



**County Government of Nyeri & another v Ndungu (Civil Appeal
2 of 2015) [2015] KECA 1011 (KLR) (18 March 2015) (Judgment)**

County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR

Neutral citation: [2015] KECA 1011 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 2 OF 2015
ARM VISRAM, MK KOOME & JO ODEK, JJA
MARCH 18, 2015**

BETWEEN

THE COUNTY GOVERNMENT OF NYERI 1ST APPELLANT

THE GOVERNOR, NYERI COUNTY 2ND APPELLANT

AND

CECILIA WANGECHI NDUNGU RESPONDENT

Applicability of the pleasure doctrine in appointments made by a Governor

Reported by Njeri Githang'a

Constitutional Law - fundamental rights and freedoms - right to fair administrative action-pleasure doctrine - whether the right to fair administrative action is applicable in the exercise of the pleasure doctrine - whether the respondent was entitled to notification and hearing before dismissal - whether the respondent's constitutional rights were violated by the appellants - Constitution of Kenya, 2010, articles 41, 47, 236; Employment Act, 2007, section 41; County Governments Act, 2012, section 31(a) &

Constitutional Law - pleasure doctrine - a legal principle under jurisprudence in England that public officers within Her Majesty's service hold office at the pleasure of the Crown - whether the pleasure doctrine was applicable in Kenya's public service - values and principles of the public service - Constitution of Kenya, 2010, articles 2(4), 3, 200(2) (c), 232, 235(1), 236;

Constitutional Law - state officers - law governing the terms and conditions of service for state officers - County Executive Committee being a State Officer - whether the Employment Act applied to state Officers -whether a State Officer's terms and conditions of service are regulated by the Constitution or the relevant statute, principles of fair administrative action and rules of natural justice

Words and phrases - pleasure doctrine -A pleasure appointment is defined in the Blacks Law dictionary, 9th Ed. as "the assignment of someone to employment that can be taken away at any time, with no requirement of cause, notice or hearing"



Brief facts

The respondent was the County Executive Secretary in charge of Culture, Gender and Social Development. She was appointed by the Governor of Nyeri County on September 27, 2013, pursuant to article 179(2) of the Constitution of Kenya 2010. On June 24, 2014, the Governor dismissed her from service and she filed a petition at the Industrial Court to challenge her dismissal.

Her petition entailed a claim that her constitutional rights had been violated and that she had not received fair administrative action. She stated that she had been dismissed in a press conference which was made known to her by members of the public and she was not given reasons for the dismissal. The Industrial Court via a judgment declared that the respondent's dismissal violated her constitutional rights, quashed the dismissal decision and reinstated the respondent into service at the Nyeri County.

Against that decision, the appellants lodged an appeal at the Court of Appeal. The basis of the appeal was that the pleasure doctrine was applicable and that the Governor had powers under section 31(a) of the County Governments Act, No 17 of 2012, to dismiss a County Executive Committee member at any time if the Governor considered it appropriate or necessary. They explained that those powers were similar to powers of the President of the Republic of Kenya to dismiss a Cabinet Secretary under article 152(5) (b) of the Constitution of Kenya 2010.

Issues

- i. What was the prescribed mode of removal/dismissal of a member of the County Executive Committee from office?
- ii. Whether the doctrine of pleasure was applicable in the dismissal of a member of a County Executive Committee by the Governor under section 31(a) of the County Governments Act and if so what was the extent of its application.
- iii. Whether a member of the County Executive Committee was appointed at the pleasure of a Governor and could be dismissed at the Governor's pleasure, without due process.
- iv. Whether the respondent's termination was subject to the Employment Act.
- v. Whether the respondent's constitutional rights were violated by the appellants.
- vi. Whether the remedies issued by the Industrial Court were proper.

Relevant provisions of the Law

County Governments Act

Section 40

"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;*
- b. abuse of office;*
- c. gross misconduct;*
- d. failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;*
- e. physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or*
- f. gross violation of the Constitution or any other law.*

(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 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 committee executive member.

On the other hand, Section 31(a) of the County Governments Act provides:-

“31. The governor -

a. may, despite section 40, dismiss a county executive committee mem at any time, if the governor considers that it is appropriate or necessary to do so;...”

Held

1. In determining how a member of a County Executive Committee could be removed from office, the Court had to take into consideration the relevant constitutional and statutory provisions. The County Governments Act was enacted pursuant to article 200 of the Constitution to give effect to Chapter 11 of the Constitution, which provided for a devolved government. In particular, article 200 (c) placed an obligation on Parliament to enact legislation which would provide the manner of election or appointment of persons to, and their removal from, offices in the County Governments.

2. The cardinal rule for construction of a statute was that a statute had to be construed according to the intention expressed in the statute itself. The object of all interpretation of a written instrument was to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act was to ascertain the intention of Parliament as expressed in the Act considering it as a whole in its context.

3. Interpretation of any document ultimately involved identifying the intention of Parliament, the drafter or the parties. That intention ought to be determined by reference to the precise words used, their particular documentary and factual context, and where identifiable, their aim and purpose. To that extent, almost every issue of interpretation was unique in terms of the nature of the various factors involved. However, that did not mean that the Court had a completely free hand when it came to interpreting documents; that would be inconsistent with the rule of law and with the need for as much certainty and predictability as could be attained bearing in mind that each case was to be resolved by reference to its particular factors.

4. From the language adopted by the Legislature in enacting sections 40 and 31(a) of the County Governments Act there were two methods through which a member of a County Executive Committee could be dismissed:

a. Under section 40, a Governor could dismiss a County Executive Committee member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal was initiated by the County Assembly. b. Under section 31(a), a Governor could dismiss a County Executive member on his own motion at any time if he considered it appropriate and necessary to do so. That appeared to vest an element of discretion on the part of the Governor when it came to dismissing a member of a County Executive Committee and was the subject of interpretation in the appeal.

5. Originally the doctrine of pleasure was a prerogative power which was unfettered. A holder of an office under pleasure could be removed at any time, without notice, without assigning cause and without there being a need for any cause. However, with the passage of time and evolution of democracy the doctrine has undergone a series of modification. The evolution of the doctrine of pleasure has been on the basis of putting to an end



arbitrary action by a public authority and ensuring that such a power is exercised reasonably and for the public good.

6. There was a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. In the nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by the rule of law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure did not mean a license to act arbitrarily, capriciously or whimsically. It was presumed that discretionary powers conferred in absolute and unfettered terms on any public authority would necessarily and obviously be exercised reasonably and for public good.

7. The application of the doctrine of pleasure has been subjected to qualifications expressly through legislation or by implication. In India, certain pleasure appointments have been subjected to restrictions by the Constitution.

8. Comparative jurisprudence showed that the evolution of the doctrine connoted that a public authority ought to act reasonably and/or fairly in exercising the said power. The extent of reasonableness or fairness is dependent on the express or implied qualification imposed in the exercise of the said doctrine by a public authority.

9. The interpretation of the law was always contextual as the law did not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The County Governments Act was enacted to give effect to Chapter 11 of the Constitution which provided for devolution. Therefore, interpretation of section 31(a) of the County Governments Act was to be in light of the values, purposes and principles of the Constitution. Whenever a court was called upon to interpret an Act of Parliament, it should ensure that the Act conformed to the Constitution.

10. The Constitution explicitly stated that sovereign power belonged to the people and the exercise of the said power ought to be in accordance with the Constitution. The Constitution took away the notion that sovereign power was vested in individuals or certain offices and could be exercised at the will of the said individual or office. The preamble to the Constitution provided that in adopting and enacting the Constitution, the people of Kenya recognized the aspirations of all Kenyans for a Government based on the essential values of human rights freedom, democracy, social justice and the rule of law. The Kenyan people exercised their sovereign and inalienable right to determine the form of governance of the country.

11. Article 1(3)(b) of the Constitution provided that the sovereign power was delegated to the national executive and the executive structures in the County Governments. Article 10(1) of the Constitution bound all state organs, state officers, public officers and all persons to observe the national values and principles of governance when applying or interpreting the Constitution; enacting, applying or interpreting any law; or implementing public policy decisions. Article 10(2) set out the national values and principles of governance including good governance, integrity, transparency and accountability.

12. Chapter 6 of the Constitution provided for leadership and integrity and placed an obligation on leaders to exercise the authority vested in them in a manner that was consistent with the purposes and objects of the Constitution. Article 73(2)(d) made leaders accountable to the public for their decisions and actions. Further, article 174(a) provided that one of the objects of devolution was to promote democratic and accountable exercise of power. Section 3(b) of the County Governments Act indicated that one of the objectives of the Act was to give effect to the objects and principles of devolution as set out in articles 174 and 175 of the Constitution. Therefore, in interpreting the nature of the power of a Governor under section 31(a) of the County Governments Act the Court had to take into account the foregoing.

13. Section 31(a) of the County Governments Act granted power to a Governor to dismiss a member of the County Executive Committee at any time or at his pleasure. However, the power was qualified to the extent that he could only exercise the same reasonably and not arbitrarily or capriciously. By dint of article 179(1) of the Constitution and section 34 of the County Governments Act, the Executive authority of a County was



vested in the County Executive Committee. The County Executive Committee comprised of the Governor, Deputy Governor and members of the County Executive Committee who were appointed by the Governor.

14. The members of the County Executive Committee assisted the Governor to carry out his mandate under the law. It was the Governor who assigned to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. That was the reason why the County Executive Committee members were individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities.

15. A County Executive Committee member was the Governor's right hand in his/her respective office. Hence the Governor had to have confidence in the County Executive Committee member. Where such confidence was lost, the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.

16. Section 31(a) of the County Governments Act placed an obligation on the Governor to exercise the said power only when necessary or appropriate which entailed reasonableness on the part of the Governor in exercising the power.

17. Reasonableness was a deferential standard animated by the principle that underlay the development of the two previous standards of reasonableness. Certain questions that came before administrative tribunals did not lend themselves to one specific, particular result. Instead, they gave rise to a number of possible, reasonable conclusions. A court conducting a review for reasonableness had to inquire into the qualities that made a decision reasonable, referring both to the process of articulating the reasons and to outcomes.

18. In judicial review, reasonableness was concerned mostly with the existence of justification, transparency and intelligibility within the decision making process and whether the decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law.

19. By virtue of the fact that a Governor ought to exercise his powers for the public good, he was not to act on selfish motives but for the benefit of the County. The reasons for exercising the power was to be valid and compelling and was dependent on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive was qualified to the extent that the same was to be for the benefit of the County and in accordance to the principles of devolution.

20. The burden lay with the respondent to establish that her dismissal was arbitrary and capricious and that her rights were violated.

21. The extent to which due process was applicable in a case such as the one before the Court depended on the express and implied limitations by statute and the circumstances of the case. There were certain circumstances a Governor could lose confidence in a member of a County Executive Committee and due to the sensitivity and/ or urgency of the matter at hand, the Governor could dismiss the member without giving notice of his intention to do so.

22. Section 31(a) of the County Governments Act did not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he could only dismiss if he considered it appropriate or necessary. Appropriateness or necessity was not arbitrariness or whimsical. Appropriateness or necessity imported the requirement that there ought to be reasons that made the dismissal appropriate or necessary. It was those reasons that determined whether the discretionary power exercised under section 31(a) of the County Governments Act was reasonable or not.

23. The respondent in the circumstances had proven that the 2nd appellant's actions were arbitrary since there was no evidence that the 2nd appellant acted reasonably in dismissing the respondent. Consequently, the respondent's right to a fair administrative action was violated by the appellants.

24. The Employment Act was enacted to govern the relationship of an employer and employee under a contract of employment. Part VI provided an elaborate due process to be followed in the case of termination of employees. It provided for the right to be notified of the intention to dismiss and a fair hearing. However, the Employment Act did not apply to State Officers. A State Officer's terms and conditions of service were



regulated by the Constitution or the relevant statute, principles of fair administrative action and rules of natural justice. It therefore followed that a member of the County Executive Committee, being a State Officer, was not subject to the provisions of the Employment Act.

25. The respondent filed the petition in the Industrial Court pursuant to article 22 of the Constitution hence the Court could grant appropriate relief including an order of judicial review.

Appeal dismissed.

Orders

Costs to the respondent.

Citations

East Africa

1. *Joho, Hassan Ali & another v Suleiman Said Shabbal* Petition No 10 of 2013 - (Mentioned)
2. *Birir, Richard Bwogo v Narok County Government & 2 others* Petition No 1 of 2014 - (Mentioned)
3. *Munyasya, Tom Luusa & another v Governor of Makueni County & another* Cause No 103 of 2014 - (Mentioned)

Australia

Amalgamated Society of Engineers v Adelaide Steamship Company Ltd & others (1920) 28 CLR 129 - (Explained)

Canada

1. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 - (Explained)
2. *David Dunsmuir v New Brunswick* [2008] 1 SCR 190 - (Explained)
3. *Knight v Indian Head School Division No 19* (1990) 1 SCR 653 - (Mentioned)

India

1. *India v Tulsiram Patel* (1985) 3 SCC 398 - (Explained)
2. *Bihar v Abdul Majid* [1954] SCR 786 - (Explained)
3. *BP Singhal v Union of India & another* (2010) INSC 365 - (Followed)
4. *PL Dhingra v Union of India* AIR 1958 SC 36 - (Explained)
5. *Moti Ram v NE Frontier Railway* 1964 AIR 600; 1964 SCR (5) 683 - (Explained)

United Kingdom

1. *Cusack v Harrow London Borough Council* [2013] 4 All ER 97 - (Explained)
2. *Ridge v Baldwin & others* [1963] 2 All ER 66 - (Mentioned)

Texts and Journals

1. Wade, HWR., Forsyth, CF., (Eds) (2004) *Administrative Law* London: Oxford University Press 9th Edn pp 354-355
2. Garner, BA., (Ed) (2004) *Black's Law Dictionary* St Paul Minnesota: West Group Publishers West 8th Edition
3. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995) *Halsbury's Laws of England* London: Butterworths 4th Edn Reissue, Vol 44(1) para 1372

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1(3)(b); 10(1)(2); 22(1); 27(1) (2)(3); 23(3)(f); 28; 41(1); 47; 50; 73(2) (d); 152(5)(b); 174; 175; 179(1),(2)(b),(6); 200(2)(c); 260 - (Interpreted)
2. County Governments (Act No 17 of 2012) section 3(b); 3(i)(j); 31(a); 35; 39; 76 - (Interpreted)
3. Employment Act, 2007 (Act No 11 of 2007) In general - (Cited)
4. Law Reform Act (cap 26) In general - (Interpreted)



5. Civil Procedure Rules (cap 21 Sub Leg) order 53 - (Interpreted)

India

Constitution of India articles 156, 310 - (Interpreted)

JUDGMENT

Introduction

1. This appeal raises a fundamental issue under the 2010 *Constitution* and the *County Governments Act*: whether a member of the County Executive Committee is appointed at the pleasure of a Governor and can be dismissed at the Governor's pleasure, without due process.

Background:

2. Article 179 (2) of the *Constitution* stipulates:-

“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. Pursuant to the above Article, the respondent was appointed vide a letter dated 27th September, 2013 as the County Executive Secretary in charge of Culture, Gender and Social Development by the 2nd appellant. Subsequently, on 24th June, 2014 the respondent was relieved from her duties by the 2nd appellant. Aggrieved with her termination, the respondent filed a Petition in the Industrial Court seeking:-A declaration that the act of the 2nd respondent (2nd appellant herein) in relieving the petitioner (respondent herein) of her duties is a breach of the latter's constitutional rights under Article 27(1), (2) & (3), 28,41 & 50 of the *Constitution* of Kenya and that the same is null and void for all intent and purposes. An order of Judicial Review to remove into this Honourable court and quash the decision of the 2nd respondent relieving the petitioner of her duties as County Executive in charge of Culture Gender and Social Development. An order of Judicial Review of prohibition to remove into this Honourable court and prohibit the respondents from appointing any fresh nominee for approval by the Nyeri County Assembly for appointment as a member of Nyeri County Executive in charge of Culture Gender and Social Development. In alternative and without prejudice to prayer (d) above, an order of payment of all dues to the petitioner in the period she would have served up to the end of her term.
4. The respondent deposed that she had moved the court pursuant to Article 22(1) of the *Constitution* because the appellants had violated her inalienable constitutional right to an efficient, lawful and procedurally fair administrative action. She deposed that she was never given any reasons for her termination; she was informed of the dismissal by the members of the public after the 2nd appellant announced the same in a press conference. She maintained that she was relieved from duty in a manner that was illegal, unconstitutional, inhuman and degrading. The respondent further deposed that the 2nd appellant violated her constitutional rights in the following ways:-By dismissing the respondent with immediate effect, the 2nd appellant violated her right to a fair hearing and fair labour practices contrary to Article 41(1) of the *Constitution*. By dismissing the respondent without giving reasons for her dismissal, the 2nd appellant acted contrary to Article 47 of the *Constitution* which prescribes fair



- administrative action. By announcing the respondent's dismissal at a press conference without any notice to her exposed her to degrading and inhuman action contrary to Article 28 of the Constitution.
5. In his replying affidavit the 2nd appellant opposed the respondent's Petition, deposing that the said Petition was incompetent and an abuse of the court process because firstly, the Governor, Nyeri County was not a legal person capable of being sued in his own name, and secondly, the Petition was not supported by sufficient material to demonstrate that her fundamental rights had been violated. According to the 2nd appellant, since the respondent was appointed under Article 179(2) (b) of the Constitution she held her office at his pleasure. Consequently, she could not question her dismissal under Section 31(a) of the County Governments Act which is in pari-materia with Article 152(5) (b) of the Constitution and which gives the President the power to dismiss a Cabinet Secretary at his own pleasure without giving reasons. The 2nd appellant further deposed that the respondent being a state officer under the meaning of Article 260 of the Constitution was not subject to the Employment Act.
 6. The trial court vide a judgment dated 5th December, 2014 allowed the respondent's Petition and issued the following orders:-Declaration that the act of the 2nd respondent (2nd appellant herein) in relieving the petitioner of her duties is a breach of the petitioner's constitutional rights under Articles 27(1), (2) & (3), 28, 41 & 50 of the Constitution and the same is null and void for all intent and purposes. An order of judicial review of certiorari is hereby issued to remove into the honourable court for quashing the decision of the 2nd respondent relieving the petitioner of her duties as the county executive in charge of culture, gender and social development and as conveyed by each and every letter issued by the 2nd respondent and addressed to the petitioner on 24/6/14 including the one erroneously dated 24/6/13. The petitioner is entitled to remain in service of the respondents and to be allowed by the respondents to continue in the respondents' service forthwith as the Nyeri County Executive Member in charge of culture, gender and social development, and to perform the attached duties in accordance with the relevant provisions of the Constitution, statutes or as lawfully assigned, unless the petitioner otherwise lawfully ceases to hold office. The respondents to pay costs of the suit.
 7. Aggrieved with that decision the appellants filed this current appeal based on the following grounds:- The learned Judge erred in law in not holding and finding that the Governor has powers under Section 31(a) of the County Governments Act, No 17 of 2012 to dismiss a County Executive Committee Member at any time if the Governor considers it appropriate or necessary to do so just like the President of the Republic of Kenya has powers to dismiss a Cabinet Secretary under Article 152(5) (b) of the Constitution. The learned Judge erred in law in not holding and finding that a County Executive Committee Member holds office at the pleasure of the Governor under Section 31(a) of the County Governments Act like a Cabinet Secretary holds office at the pleasure of the President under Article 152(5) (b) of the Constitution. The learned Judge erred in law in not holding that the pleasure doctrine was applicable in the appointment and dismissal of Members of County Executive Committee under Article 179(2) (b) of the Constitution as read together with Section 31(a) of the County Governments Act just as it is applicable to the appointment and dismissal of Cabinet Secretaries under Article 152(2) & (5) (b) of the Constitution. The learned Judge erred in holding that the dismissal of a County Executive Committee Member by a Governor has to involve the due process by serving a County Executive Committee Member with a notice to show cause and giving reasons for such dismissal and giving the County Executive Committee Member a chance to be heard in writing before dismissal. The learned Judge erred in law in not holding that the appointment and dismissal of a County Executive Committee Member is governed by Article 179 (2) (b) & 200 (2) (c) of the Constitution as read together with Section 35 & 31(a) of the County Governments Act and that the Employment Act does not apply to the same just as it does not apply to the appointment and dismissal of Cabinet Secretaries which is governed by Article 152 (2) & 5(b) of the Constitution. The learned Judge in view of the provisions of



Article 179(2) (b) & 200 (2) (c) of the Constitution as read with together with Section 35 & 31(a) of the County Governments Act erred in holding that relieving the respondent from her duties was in breach of the petitioner's rights under Article 27(1) (2) & (3), 28, 41 & 50 of the Constitution. The learned Judge erred in holding that Section 76 of the County Governments Act is applicable to County Executive Committee members as it applies to County Public Services while a member of a County Executive Committee is not an employee of the County Public Service Board but an appointee of the Governor under Article 179(2) (b) of the Constitution. The learned Judge erred in not holding and finding that a dismissal of a County Executive Committee Member by the Governor under Section 31(a) of the County Government Act just like that of the President of a Cabinet Secretary under Article 152(5) (b) of the Constitution does not oblige the two to give reasons but under Section 40 of the County Governments Act, the County Assembly just like the National Assembly under Article 152(6) of the Constitution has to give the reasons enumerated therein. The learned Judge erred in holding that the relieving of duties of the respondent by the Governor was not in accordance with the Constitution or that Section 31(a) of the County Governments Act requires the Governor to give reasons for relieving a County Executive Committee Member. The learned Judge erred in not finding and holding that if the appointment and dismissal of County Executive Committee members or Cabinet Secretaries is to be subjected to the provisions of the Employment Act whereby they have to be served with a notice to show cause and disciplinary hearings are conducted, both the National and County Governments may ground to a halt to the grave prejudice of the citizenry. The learned Judge erred in holding that Article 179(7) of the Constitution which provides that 'if a vacancy arises in the office of the County Governor, the members of the County Executive Committee appointed under clause 2(b) cease to hold office.' has no relevance to the dispute in question while at the same time holding that for an Executive Committee Member to cease to hold office due process has to be followed. The learned Judge erred in law in granting orders of judicial review in a Petition when judicial review has its own elaborate procedure under the Law Reform Act and Order 53 of the Civil Procedure Rules.

Appellants' submissions:

8. Mr. Wahome Gikonyo, learned counsel for the appellants, submitted that there are conflicting authorities in the High Court in respect of the applicability of the pleasure doctrine in appointments made by a Governor; whether the Governor has power to terminate the services of a member of the County Executive Committee at his own pleasure without following due process. He submitted that Section 31(a) of the County Governments Act was in pari materia with Article 152(5)(b) of the Constitution which empowers the President to terminate the services of a Cabinet Secretary at his own pleasure. While placing reliance on the definition of the word 'may' in the Black's Law Dictionary, 8th Edition, Mr. Wahome urged that the word may in Section 31(a) of the County Governments Act permits a Governor to terminate the services of the respondent without following due process.
9. He argued that a pleasure appointment such as the one enjoyed by the respondent could be taken away without notice, and if the legislator had intended otherwise, it would have said so explicitly in the statute. According to Mr. Wahome, the loss of confidence in a member of the County Executive Committee was sufficient reason to terminate his/her services. He argued that Section 76 of the County Governments Act only applied to County employees and not members of the County Executive Committee. Mr. Wahome urged us to allow the appeal.

Respondent's submissions:

10. Mr. J.M. Ng'ang'a, learned counsel for the respondent, in opposing the appeal, submitted that in jurisdictions where the pleasure doctrine is applicable like in India the same is expressly stated in the Constitution. He submitted that the Constitution of Kenya does not contain the aforementioned



provision hence an Act of Parliament which contains the same is contrary to the Constitution and is void. Mr. Ng'ang'a argued that by dint of Article 179(2)(b) of the Constitution the Governor needs approval of the County Assembly in the appointment of County Executive members hence his power is not absolute. Therefore, Mr. Ng'ang'a urged that the respondent was entitled to a fair administrative action and could not be dismissed unprocedurally.

11. According to Mr. Ng'ang'a, even if the pleasure doctrine was applicable the same does not license a person to act arbitrarily and whimsically. The doctrine does not have an absolute unrestricted application. Mr. Ng'ang'a submitted that political questions and exercise of prerogative power in this country are subject to judicial review on principles of legality, rationality or procedural impropriety; the same suggests that this country is moving away from the pleasure doctrine. Mr. Ng'ang'a argued that Section 31(a) of the County Governments Act is ambiguous and unconstitutional. He maintained that the respondent's dismissal was based on Section 40 of the County Governments Act. Mr. Ng'ang'a urged us to dismiss the appeal.

Analysis:

12. Section 17 of the Industrial Court Act provides:-

“ 17

- (1) Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.
- (2) Any appeal from a judgment, award, decision, decree or order of the Court shall lie only on matters of law” Emphasis added.

By virtue of the foregoing provisions we are restricted to delving into matters of law only. We are of the considered view that the following issues arise for our consideration:-

What is the prescribed mode of removal/dismissal of a member of the County Executive Committee from office? Whether the doctrine of pleasure is applicable in the dismissal of a member of a County Executive Committee by the Governor under Section 31(a) of the County Governments Act, if so what is the extent of its application? Whether the respondent's termination was subject to the Employment Act. Whether the respondent's constitutional rights were violated by the appellants. Whether the remedies issued by the Industrial Court were proper.

Dismissal of a member of a County Executive Committee:

13. In determining how a member of a County Executive Committee can be removed from office we have to take into consideration the relevant constitutional and statutory provisions. 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 a devolved government. In particular Article 200 (c) placed an obligation on Parliament to enact legislation which would provide:-

“ ..the manner of election or appointment of persons to, and their removal from, offices in the county governments...” Emphasis added.

The County Governments Act reiterates the foregoing as one of the objects of the Act in Section 3(j) (i). In our view the relevant provisions are Sections 31(a) & 40 of the County Governments Act.

14. Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed



according to the intention expressed in the statute itself. *Halsbury's Laws of England*, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372 provides:-

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

15. The intention of a statute can be identified through a number of factors. In *Cusack v Harrow London Borough Council* (2013) 4 ALL ER 97, the Supreme Court observed:-

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

Further, in *Halsbury's Laws of England* (*supra*):-

“It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act...”

16. Going back to how a member of a County Executive Committee can be removed from office Section 40 provides:-

“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;
 - b. abuse of office;
 - c. gross misconduct;
 - d. failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;
 - e. physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or



- f. gross violation of the *Constitution* or any other law.
- (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 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 committee executive member.

On the other hand, Section 31(a) of the *County Governments Act* provides:-

- “ 31. The governor –
 - a. may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;...”



17. In the persuasive authority of *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd. & others* (1920) 28 CLR 129, the Australian High Court while echoing the cardinal rule of statutory interpretation stated herein above expressed itself as follows:-

“The fundamental rule of interpretation, to which all others are subordinate, is that statute is to be expounded according to the intent of parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning...”

18. From the language adopted by the legislator in enacting Sections 40 & 31(a) we discern two methods through which a member of a County Executive Committee can be dismissed. Firstly, under Section 40 a Governor can dismiss a County Executive Committee member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal is initiated by the County Assembly. Secondly, under Section 31(a) a Governor can dismiss a County Executive member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second mode that appears to vest an element of discretion on the part of the Governor and which is the subject of interpretation in this appeal.
19. The respondent was dismissed from office by a letter dated 24th June, 2014 from the 2nd appellant pursuant to Section 40(1) of the *County Governments Act*. Subsequently, by a letter of even date, the 2nd appellant corrected the earlier letter by indicating that the respondent’s dismissal was pursuant Section 31(a) of the *County Governments Act*. It is not lost to us that the amendment was due to the fact that the 2nd appellant could only dismiss the respondent on his own motion under Section 31(a) and not Section 40(1) as herein above observed.

Applicability of the doctrine of pleasure:

20. As noted from the foregoing Section 31 (a) gives a Governor an element of discretion when it comes to dismissing a member of a County Executive Committee. The appellants argue that this discretion is based on the doctrine of pleasure that is applicable to appointments by the Governor under Article 179(2)(b) of the *Constitution*. The Industrial Court in finding that the doctrine had no application in the current constitutional set up of this country expressed itself as follows:-

“The court upholds its opinion in *Richard Bwogo Birir v Narok County Government & 2 others* (2014) eKLR thus,

“To answer the 1st issue for determination being whether the pleasure doctrine applies in Kenya’s public service and particularly in this case, the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the *Constitution* of Kenya, 2010. The court further finds that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the petitioner (respondent) by the 2nd respondent (2nd appellant) as was purportedly advanced for the respondents. Finally, the court holds that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The court further holds that it is through the application of the doctrine of servants of the people and the



doctrine of due process of law that public and state officers in Kenya are subdued by the people who are the holders of sovereign power in the new Republic.”

.....

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

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

21. The pleasure doctrine can be traced back to England wherein the tenure of a public servant was deemed to be at the pleasure of the Crown. A public servant used to hold office until the Crown directed his/her dismissal. A pleasure appointment is defined in the *Black's Law Dictionary*, 9th Ed. as :-

“The assignment of someone to employment that can be taken away at any time, with no requirement of cause, notice or hearing.”

In *Union of India v Tulsiram Patel* (1985) 3 SCC 398, the Supreme Court of India set out the origin of the doctrine of pleasure as follows:-

“In England, except where otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown or *durante bene placito* (‘during good pleasure’ or during the pleasure of the appointor’) as opposed to an office held *dum bene se gesserit* (‘during good conduct’), also called *quadiu se bene gesserit* (‘as long as he shall behave himself well’). When a person holds office during the pleasure of the Crown, his appointment can be terminated at any time without assigning cause...”

In the case of *State of Bihar v Abdul Majid* (1954) SCR 786, the Supreme Court of India expressed itself as herein under:-

“The rule that a civil servant holds office at the pleasure of the Crown has its origin in the latin phrase ‘*durante bene placito*’ (‘during pleasure’) meaning that the tenure of office of a civil servant, except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, they cannot claim damages for premature determination of their services.”

22. The justification of the said doctrine was set out in *B.P. Singhal v Union of India & another* (2010) INSC 365 wherein the Supreme Court of India observed:-

“12.1 *In Shenton v Smith* (1895) AC 229, the Privy Council explained that the pleasure doctrine was a necessity because, the difficulty of dismissing those servants whose continuance in office was detrimental to the State would, if it



were necessary to prove some offence to the satisfaction of a jury (or court) be such, as to seriously impede the working of the public service.”

23. Originally the doctrine of pleasure was a prerogative power which was unfettered. A holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. However, with the passage of time and evolution of democracy this doctrine has undergone a series of modification. In *B.P. Singhal v Union of India & another* (*supra*) the Supreme Court of India observed:-

“ 13. There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. In the nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure does not mean a license to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good.”

In *Administrative Law*, HWR Wade & CF Forsyth, 9th Ed pg-354-355, the learned authors stated:-

“The common theme of all authorities as far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely- that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown’s lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered government discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

.....

The whole concept of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed.”

The evolution of the doctrine of pleasure has been on the basis of firstly, putting to an end arbitrary action by a public authority and secondly, ensuring that such a power is exercised reasonably and for the public good.

24. The application of the doctrine has been subjected to qualifications expressly through legislation or by implication. In India certain pleasure appointments have been subjected to restrictions by the *Constitution*. Article 310 of the *Constitution* of India provides:-

“ 310. Tenure of office of persons serving the Union or a State-

1. Except as expressly provided by this *Constitution*, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with



defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

Article 311 provides in part:-

“ 311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or State;-

(1)

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity to being heard in respect of those charges.”

25. The Supreme Court of India while referring to the qualifications on the pleasure doctrine under Article 310 of the *Constitution* in *P.L. Dhingra v Union of India* AIR (1958) SC 36, held,

“Subject to these exceptions our *Constitution*, by Art. 310(1), has adopted the English Common Law rule that public servants hold office during the pleasure of the President or Governor, as the case may be and has, by Art. 311 imposed two qualifications on the exercise of such pleasure. Though the two qualifications are set out in separate Articles they quite clearly restrict the operation of the rule embodied in Art. 310(1). In other words the provisions of Art. 311 operate as a proviso to Art. 310(1)

Further, in *Moti Ram v N.E. Frontier Railway* AIR (1964) SC 600 the Supreme Court stated:-

“The rule of English law pithily expressed in the latin phrase ‘durante bene placito (‘during pleasure’) has not been fully adopted either by S. 240 of the Government of India Act, 1935 or by Art. 310 (1) of the *Constitution*. The pleasure of the President is clearly controlled by the provisions of Art. 311, and so, the field that is covered by Art. 311 on a fair and reasonable construction of the relevant words used in that article would be excluded from the operation of the absolute doctrine of pleasure. The pleasure of the President would still be there, but it has to be exercised in accordance with the requirements of Art. 311.”

26. In *B.P. Singhal v Union of India & another* (*supra*), the Supreme Court of India found that in the absence of an express limitation on the application of the doctrine of pleasure there exists an implied limitation that the power would not be exercised arbitrarily, whimsically or capriciously; the power would be subject to the fundamentals of constitutionalism. In the aforementioned case, the Supreme Court of India while noting that by virtue of Article 156 of the *Constitution* a Governor held his office at the pleasure of the President and the exercise of said power was not subject to any limitation or restriction by legislation held,

“

“ 42. When a Governor holds office during the pleasure of the Government and the power to remove at pleasure of the President is not circumscribed by any conditions or restrictions, it follows that the power is exercisable at any time, without assigning any cause. However, there is a distinction between the need



for cause for the removal, and the need to disclose the cause for removal. While the President need not disclose or inform the cause for his removal to the Governor, it is imperative that a cause must exist. If we do not proceed on that premise, it would mean that the President on the advice of the Council of Ministers, may make any order which may be manifestly arbitrary or whimsical or mala fide. Therefore, while no cause or reason be disclosed or assigned for removal by exercise of such prerogative power, some valid cause should exist for the removal.

.....

49. ...What Article 156(1) dispenses with is the need to assign reasons or the need to give notice but the need to act fairly and reasonably cannot be dispensed with by Article 156(1). The President in exercising power under Article 156(1) should act in a manner which is not arbitrary, capricious or unreasonable.”

27. Comparative jurisprudence shows that the evolution of the doctrine of pleasure connotes that a public authority ought to act reasonably and/or fairly in exercising the said power. The extent of reasonableness or fairness is dependent on the express or implied qualification imposed in the exercise of the said doctrine by a public authority. In *David Dunsmuir v New Brunswick* (2008) 1 S.C.R 190 the Supreme Court of Canada observed:-

“79. Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however easy to apply. As has been noted many times, ‘the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.’”

28. In *Ridge v Baldwin & others* (1963) 2 ALL ER 66, the House of Lords held that a public employee’s right to procedural fairness/ due process was dependent on his/her status as an office holder. In doing so, Lord Reid classified the dismissal of a public employee into three, that is, firstly, dismissal of a servant by his master wherein the relationship is purely governed by the contractual terms. Secondly, dismissal from an office held during pleasure wherein it was held that procedural fairness was not applicable. Thirdly, dismissal from an office where there must be something against a man to warrant his dismissal. It was held that procedural fairness was only applicable to the third distinction. Subsequently, the Supreme Court of Canada in *Knight v Indian Head School Division No 19* (1990)1 SCR 653 the applicability of procedural fairness was extended to offices held at pleasure.

29. However, the Supreme Court of Canada in *David Dunsmuir v New Brunswick* (*supra*) held that in determining the applicability of due process:-

“

“ 113. The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority.

.....

115. The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected



by a contract of employment. This will be the case with judges, ministers of the Crown and others who ‘fulfill constitutionally defined state roles’. It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office ‘at pleasure’. Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.” Emphasis ours.

30. Turning back to the applicability of the doctrine of pleasure in this country we note that there are conflicting decisions in the Industrial Court on the issue. In *Richard Bwogo Birir v Narok County Government & 2 others* – Petition 1 of 2014 and in this case, the Industrial Court held that the doctrine has no application in this country while in *Tom Luusa Munyasya & another v Governor of Makueni County & another*- Industrial Cause No 103 of 2014 it was held that the doctrine applied without any limitation. The appellants herein maintain that the respondent’s appointment was at the pleasure of the 2nd appellant; the doctrine of pleasure applied in the circumstances without any limitations.
31. In *David Dunsmuir v New Brunswick* (*supra*) the Supreme Court of Canada expressed itself as follows:-
 - “ 28. By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision making powers have legal limits derived from the enabling statute itself, the common law or civil law or the *Constitution*.”
32. In order to determine whether the doctrine of pleasure is applicable and the extent of its application in Kenya we are guided by the following dicta in *David Dunsmuir v New Brunswick* (*supra*),
 - “The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law.”
33. The *County Governments Act* was enacted to give effect to Chapter 11 of the *Constitution* which provides for devolution. Therefore, interpretation of Section 31(a) of the said Act ought to be in light of the values, purposes and principles of the *Constitution*. The Supreme Court of Kenya in *Hassan Ali Joho & another v Suleiman Said Shabbal* – Petition 10 of 2013 held that whenever a court is called upon to interpret an Act of Parliament it should ensure that the Act conforms to the *Constitution*. The current *Constitution* explicitly states that sovereign power belongs to the people and the exercise of the said power ought to be in accordance with the *Constitution*. The *Constitution* took away the notion that sovereign power was vested in individuals or certain offices and could be exercised at the will of the said individual or office. The preamble to the *Constitution* provides that in adopting and enacting the *Constitution* the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights freedom, democracy, social justice and the rule of law. The Kenyan people exercised their sovereign and inalienable right to determine the form of governance of the country.
34. Article 1(3) (b) of the *Constitution* provides that the sovereign power is delegated to the national executive and the executive structures in the county governments. Article 10 (1) of the *Constitution* binds all state organs, state officers, public officers and all persons to observe the national values and principles of governance when applying or interpreting the *Constitution*; enacting, applying or



interpreting any law; or implementing public policy decisions. Article 10(2) sets out the national values and principles of governance as follows:-

- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people;
- b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- c. good governance, integrity, transparency and accountability; and
- d. sustainable development.” Emphasis added.

35. Chapter 6 of the Constitution provides for leadership and integrity. It places an obligation on leaders to exercise the authority vested in them in a manner that is consistent with the purposes and objects of the Constitution. Article 73(2) (d) of the Constitution has made leaders accountable to the public for their decisions and actions. Further, Article 174 (a) provides that one of the objects of devolution is to promote democratic and accountable exercise of power. We note that Section 3(b) of the County Governments Act indicates one of the objective of the Act is to give effect to the objects an principles of devolution as set out in Articles 174 & 175 of the Constitution
36. Therefore in interpreting the nature of the power of a Governor under Section 31(a) of the County Governments Act we have to take into account the foregoing.
37. We are of the considered view that the 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. Why do we say so?
38. Firstly, By dint of Article 179(1) of the Constitution and Section 34 of the County Governments Act the executive authority of a County is vested in the County Executive Committee. The County Executive Committee comprises of the Governor, Deputy Governor, members of the County Executive Committee who are appointed by the Governor. The members of the County Executive Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities. (See Article 179 (6) of the Constitution and Section 39 of the County Governments Act.) A County Executive Committee member is the Governor’s right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member. Where such confidence is lost the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.
39. Secondly, Section 31 (a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising this power. In Dunsmuir v New Brunswick (*supra*) the Supreme Court while discussing reasonableness observed:-

- “ 47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness; certain questions that come before administrative tribunals do not lend



themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

Further, by virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her county. 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 to the principles of devolution as set out herein above. In *B.P. Singhal v Union of India & another* (*supra*)

“ 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.”

Was the Respondent’s right to a fair administrative action violated?

- 40. From the foregoing it is clear that a Governor ought to exercise his power to dismiss a member of a County Executive Committee under Section 31(a) of the *County Governments Act* reasonably and for the public good. In this case, the respondent contended that her right to a fair administrative action was violated by the appellants. This is because the 2nd appellant neither informed her of the allegations against her nor gave her an opportunity to defend herself before the dismissal.
- 41. In *B.P. Singhal v Union of India & another* (*supra*) the Supreme Court of India held,

“ The President in exercising power under Article 156(1) should act in a manner which is not arbitrary, capricious or unreasonable. In the event of challenge of withdrawal of the pleasure, the court will necessarily assume that it is for compelling reasons. Consequently, where the aggrieved person is not able to establish a prima facie instance of arbitrariness or malafides, in his removal the court will refuse to interfere.”

The burden lay with the respondent to establish that her dismissal was arbitrary and capricious and that her rights were violated.



42. As demonstrated herein above the extent to which due process is applicable in a case such as this depends on the express and implied limitations by statute and the circumstances of the case. There are certain circumstances a Governor may lose confidence in a member of a County Executive Committee and due to the sensitivity and/or urgency of the matter at hand the Governor may dismiss the member without giving notice of his intention to do so. Further, Section 31 (a) of the [County Governments Act](#) does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he can only dismiss if he considers it appropriate or necessary. Appropriateness or necessity is not arbitrariness or whimsical. Appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power exercised under Section 31(a) of the [County Governments Act](#) is reasonable or not. In [Associated Provincial Picture Houses Ltd. v Wednesbury Corporation](#) (1947) 2 ALL ER 680, Lord Green expressed himself as herein under: -

“It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonableness’ in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”

43. Article 47 of the [Constitution](#) provides in part:-

“ 47

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

In the instant case the respondent was dismissed vide a letter dated 24th June, 2014 with immediate effect. From the said letter it is not clear under what circumstances the respondent’s services were terminated. We also note that no evidence was tendered by the appellants as to the reason(s) for the respondent’s dismissal. In fact the appellants maintained that 2nd appellant had the power to dismiss the respondent at his pleasure without giving reasons. We find that in the circumstances that the respondent proved that the 2nd appellant’s actions were arbitrary. This is because there was no evidence that the 2nd appellant acted reasonably in dismissing the respondent. Consequently, we concur with the trial court that the respondent’s right to a fair administrative action was violated by the appellants.



Applicability of the Employment Act:

44. The *Employment Act* was enacted to govern the relationship of an employer and employee under a contract of employment. Part VI provides an elaborate due process to be followed in the case of termination/dismissal of employees. It provides for the right to be notified of the intention to dismiss and a fair hearing.
45. 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: -
- a. President;
 - b. Deputy President;
 - c. Cabinet Secretary;
 - d. Member of Parliament;
 - e. Judges and Magistrates;
 - f. Member of a commission to which Chapter fifteen applies;
 - g. Holder of an independent office to which Chapter fifteen applies;
 - h. Member of a County Assembly, Governor, or Deputy Governor of a County, or other member of the Executive Committee of a County Government;
 - i. Attorney General;
 - j. Director of Public Prosecutions;
 - k. Secretary to the Cabinet;
 - l. Principal Secretary;
 - m. Chief of the Kenya Defence Forces;
 - n. Commander of a service of the Kenya Defence Forces;
 - o. Director-General of the National Intelligence Service;
 - p. Inspector General, and the Deputy Inspectors- General, of the National Police Service; or
 - q. An office established and designate as a State Office by national legislation.
Emphasis added.
46. We are of the considered view that the *Employment Act* does not apply to State Officers. A State Officer's terms and conditions of service are regulated by the *Constitution* or the relevant Statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to the provisions of the *Employment Act*.

Appropriateness of the remedies issued:

47. The appellants took issue with the orders that were issued by the trial court. They argued that the orders were judicial review orders yet what was before the court was not judicial review proceedings.



The respondent filed the Petition in the Industrial Court pursuant to Article 22 of the Constitution.
On this issue we can do no better than reproduce Article 23 (3)(f) of the Constitution: -

“ Article 22 (3) In any proceedings brought under Article 22, a court may grant appropriate relief including-

- (a)
- (f) an order of judicial review.”

Conclusion:

48. The upshot of the foregoing is that we find that the appeal herein has no merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 18TH DAY OF MARCH, 2015.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

