



**Hongo v Governor Kisumu County & 5 others (Petition E020 of 2024)  
[2025] KEELRC 546 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 546 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E020 OF 2024**

**JK GAKERI, J**

**FEBRUARY 27, 2025**

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 21, 23(1), 27(4), (6) &  
(3), 56,232, AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF RULES 11, 12, 13, 20 AND 21 OF THE  
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDSOMS) AND PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTIONS 8, 40 AND 45 OF THE COUNTY  
GOVERNMENT ACT, ACT 17 OF 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2,  
3, 10(1), 2(C), 22(1), 25(C), 27, 28, 40, 41(1), 43, 46, 47(1), 50, 75, 159(1)  
(2) AND (E)(A) AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**DR. KENNEDY OUMA AKELLO HONGO, HSC ..... PETITIONER**

**AND**

**THE GOVERNOR KISUMU COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF KISUMU ..... 3<sup>RD</sup> RESPONDENT**

**THE SPEAKER COUNTY ASSEMBLY OF KISUMU ..... 4<sup>TH</sup> RESPONDENT**

**THE COUNTY ATTORNEY (LEGAL ADVISOR) ..... 5<sup>TH</sup> RESPONDENT**

**JEROME OCHIENG ..... 6<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner filed this Petition on 20<sup>th</sup> May, 2024 together with a Notice of Motion under Certificate of Urgency seeking various Orders and the Court granted Conservatory Orders on even date restraining the respondents from replacing the Petitioner or substantively filling the position he occupied of County Executive Committee Member.
2. The Petitioner subsequently sought and was granted leave to amend the Petition and did so on 14<sup>th</sup> June, 2014 and filed the same on 11<sup>th</sup> July, 2024.
3. The Petitioner stated that he was nominated and subsequently appointed by the 1<sup>st</sup> respondent as County Executive Committee Member, Lands, Physical Planning, Housing and Urban Development on 13<sup>th</sup> December, 2023 and served in that capacity until 19<sup>th</sup> April, 2024 when he received a termination letter dated 18<sup>th</sup> April, 2024 from the 1<sup>st</sup> respondent through the County Secretary.
4. That before the letter was issued, the 1<sup>st</sup> respondent's communication department had already disclosed his termination on social media together with that of a colleague, Ms. Marylyn Agwa and their replacements.
5. The Petitioner avers that the termination was devoid of notice and reasons which are mandatory.
6. That as it is only the two of them who were isolated for termination and the same was discriminatory and his terminal benefits remain outstanding.
7. The Petitioner further avers that his letter to the 1<sup>st</sup> respondent requesting for reason(s) for termination yielded no response and the manner of termination had rendered him unemployable and had 3<sup>rd</sup> party obligations such as banks, to honour.
8. That the 6<sup>th</sup> respondent, Jerome Okoth Ochieng, the Petitioner's replacement was nominated, vetted and approved for swearing in two days to defeat on-going proceedings in the matter.
9. The Petitioner alleges that the respondents violated his right to an efficient, lawful and procedurally fair administrative action and thus violated the provisions of Article 41 and 47 of *the Constitution* of Kenya.
10. The Petitioner sought the following reliefs:
  1. Compensation.
  2. A declaration that the act of the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondents in relieving him of his duties is a breach of his constitutional rights under Article 22(1), 27(1) (2) and (3), 28, 35, 40, 41(1) 47 and 50(1) of *the Constitution* of Kenya and the same is null and void.
  3. An Order of certiorari to remove into this Honourable Court and quash the decision of the 1<sup>st</sup> respondent relieving the Petitioner of his duties as Executive Committee Member, Land, Physical Planning, Housing and Urban Development.
  4. A declaration that the purported appointment, vetting, approval, swearing in and assumption of office of the 6<sup>th</sup> Respondent and all processes thereto were acts of illegality in breach of *the constitution* and therefore null and void.
  5. An Order of certiorari to remove into this Honourable court and quash the decision of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents for illegally appointing the 6<sup>th</sup> respondent to the rank of the



Executive Committee Member, Land, Housing, Physical Planning and Urban Development  
Kisumu County.

6. An Order of mandamus compelling the respondents to reinstate the Petitioner to his position and all benefits thereof.
7. An Order of mandamus compelling the respondents to refund all sums drawn from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents towards the appointment, vetting, approval swearing in and assumption of office of the 6<sup>th</sup> respondent and an account be rendered forthwith.
8. An Order of mandamus compelling the 6<sup>th</sup> respondent to refund all sums paid to him or obtained by him since his illegal appointment to the impugned rank within the 2<sup>nd</sup> respondent.
9. An Order of prohibition to remove into this Honourable Court and prohibit the respondents from appointing any fresh nominee for approval by the Kisumu County Assembly for appointment as Executive Committee Member, Land, Physical Planning, Housing and Urban Development, JEROME OKOTH OCHIENG.
10. In the alternative and without prejudice to prayers (d5)? an order of payment of all dues to the Petitioner, including general and aggravated damages for the period he would have served up to the end of the term of the 1<sup>st</sup> respondent.

### **Respondent's case**

11. The respondents filed two sets of grounds of opposition contending that the prayer to restrain the vetting of the 6<sup>th</sup> respondent had been overtaken by events as the exercise had taken place and he had been sworn into office and reinstatement would be harmful as would others orders sought.
12. The 3<sup>rd</sup> and 5<sup>th</sup> respondents opposed the application and Petition on the grounds that both were speculative and did not reveal any cause of action, the doctrine of constitutional avoidance and ripeness affected the Petition and application, and the Orders sought if granted would undermine the powers and privileges of the County Assembly as it had procedures on approval process.
13. In their Replying Affidavit sworn by Hesbon Hongo on 10<sup>th</sup> July, 2024 the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents depose that the Petitioner was indeed a member of the County Executive Committee responsible for Lands, Physical Planning, Housing and Urban Development until 19<sup>th</sup> April, 2024.
14. That under Article 179(1) of *the Constitution* of Kenya a County Government exercises its executive authority through the County Executive Committee which the claimant was a member and its functions include supervision, administration and service delivery in the County and all decentralized units and agencies and co-ordinate functions of the administration and its departments.
15. The affiant depones that the 1<sup>st</sup> respondent relied on the County Executive to implement his manifesto for policy and approvals and the committee is accountable to the Governor collectively and individually and owing to its central role in the functioning of the County Government, its membership is based on trust, and termination of a member impliedly conveys the loss of trust and breakdown of synergy.
16. That the 2<sup>nd</sup> respondent notified the public of the proposed nomination of the 6<sup>th</sup> respondent through press and technology based platforms and the 1<sup>st</sup> respondent's nominee was vetted and approved by the County Assembly after notification had been made in Newspapers and the Clerk's letter to the County Secretary dated 22<sup>nd</sup> May, 2024 confirmed the approval of the Petitioner's replacement as the County Executive Committee Member for Lands, Physical Planning Housing and Urban Development and he



was appointed and sworn in on the same day at 4:00pm and assumed office, before which the position was vacant as Mr. John Awiti was acting.

17. That the appointment of the 6<sup>th</sup> respondent as a County Executive Committee Member has been overtaken by events as there was no court order restraining the respondents from proceeding as they did as none was aware of the court order and thus cannot be faulted for exercising their statutory mandate as the Petitioner's counsel did not serve the interim Orders on time and could thus not institute any contempt proceedings against the respondents.
18. The affiant deposes that the instant Petition is different from Kisumu ELRC PETITION NO. E017 OF 2024 Marylyne Yanzar Agwa V The County Governor of Kisumu which was filed earlier and the orders made in the matter were not in rem and thus not relevant to the instant Petition.
19. That based on the circumstances in which the Petitioner lost office, which connotes loss of confidence, it would not be in the interest of the County Government of Kisumu to reinstate the Petitioner and if the court found that the termination was unlawful, it be minded to grant reliefs other than reinstatement as it would be impracticable and damages are compensatory not punitive.
20. That publication of the Petitioner's termination on social media to publicize the event and there was no ill-will, malice or spite and 3<sup>rd</sup> party obligations are personal to the petitioner.
21. In his Supplementary Affidavit, the Petitioner deposes that the respondents admit that the termination was wrongful vide their grounds of opposition. That the respondents were aware of service before their actions on 21<sup>st</sup> and 22<sup>nd</sup> May, 2024 hence the rush and were aware of the suit on 16<sup>th</sup> May, 2024 when it came up for directions as they were parties to ELRC Petition No. E017 of 2024 and directions were served before vetting and swearing in took place, and it was thus illegal.
22. That there was no vacancy in the office as Mr. Awiti John was acting and reinstatement was a practicable relief.
23. That the conservative orders against the substantive filling of the position occupied by the Petitioner had not been discharged.
24. That the respondents acted in contempt of court as they were aware of the court orders in both cases and a contemnor lacks audience of the court and no valid appointment took place.
25. The affiant urges that since the court orders in ELRC Petition No. E017 of 2024 were served on the respondents and the Petitioner in both cases were terminated together, there would be no hiring for both positions.
26. That the respondents by-passed the 3<sup>rd</sup> and 4<sup>th</sup> respondents legislative process to avert public scrutiny and the process was flawed and it was a targeted appointment and the hiring of one Jerome Okoth Ochieng was illegal as he has violated Chapter VI.

### **Petitioner's submissions**

27. On conservatory orders, counsel relies on the provisions of Article 20(1), 27, 28, 41(1), 47 and 5 of Constitution of Kenya and [Fair Administrative Action Act](#) to urge that all state officers are subject to various duties and dismissal of a state officer implicates due process on notice, reasons, right to be heard and cross-examine witnesses.
28. Reliance was made on Centre for Rights Education & Awareness (CREAW) & 7 Others V Attorney General [2011] eKLR on prima facie case, as were the decisions in Adrain Kamotho Njenga V Selection Panel for the Appointment of Commissioners of the IEBC [2021] and 2 Others IEBC [2021] eKLR



and Trust Bank Ltd V Amin Co. Ltd & Another [2000] eKLR, to urge that the 6<sup>th</sup> respondent was not eligible for appointment and the appointment of an acting County Executive Committee Member was unprocedural as the procedure was not complied with as there was no nomination, short listing, interview, vetting and approval and conservatory Orders should be sustained and confirmed.

29. As to whether the Petition is proved, counsel submits that the Petition meets the threshold in Anarita Karimi Njiru V Republic [1979] eKLR as violations of the constitution had been laid bare and in particular Articles 27, 41, 47, 50(1), 10, 20(1) and 232 of the Constitution due to absence of notice, hearing, discrimination and no reason was given.
30. Reliance was also made on the sentiments of the Court of Appeal in County Government of Nyeri & Another V Cecilia Wangechi Ndungu [2015] eKLR, to urge that the Petitioner's case has not been challenged.
31. On reliefs, counsel submits that it appeared that the 1<sup>st</sup> respondent relied on Section 31(a) of the County Governments Act which accord Governors discretion to dismiss County Executive Committee Members and cited the court of Appeal's rendition in the County Government of Nyeri & Another V Ndung'u (Supra), to urge that the discretion ought to have been exercised reasonably and for the benefit of the people.
32. As to whether the Petitioner's constitutional rights were violated, counsel submits that they were as due process was not followed as per Article 236(b) of the Constitution and cites Walid Khalid V County Assembly of Mombasa & Others [2018] eKLR on due process.
33. Counsel urges the court to allow the Petition and Application and quash the 1<sup>st</sup> respondent's decision.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondents submissions**

34. Counsel submitted that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were neither the Petitioner nor, employers of the Petitioner and took no part in his dismissal or termination and the claim against them should be dismissed with costs.
35. The 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents did not file submissions even after being accorded two distinct opportunities to do so on 17<sup>th</sup> December, 2024 and 29<sup>th</sup> January, 2025.

### **Analysis and determination**

36. On conservatory Orders, when the matter came up under Certificate of Urgency on 20<sup>th</sup> May, 2024, the court directed service of the motion and responses and Inter Partes hearing on 23<sup>rd</sup> May, 2024. More significantly, the court granted a conservatory Order restraining the respondents from replacing the Petitioner or substantively filling the position he occupied as County Executive Committee Member.
37. The only Orders not granted were reinstatement of the Petitioner, vetting of Mr. Jerome Okoth Ochieng for the position and provision of reasons and/or justification why the Petitioner was terminated.
38. In sum, the court did not at this stage restrain the respondents from any other activity other than filling the position of the Kisumu County Executive Committee Member, Land, Physical Planning Housing and Urban Development.
39. Strangely, the Petitioner provided no evidence as to when it served this order on the respondents.
40. This was a critical piece of evidence, if the Orders of the Court had to be effectively enforced and observed by both parties.



41. According to the Petitioner, since the respondents were parties to ELRC Petition No. E017 of 2024, filed earlier and attended court on 16<sup>th</sup> May, 2024, they were aware of the orders of the court made on the 2<sup>nd</sup> May, 2024 in the matter as since the Petitioner in Petition No. E017 of 2024 and Petitioner in the instant Petition were dismissed on the same day and in the same manner.
42. The Petitioner appears to be suggesting that the Order in Petition No. E017 of 2024 applied to Petition No. E020 of 2024, an argument the respondents fault and expressly acknowledge that the Petitioner did not serve the orders granted by the court on 20<sup>th</sup> May, 2024 to forestall the nomination, vetting, approval and appointment of Mr. Jerome Okoth Ochieng as the Kisumu County Executive Member, Land, Physical Planning Housing and Urban Development on 23<sup>rd</sup> May, 2024.
43. In the absence of service of the court order, how would the respondents have appreciated that there was a court order restraining what they were doing or about to do?
44. The Petitioner's argument that the respondents were aware of the Order in Petition No. E017 of 2021 lacks persuasion as the two, cases, as the respondents argue, are distinct and independent of each other, the similarities of circumstances notwithstanding.
41. More importantly, in Petition No. E017 of 2024, the court restrained the respondents "from vetting nominees of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the position of County Executive Member for Water, Energy, Environment, Natural Resources and Climate Change".
42. Clearly, the court's order was specific to a particular office and no other and could not be applied by implication or otherwise to the County Executive Member, Land, Physical Planning, Housing and Urban Development.
43. Relatedly, and as correctly argued by the respondents, restraining orders are generally in persona not in rem and in this case, the order in Petition No. E017 of 2024 was very specific.
44. Arguably, the fact that the respondents were aware of the Conservatory Orders under Petition No. E017 of 2024 did not preclude them from filling the position left vacant after the Petitioner's dismissal. There was no court order restraining them from proceeding in the manner they did as the relevant Order was not served upon them on time.
45. The Petitioner's argument that the appointment of Mr. Jerome Okoth Ochieng was procedurally flawed and illegal lacked supportive evidence to demonstrate what the respondents did and in violation of what specific provisions of the law.
46. The fact that it was done in record time did not per se make it unprocedural.
47. It is trite law that he who alleges, must prove the allegations as encapsulated in Section 107 of the [Evidence Act](#) and reiterated in countless decisions such as *Alice Wanjiru Ruhiu V Assembly of Yahweh* [2021] eKLR, *Raila Odinga & Another V I.E.B.C & 2 Others*; *Ekuru Aukot & Another (Interested parties); Attorney General (Amicus Curiae)* [2017] KESC 42 (KLR) *David Bagine V Martin Bundi* [1997] eKLR, *Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another* [2005] IEA 334, *Evans Nyakwana V Cleophas Bwana Ongaro* [2015] eKLR among others.
48. Section 107 of the [Evidence Act](#) provides:
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



49. Similarly, Section 108 of the Evidence Act provides:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

50. In this case, the burden of proof lay on the Petitioner to evidentiary demonstrate that Mr. Jerome Okoth Ochieng was not eligible for appointment as County Executive Committee Member, Lands, Physical Planning, Housing and Urban Development, Kisumu County and that his appointment was vitiated because the provisions of the Constitution of Kenya County Government Act or indeed any other relevant Act were violated and how.
51. In the absence of such evidence the Petitioner's averments and submissions remain unsubstantiated.
52. A Press Release from the Office of the Governor shows that the 1<sup>st</sup> respondent nominated Mr. Jerome Okoth Ochieng as the Petitioner's replacement on 30<sup>th</sup> April, 2024 and the County Secretary, by letter dated 3<sup>rd</sup> May, 2024 forwarded the name to the Clerk County Assembly of Kisumu for purposes of vetting. The letter attached Mr. Jerome Okoeth Ochieng's CV, copy of identity car, academic papers and testimonials and a Notice of Vetting of the nominee was made by the Kisumu County Assembly Clerk and published in the Daily Nation on Tuesday, 14<sup>th</sup> May, 2024.
53. Relatedly, the Clerk of the Kisumu County Assembly wrote to the Regional Manager Ethics & Anti-Corruption Commission on 13<sup>th</sup> May, 2024 on background checks on the nominee and vide letter dated 22<sup>nd</sup> May, 2024, the Clerk Kisumu County Assembly communicated the outcome of the approval of Mr. Jerome Okoth Ochieng to the County Secretary.
54. The respondent's evidence shows that Mr. Jerome Okoth Ochieng attached copies of his I.D, clearance by the Directorate of Criminal Investigations (D.C.I) and the Kenya Revenue Authority.
55. Finally, the Kisumu County Assembly HANSARD for Wednesday 22<sup>nd</sup> May, 2024, at 2:30pm reveals that the report of the Select Committee on Appointment on the suitability of Mr. Jerome Okoth Ochieng to the position of County Executive Committee Member for Lands, Physical Planning, Housing and Urban Development was placed before the Assembly report was adopted by the Assembly at 15:39 hours.
56. The Speaker directed that the deliberations together with the HANSARD be prepared and forwarded to the Governor to effect the appointment of Mr. Jerome Okoth Ochieng as the County Executive Committee Member for Lands, Physical Planning, Housing and Urban Development and by letter dated on even date Mr. Jerome Okoth Ochieng was appointed and accepted the appointment by signing the letter and took and subscribed to the oath of office.
57. In the absence of evidence to controvert these processes, the court has no basis to find that the appointment of Mr. Jerome Okoth Ochieng was vitiated in any respect.
58. Equally, the Petitioner faults the acting appointment of Mr. John Owiti after the Petitioner's termination on the premises that procedures were not followed.
59. However, the Petitioner's argument is reticent on the law, policy, procedure or manual violated by the 1<sup>st</sup> respondent in appointing a person to act as County Executive Committee member pending a substantive appointment which required attendant procedures including approval by the County Assembly.



60. An Acting appointment is recognized as a temporary method of ensuring that the obligations of a particular office are performed and services rendered by another person pending the recruitment or appointment of substantive holder of the office.
61. It is undoubtedly, a pragmatic way of ensuring that services are rendered seamlessly, which is more acute in public service where discontinuity of service is unenvisioned.
62. An Acting appointment accords the organization sometime to go through the recruitment or appointment process and in most instances, the person acting is an insider who is eligible to hold that office.
63. In such circumstances, the particular office is deemed vacant for purposes of recruitment as the person acting has a substantive appointment of another office and cannot be said to be holding two offices at the same time.
64. Section 34(3) of the [Public Service Commission Act](#) places a minimum period in acting capacity at 30 days and the ceiling at 6 months.
65. The Petitioners contention that the office he left vacant was indeed not vacant is unsustainable as an acting appointment is by its very nature temporary, hence the payment of an acting allowance over and above the officers gross salary, to appreciate the extra load the officer has to carry before the holder of the particular office is recruited or appointed.
66. In the court's view, the Petitioner has failed to prove that the appointment of Joh Owiti as acting County Executive Committee Member for Lands, Physical Planning, Housing and Urban Development, by the 1<sup>st</sup> respondent was vitiated.
67. In the end, having failed to prove service of the court's Order made on 20<sup>th</sup> May, 2024, it is discernible that the same was overtaken by events, which perhaps explains why the Petitioner could not institute contempt proceedings against any of the respondents as they had not violated any court order.
68. Having found that Mr. Jerome Okoth Ochiengs appointment took place on 22<sup>nd</sup> May, 2024 before any Order was served on any of the respondent's, prayer No. 2, and 3 of the Notice of Motion dated 16<sup>th</sup> May, 2024 fell by the way side and Prayer No.4 had no time limit.
69. Finally, reinstatement is a final relief, seldom appropriate at the interlocutory stage as it requires interrogation of the circumstances surrounding the termination.
70. Having found that the conservatory Order issued on 20<sup>th</sup> May, 2024 was overtaken by events to the extent that the position of County Executive Committee Member for Lands, Physical Planning, Housing and Urban Development had already been filled substantively, and provision of reasons or justification for termination of the Petitioner and reinstatement did not commend themselves for issue at the interlocutory stage the Petitioners Notice of Motion dated 16<sup>th</sup> May, 2024 was effectively spent.
71. The other issues for determination are;
  - i. Whether the Petitioners constitutional rights were violated; and
  - ii. Whether the Petitioner is entitled to the reliefs sought.
72. On termination of the Petitioner's appointment, it is common ground that it was done by the 1<sup>st</sup> respondent vide letter dated 18<sup>th</sup> April, 2024 and no reasons were provided for the drastic action and not even the Petitioner's request for the same vide letter dated 29<sup>th</sup> April, 2024 yielded a response.



73. Puzzlingly, while the letter of termination of service relies on Article 75 of *the Constitution* of Kenya and Section 40(1)(c) of the *County Governments Act*, a communication from the 1<sup>st</sup> respondent's office dated 19<sup>th</sup> April, 2024, but which does not bear the 1<sup>st</sup> respondent's signature, cites Section 31(a) of the County Government's Act.
74. Section 31 of the *County Governments Act* confer upon a County Governor authority to dismiss a member of the County Executive Committee.
75. The Section provides that:
- The Governor—
- (a) may dismiss a county executive committee member;
  - (b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;
  - (c) may appoint an accounting officer for each department, entity or decentralized unit of the county government; and
  - (d) shall have such powers as may be necessary for the execution of the duties of the office of governor.
76. Clearly, there are two avenues through which the County Governor may dismiss a member of the County Executive Committee namely, at his or her own motion or at the intigation of the County Assembly vide a resolution under Section 40 of the *County Governments Act*.
77. Courts have applied these provisions in the course of interrogation the powers of Governors to remove members of County Executive Committee. One of the earliest Court of Appeal decisions on the issue is that of County Government of Nyeri & Another V Cecilia Wangechi Ndung'u (Supra), where the Court expressed itself as follows:
78. 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.
79. 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”.
80. Relatedly, in County Government of Garissa & another V Idriss Aden Mukhtar & 2 Others [2020] eKLR, the Court of Appeal held as follows;
- ...That the pleasure doctrine was not preserved under Section 31(a) of the County Government Act. Nor do we agree that the section allows the Governor to dismiss members of the county executive without observing any procedures or assigning any reasons. Section 31(a) merely gives the Governor the discretion to dismiss a county executive member for a reason and process other than that stated in Section 40 of the CGA, subject to due process being followed.



It is not lost on us that the Governor is the political leader of the county, and that he is aligned to a specific political party. It is natural that he would identify for appointment as members of his county executive committee, persons who are committed to his cause and whom he has confidence in. Section 31(a) would therefore come in handy where the Governor has reason to lose confidence in an executive committee member due to sabotage or such like activity that would hamper proper governance of the county.

This means that there must be reasons upon which it can be concluded that the powers of the Governor have been exercised in good faith and for proper reasons and not arbitrarily or capriciously. It cannot be as the appellants appear to contend, that the Governor is entitled to fire the respondents at will without any reason and without due process.

That would be contrary to the respondents' constitutional rights to fair labour practices and the right to fair hearing. Thus, the appellants had to satisfy the court not only that the Governor had a good reason for the termination of the respondents' employment, but also that the reason for the termination was one which justified urgent action under Section 31(a) of the CGA. Secondly, the Governor had to satisfy the court that in taking the action, due process was followed and a fair hearing given to the respondents...

The Governor misinterpreted his powers under Section 31(a) of the CGA, as giving him a free hand to dismiss the respondents at his pleasure, and therefore did not give them any hearing before termination of their employment. This was a clear breach of the respondents' rights to fair labour practices under Article 41(2) of *the Constitution* and right to fair administrative action under Article 47 of *the Constitution*. It was also a breach of natural justice and therefore, the respondents' dismissal was unfair termination”.

81. The foregoing sentiments apply on all fours to the circumstances of the instant suit as the Governor of Kisumu, the 1<sup>st</sup> respondent dismissed the Petitioner in exercise of the power conferred by Section 31(1) of the *County Governments Act* on his own motion and the County Assembly of Kisumu was not involved.
82. Evidently, the 1<sup>st</sup> respondent did not provide any reason or justification of the dismissal of the Petitioner and no due process was followed as ordained by the provisions of Article 236(b), 41 and 47 of *the Constitution* of Kenya and thus the dismissal did not meet the threshold of a fair one as envisaged by *the Constitution*.
83. For the foregoing reasons, it is the finding of the Court that termination of the Petitioner's services by the 1<sup>st</sup> respondent vide letter dated 18<sup>th</sup> April, 2024 was unfair and unlawful.
84. Relatedly, it is the further finding of the court that the 1<sup>st</sup> respondent acted arbitrarily and thus violated the Petitioner's Constitutional right to fair administrative action for which the Petitioner is entitled to damages.
85. On reliefs, the court proceeds as follows;
  - i. Declaration  
The court is satisfied that the Petitioner has demonstrated that his constitutional right to fair administrative action was violated as well as his right to due process and a declaration to that effect is merited
  - ii. Certiorari



The court is not persuaded that quashing the 1<sup>st</sup> respondent's decision in the circumstances of this case is an efficacious relief since the position previously held by the Petitioner was substantively filled on 22<sup>nd</sup> May, 2024.

The order sought is declined.

iii. Declaration that the recruitment of the 6<sup>th</sup> respondent was illegal

As adverted to elsewhere in this judgment, the Petitioner provided no verifiable evidence to prove that the termination, vetting, approval, swearing in and assumption of office of the 6<sup>th</sup> respondent was vitiated in any respect.

The declaration sought is declined.

iv. Certiorari to quash the decisions of the respondents (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup>) appointing the 6<sup>th</sup> respondent as the Executive Committee Member Lands, Physical Planning, Housing and Urban Development Kisumu County for illegality is in the courts finding unproven and the order sought is declined.

v. Mandamus to compel the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to refund sums expended towards the 6<sup>th</sup> respondent's appointment account rendered.

This Petitioner did not provide evidence or legal basis on which the foregoing order may be made.

The relief is declined.

vi. Mandamus to compel the 6<sup>th</sup> respondent to refund sums paid to him

The Petitioner provided no verifiable evidence to prove that the appointment of the 6<sup>th</sup> respondent as County Executive Committee member was illegal or void in law.

The relief is decline.

vii. Prohibition to prohibit the respondent's from appointing another person as Executive Committee Member Lands, Physical Planning, Housing and Urban Development.

This relief was overtaken by events on 22<sup>nd</sup> May, 2024 and is thus otiose.

viii. Reinstatement

Although the Petitioner sought reinstatement to his former position, he adduced no evidence to show that the 1<sup>st</sup> respondent retained the trust and confidence he had in him previously. As the Court of Appeal has observed, Governors, as political heads of the County nominate for appointment to the County Executive Committee individuals in whom they have confidence in to assist them realize their plans for the County.

The manner in which the Petitioner was dismissed would appear to suggest that the 1<sup>st</sup> respondent had lost confidence in the Petitioner.

The court is not persuaded that reinstatement of the Petitioner would be an appropriate remedy in this instance.

The prayer is declined.

ix. Compensation



Having found that the Petitioner's dismissal was unlawful and unfair for want of adherence to tenets of *the Constitution*, and in particular fair administrative action due process, and fair labour practices, the Petitioner is entitled to compensation in accordance with the provisions of Article 23(3) (e) of *the Constitution* of Kenya.

The Petitioner pleaded that the dismissal was prejudicial to him as he had financial commitments to meet and had loans to repay and anticipated serving for the entire term of the Governor.

Bearing in mind that appointments to office, analogous to ordinary employment does not guarantee engagement for the entire duration, and the Petitioner had only served for about one year and four months, which fairly short and sought reasons for the dismissal.

The court is persuaded that the sum of Kshs.1,617,000.00 being 4 months gross salary is fair compensation.

86. In conclusion, judgment is entered in favour of the Petitioner against the 2<sup>nd</sup> respondent in the following terms:
- a. Declaration that the 1<sup>st</sup> respondent violated the Petitioner's constitutional rights on due process, fair labour practices and fair administrative action.
  - b. Kshs.1,617,000 compensation.
  - c. Costs of the suit.
  - d. Interest on (b) above from date of judgment till payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

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**JUDGE**

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**DRAFT**

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