fair. The learned judge found, *inter alia*: that the respondents were officers in the county public service; that the respondents' employment was not dependent on the term of office of the governor who appointed them; that though the CGA provides for the appointment of chief officers, it does not provide for their removal; that the Governor had only powers to appoint and re-assign chief officers, and not to remove them from office; and that the action of the appellants of terminating the respondents' employment violated **Article 41 & 236** of the Constitution, and **sections 41, 43 & 45** of the **Employment Act**. Consequently, the learned judge granted the respondents' prayers for orders of certiorari calling for and quashing the decision of the appellants terminating the employment of the respondents as chief officers of the County Government of Kisumu and conveyed to each of the respondents through letters dated 26<sup>th</sup> September 2017, and 24<sup>th</sup> August 2017.

[5] In their memorandum of appeal, the appellants have faulted the findings and judgments of the trial judge contending that the learned judge erred in: failing to find that the appellant had the power to terminate the employment of the respondents; failing to note that **Articles 1, 179 and 180** of the **Constitution** read together with **sections 30, 31 and 46(2)** of the **CGA** vested powers on the Governor that included termination of services of the respondents as part of reconstitution and reorganization of his government; failing to find that the respondents' petition was non justiciable to the extent that it purported to set up departments and portfolios for the Governor contrary to section 46(2) of the CGA; failing to find that the respondents' contracts were for a fixed term which pursuant to **section 10(3)** of the **Employment Act**, ought to be interpreted strictly in accordance with the stated terms.

[6] In addition, the appellants maintained that the learned judge erred in failing to find that the relationship between the Governor and the County Board was that of principal and agent so far as the employment and termination of the contracts of the respondents was concerned; and in finding the Governor personally liable for the cost of the petition when the Governor was acting in his official capacity. The appellants urged the Court to allow the appeal and set aside the judgment of 7<sup>th</sup> November 2017, concluding that the learned judge misdirected herself on the applicable principles and the law in evaluating the evidence, and thereby arrived at a wrong decision.

[7] In support of their appeal, the appellants filed written submissions, which were duly highlighted by their counsel, Mr. Kenneth Amondi and Victor Obondi. In his submissions, Mr. Amondi identified seven issues for determination. These were:

(i) whether a new county governor has powers under Articles 1, 179 and 180 of the Constitution as read with sections 30, 31 and 46(2) of the CGA to terminate the services of chief officers appointed by his predecessors as part of the process of reconstituting and reorganizing his government;

(ii) whether the respondents' action seeking to have the appellants compelled to reinstate them to their former positions was non justiciable, and contrary to doctrines of separation of powers under **Article 175(a)** of the **Constitution** as the positions are no longer in existence having been subsumed in the restructuring and reorganization of the new County Government pursuant to section 46(2) of the CGA;

(iii) whether the order issued by the trial court reverses the scheme of the Governor to restructure and reorganize his government and whether the bad blood between the Governor and the respondents can be viewed as insubordination on the employer's managerial prerogative, to the extent that it compromises the employer employee relationship under section 49(3) of the Employment Act;

(iv) what is the legal consequence of a letter of appointment for the position of a chief officer issued by a governor which runs beyond the gubernatorial terms of the appointing authority, and whether the mischief attendant thereto can be cured by exercising the exit termination clause.

(v) whether the County Board is a principal entity unto itself in the restructuring, reorganization of departments and appointment of chief officers or whether it performs that task as an agent of the county governor;

(vi) whether the county governor is entitled to enforce the exit clause in a chief officers letter of appointment by serving a one months' notice where the chief officer is serving; and

(vii) whether the order of costs against the Governor personally was proper.

[8] The appellants argued these seven issues under four (4) headings. The first three issues fell under the first heading, which relates to the power of the Governor to reconstitute and reorganize the county Government. The appellant argued that the judgment of the trial court was delivered *per incuriam* as it was inconsistent with the principles and doctrines of separation of powers that require the court's interference with other constitutional organs to be limited to situations where a constitutional organ has failed to act in accordance with the Constitution,

or to determine whether anything done under the authority of the Constitution or any law, is inconsistent with or contravenes the Constitution. The appellants asserted that in removing the respondents from office, the Governor was in the process of performing his constitutional responsibilities which includes restructuring, reorganizing and coordinating departments; and that it was not demonstrated that the Governor lacked the legal mandate to perform this function so as to invite the Judicial Review Jurisdiction of the High Court.

[9] The appellants relied on several authorities including, the Supreme Court decisions, **Justus Kariuki Mate & Another vs Hon. Martin Wambora & Another [2017] eKLR**, where the principles governing the doctrine of separation of powers were outlined including the caution:

*“that the courts of law are the proper judge of compliance with constitutional edit for all public agencies; but this is attended with the duty of objectivity and specificity in the exercise of the judgment; for the due functioning of constitutional governors the courts be guided by restraint limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case”*

[10] The appellants therefore urged that the Employment & Labour Relations Court ought not to have interfered with the exercise of the Governor’s constitutional executive authority, which includes the discharge of his managerial prerogative of restructuring, reorganizing and coordinating departments in his County Government; and that the Governor could perform this function through the County Board.

[11] The Court was urged to find that the judgment of the Employment & Labour Relations Court was infringing on the legitimate expectation and the wider public interest of the people of Kisumu, who were influenced by the Governor’s transformative agenda to vote for the Governor, and who expect the Governor to implement his agenda within his five year tenure. Further, that the Court should balance the interest of the wider public against the interests of the respondents who have an alternative remedy in damages should it be found that they were unlawfully terminated.

[12] In regard to the legal effect of the respondent’s letters of appointment, the appellants argued that, the terms of appointment included a five year renewable contract term that could be terminated before completion of that period by either party giving a one months’ notice or paying one month’s salary in lieu of notice; that the respondents’ letters of termination were premised on the exit clause, which was in the contract; that in accordance with the Public Service Commission Human Resource Manual, it was contemplated that the respondent’s offices could be reorganized or abolished; and that the implementation of the court order has resulted in bad blood between the respondents and the appellants which is inimical to the core values of mutual trust and confidence envisaged in the employment relationship.

[13] On the relationship between the office of the Governor and that of the County Board, the Court was urged to find that pursuant to **section 55 and 59 of the CGA**, part of the functions of the County Board includes, the establishment and abolition of offices in the county public service, appointment and confirmation of appointments, and discipline and removal of persons to these offices; and that the County Board exercises these powers on behalf of the Governor in the Kisumu county public service.

[14] It was submitted that, the learned judge erred in holding the Governor personally liable to bear the costs of the respondents; that there was no basis in law for attaching personal liability to the Governor for acts done in good faith, and in exercise of his proper constitutional and statutory duties; and that the Governor acted in accordance with the advice given to him by the Council of Governors.

[15] Learned counsel, Mr. Nyamweya Mogusu appeared for the respondents. In arguing the appeal Mr. Mogusu made oral submissions in which he pointed out that apart from the issue of costs, all the other issues raised in the appellant’s submissions were new issues that had not been raised in the memorandum of appeal; that the respondents being chief officers of the County Government, they were not members of the county executive committee to whom Article 179 and 180 of the Constitution was applicable.

[16] In regard to the office of the Governor, Mr. Mogusu drew the Court’s attention to sections **30** of the **CGA** that deals with functions and responsibilities of the Governor, section 31 of the same Act that deals with powers of the Governor in the dismissal of county executive committee members, and section 46(2) of the same Act that deals with the organization of the County by the county executive committee. Counsel maintained that these provisions were applicable to the county executive committee members and not to the respondents who were chief officers.

[17] It was argued that what was before the learned judge was a constitutional petition in which the trial judge was invited to determine whether the right of the respondents were violated; that there was a constructive termination of the services of the respondents through the advertisement that called for applications for their positions; that under **Article 236 of the Constitution**, a public officer’s right in employment is protected; and that under section 59(c) of the CGA, County Public Service Boards have jurisdiction in employment matters.

[18] Further, that the letters written to the respondents after the advertisement was of no effect as the respondents’ employment had already been constructively terminated; that the Governor failed to comply with the principles of governance under **Article 10 of the Constitution** and the CGA; that the Governor was performing a public duty and therefore ought to have given the respondents a fair hearing, treated them with human dignity, and also complied with fair labour practices, and fair administrative action; that unlike the President whose authority is specified under Article 131(1) as Commander in Chief, the Governor’s function is spelt out under Article 179 and 180 as head of a County Authority.

[19] In addition, it was argued that the respondents’ rights under **Article 236 of the Constitution** that protects employment of county public officers was violated, in that, due process was not followed; that the court had jurisdiction under Article 23 of the Constitution to determine the respondents’ complaints; that the CGA section 59 (c) provides the functions of the County Board in employment issues; that the County Board is an independent institution and the Governor can only co-operate with it; that on the issue of costs, the authority of the Governor is a trust authority which must be exercised in accordance with the Constitution and therefore the learned judge was right in condemning the Governor to pay costs.

[20] In reply to the respondents' submissions, Mr. Obondi argued that the Governor was not acting in his individual capacity, but was acting in his official capacity as the elected Governor; that the learned judge did not exercise her discretion justifiably as she did not give any reasons for the order of costs; that the applicable section to the abolition of office was section 46(1) of the CGA, and not section 76; and that there was no evidence that the County Board was not in the picture.

[21] We have carefully considered the record of appeal, the memorandum of appeal, submissions made before us, and the authorities cited. It is common ground that all the respondents were employed on contract as county chief officers on different dates in September and December 2014 and May 2015. They were all subsequently confirmed in their positions on 26<sup>th</sup> January, 2017. Following the election of the Governor in August 2017, all the respondents were served with letters dated 24<sup>th</sup> August, 2017 sending all on compulsory leave of 30 days ostensibly to pave way for reorganization of the county public service, but instead the respondents' positions were a few days later advertised for recruitment, and their contracts of employment subsequently terminated through notices dated 26<sup>th</sup> September, 2017.

[22] The dispute between the appellants and the respondents arises from the respective contracts of employment. A number of issues have arisen concerning the appointment of the respondents and the termination of their services. In our view, all the issues raised revolve around two main issues. These are whether the contract of employment of a county chief officer is tied to the term of office of the governor in office during his employment; and whether a county governor has powers to remove a chief officer in the county government.

[23] At the outset it is important to understand the position of a county chief officer. A county chief officer is defined under section 2 of CGA as an officer who is appointed under section 45 of the CGA. This position is different from that of the executive committee member, who is under Article 179(2)(b) of the Constitution and section 30(e) of the CGA, appointed by the county governor with the approval of the county assembly.

[24] Article 179 of the Constitution that deals with County executive committees states as follows:

179.

**(1) The executive authority of the county is vested in, and exercised by, a county executive committee.**

**(2) The county executive committee consists of—**

**(a) the county governor and the deputy county governor; and ?**

**(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly. ?**

**(3) The number of members appointed under clause (2)(b) shall not exceed—**

**(a) one-third of the number of members of the county assembly, if the assembly has less than thirty members; or ?**

**(b) ten, if the assembly has thirty or more members. ?**

**(4) The county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.**

**(5) When the county governor is absent, the deputy county governor shall act as the county governor.**

**(6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.**

**(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office. (emphasis added).**

[25] Section 45 of CGA provides for appointment of county chief officers as follows:

**45. Appointment of county chief officers**

**(1) The governor shall—**

**(a) nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and**

**(b) with the approval of the county assembly, appoint county chief officers. ?**

**(2) The office of a county chief officer shall be an office in the county public service.**

**(3) A county chief officer shall be responsible to the respective county executive committee member for the administration of**

a county department as provided under section 46.

**(4) The county chief officer shall be the authorized officer in respect of the exercise of delegated power.**

**(5) The governor may re-assign a county chief officer.**

**(6) A county chief officer may resign from office by giving notice, in writing, to the governor.**

[26] The appointment provisions reveal some differences in the appointment process for county chief officers and executive committee members. The first point of distinction is the fact that unlike the appointment of executive committee members that goes through three stages, that is, the identification of the candidates where the governor has a free hand, publication of the names for public participation, and the presentation of the candidates identified before the county assembly for approval, the appointment of County chief officers commences with the involvement of the County Public Service Board that has the leading role of identifying suitable candidates through competitive sourcing, and making recommendations to the governor, who can only identify his nominee from the candidates recommended by the County Public Service Board. Secondly, the governor can only appoint the county chief officer if his nominee is approved by the County Assembly.

[27] In regard to removal of county executive committee members, section 39 and 40 of the CGA provides that the county executives committee members are accountable to the governor in the performance of their duties, and gives the governor powers to remove a county executive committee member on grounds such as incompetence, abuse of office, gross misconduct, failure to attend 3 consecutive meetings, physical or mental incapacity, and gross violation of the Constitution.

[28] Further, under Article 179(7), the term of office of executive committee members appointed by the governor is tied to the term of the appointing governor such that if the governor ceases to occupy the office, the appointment of the executive committee member also ceases.

[29] Under Article 45(2) the office of a county chief officer is an office in the county public service. Section 55 of CGA, provides objectives for the county public service which includes to ensure the putting in place of a county public service that espouses the constitutional values and principles enshrined under Article 10 and 232 of the Constitution; enhance service delivery; enforce common standards and norms to be applied in all counties, ensure efficient quality and productive service for the people of the county.

[30] Under Section 5(2)(f), a county government is responsible for establishing and staffing its public service as contemplated under Article 235 of the Constitution. That Article gives a county government the following specific responsibilities, which have to be done within a framework of uniform norms and standards prescribed by an Act of Parliament:

***“(a) establishing and abolishing offices in its public service***

***(b) appointing persons to hold or act in those offices, and confirming appointments; and***

***(c) exercising disciplinary control over and removing persons holding or acting in those offices.”*** (emphasis added).

[31] It is important to note that under Article 176 of the Constitution a county government consists of a county assembly and a county Executive. This means that the powers of the county government under Article 235 of the Constitution have to be exercised jointly by the county assembly and the county executive.

Worthy of note is that sections 30 of CGA that provides the functions and responsibilities of the governor, and section 31 of CGA that provides for the powers of the governor, includes powers to dismiss a county executive committee member and to appoint accounting officers, but does not include powers to dismiss a county chief officer.

[32] Two things are evident. First, that the procedure for appointment of a chief officer under section 45 of the CGA as reproduced above, clearly reflects the involvement of the county government through the joint participation of the county assembly and the county executive as envisaged by Article 235 of the Constitution. Secondly, it is evident from Article 235 that the county government has the power to appoint and discipline persons employed in its public service including removing them from office. However, this power has been delegated to County Public Service Boards pursuant to Article 235 of the Constitution

as read with section 57 of the CGA. Moreover, the powers to appoint and discipline county public service officers is not an executive power to be exercised by the governor alone, nor does the County Public Service Board act as an agent of the governor in exercising the powers, but as an agent of the county government.

[33] County Public Service Boards are corporate bodies established in each county under Section 57 of the CGA as read with Article 235 of the Constitution. The functions of the County Public Service Boards are spelt out under Section 59 of the CGA, which obligates each Board to perform the following functions on behalf of its county government:

***“(a) establish and abolish offices in the county public service;***

***(b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;***

***(c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;***

**(d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;**

**(e) promote in the county public service the values and principles referred to in Articles 10 and 232;**

**(f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;**

**(g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;**

**(h) advise the county government on implementation and development;**

**(i) advise county government on implementation and monitoring of the national performance management system in counties;**

**(j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pension and gratuities for county public service employees”.**

[34] The above provisions removes any doubt concerning the wide powers of the County Public Service Board to act on behalf of the county government in dealing with appointments, confirmations, promotions, discipline, and removal of persons holding county public service offices.

[35] Coming back to the facts before us, an examination of the respondents’ letters of appointment, confirmation, compulsory leave and notice of termination reveal a common pattern. The appointment letters were all signed by the county secretary and copied to the Governor and Deputy Governor. The letters of confirmation were signed by the county secretary and copied to the secretary County Public Service Board. The Governor signed the letters for compulsory leave, and the Acting county secretary signed the notices for termination of contract.

[36] Under section 44 of the CGA a county secretary is the head of the county public service and is also responsible for conveying the decisions of the county executive committee to appropriate persons and authorities. A county secretary is not a member of the County Public Service Board, which has its own secretary. In the notices of termination, which were signed by the acting county secretary, it is not stated when or how the decision to terminate the respondents’ contract of service was made nor is it clear whether the County Board or the county assembly were involved in making the decision.

[37] The Governor personally signed the letters of compulsory leave, wherein he states, *inter alia*:

**“This is to notify you of my decision to send you on compulsory leave with immediate effect. This is to allow me evaluate your Performance and to restructure/reorganize my Government...”** (emphasis added)

[38] The letter reveals that the Governor was the one who made the decision to send the respondents on compulsory leave in his capacity as the county executive. There is no reference to the county assembly or the County Board. The letter is in fact only copied to the Director Human Resource Management. In the letters of termination that were dated just a month after the compulsory leave, the reasons for the termination of the contract is given as “ongoing restructuring and reorganization of the County Government.” This shows that the termination was a direct result of the earlier action taken by the Governor. While it was anticipated that it might be necessary to initiate programs for restructuring and reorganization of the county public service in line with the manifesto of an incoming county government, such programs were required to be done under the recommendation and advise of the County Public Service Board channeled through the county government.

[39] In the case of the respondents, there is no evidence that the County Board was involved in the proposed restructuring and reorganization or that the removal of the respondent was recommended by the County Board. Although the termination letter is copied to the secretary of the County Board, it does not refer to any decision of the County Board. This shows that the decision did not emanate from the County Board but from the Governor.

[40] We have perused the CGA and the relevant provisions relating to the county public service in the Constitution, but are unable to find a provision similar to **Article 179(7) of the Constitution** that ties the term of employment of county chief officers to the term of the governor who employed them. It is apparent that unlike the position of the county executive member, the intention of the framers of the Constitution in providing for the establishment of County Public Service Boards, was to ensure that there is a corporate body similar to the Public Service Commission in the national Government that is responsible for the regulation of employment of officers in the county public service. This was to ensure some element of stability in the management of the human resource in the county public service given that the county executive committee would keep changing.

[41] Indeed, the respondents were employed on a five year “renewable” contract that did not correspond with the term of the governor who employed them. If the term of employment was intended to correspond with that of that governor, then, the respondents would have been given a contract term that ends with the term of the governor who employed them, with no provision for renewal. We are therefore in agreement with the learned judge that the employment of the respondents was not pegged on the term of the governor who employed them.

[42] In each of the respondents’ letter of appointment, it was indicated as follows:

**“This appointment is on a five (5) year renewable contract, subject to a successful six (6) months’ probation period. Your probation period may be extended, or the appointment terminated before completion of that period by either party giving one**

*months' notice or paying one month's salary in lieu of notice".*

[43] In the respondents' letters of termination of contract, reference was made to the above clause as follows:

***"This letter serves to give you one month's notice as provided for in your appointment letter and in the employment Act 2007, Part VI, Section 35(1)".***

[44] It was argued by the appellant that the respondents' termination was in accordance with the exit clause reflected in the appointment letter. We have deliberately reproduced the relevant portions of the letter as in our view, a plain reading of the exit clause in the letter of appointment shows that the exit clause only referred to the termination during the probation period when the probation period could either be extended or the appointment terminated by giving one months' notice or one month's salary in lieu of notice. Since all the respondents had successfully served the probation period and were confirmed in their appointment, there was no other exit clause that could be applied. That is to say that the contract remained fixed for the agreed period of five (5) years subject to termination in terms of the contract or on disciplinary grounds. Further, the respondents' contracts of employment were not ordinary contracts of employment between an employer and employee, but contracts of employment in the public service that has statutory underpinning.

[45] Section 43 of the Employment Act places the burden on the employer to prove the reasons for termination of a contract of employment. That section states as follows:

**"43. Proof of reason for termination**

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."**

[46] In the case of the respondents, the appellants have not been able to prove that the respondents' termination of employment was in accordance with their contract of employment, or in accordance with any provision of the law. To the contrary, the respondents have proved that their contracts of employment were terminated irregularly as neither the provisions of the Constitution nor the CGA were followed nor were they given any hearing or proper reason for the termination of the contracts, and therefore the termination was unfair. The respondents' constitutional rights relating to fair labour practices, fair administrative action and a fair hearing were all violated.

[47] It was argued that the respondents' termination of employment was justified in public interest, because of the legitimate expectation of the people of Kisumu County who elected the Governor on the basis of his manifesto and promised changes. We reject this argument for the reason that fundamental rights and freedoms under the Constitution are sacrosanct rights that this Court has the obligation to protect. Moreover, the Court cannot uphold an action of the Governor that is clearly *ultra vires* his constitutional and statutory powers.

[48] We have come to the conclusion that the Governor initiated the removal of the respondent without following the appropriate machinery. The respondents being county public officers, the Governor could not terminate their services without involving the County Board and the county assembly. In sending the respondents on compulsory leave and terminating the respondents' contract, the Governor usurped the role of the County Board. This denied the respondents their rights under section 77 of the CGA that allows any county public officer that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the Public Service Commission. Further, the respondents' constitutional fundamental rights were violated.

[49] In the circumstances, the learned judge acted within her constitutional jurisdiction in reviewing the appellant's actions and granting the orders of certiorari to protect the respondents' from violation of their fundamental rights and to prevent the appellants from acting in a manner that contravenes the Constitution and the statute.

[50] As regards the award of costs, this was a discretionary order. However, the learned judge was obliged to exercise that discretion judicially. In ordering the Governor to personally bear the costs of the respondents, the learned judge did not give any reasons. The order against the Governor was a punitive order and it was necessary for the learned judge to justify such an order. It is evident that in terminating the respondents' employment, the Governor was motivated by a wish to reorganize his administration in accordance with his manifesto and promise to serve the people of the county better. This was a factor that the learned judge failed to take into account in exercising her discretion on costs. There being no evidence of malice, the punitive order of costs against the Governor was not justified.

[51] We believe we have said enough to come to the conclusion that save for the issue of costs, this appeal must fail. Accordingly, the appeal is dismissed except for the order of costs made personally against the Governor, which is set aside and substituted with an order of costs against the appellants jointly, both in the lower court and in this Court.

Those shall be the orders of the Court.

**Date and delivered at Kisumu this 21<sup>st</sup> day of June, 2018.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**