



Mberia & 3 others v County Government of Meru & 2 others (Petition E001 of 2022) [2024] KEELRC 1190 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1190 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
PETITION E001 OF 2022**

ON MAKAU, J

MAY 22, 2024

BETWEEN

**JOSEPH KITHURE MBERIA 1ST PETITIONER
PAUL MWAKI ARIMI 2ND PETITIONER
DR. JOHN NTOITI 3RD PETITIONER
KENNETH KIMATHI MBAE 4TH PETITIONER**

AND

**COUNTY GOVERNMENT OF MERU 1ST RESPONDENT
MERU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT
THE GOVERNOR, COUNTY GOVERNMENT OF MERU 3RD RESPONDENT**

JUDGMENT

1. The petition herein is brought under Articles 1, 2, 3, 73, 157, 165, 232, 236, 258, 259 and chapter 4 of *the Constitution*, the *leadership and Integrity Act*, the *County Governments Act*, section 4 (3) of the Fair Administrative Actions Act, Meru *Alcoholic Drinks Control Act*, Meru County Microfinance Corporation Act, Meru County Revenue Act, and the Meru County Water and Sanitation Services Act.
2. The Petitioners brought this case in order to safeguard their constitutional rights to human dignity, access to information, fair labour practices, fair administrative action, fair hearing and protection of public officers; which were allegedly being infringed and also continue to be threatened.
3. Their case is that they were appointed to serve as chief administrative officers of autonomous Boards following a competitive process and approval by the county assembly of Meru. Their contracts were further renewed vide resolution of the boards.



4. They averred that vide letters dated 6/9/2022, 29/8/2022 and 7/9/2022, the 1st Respondent sent them on compulsory leave for an unspecified duration and immediately thereafter appointed persons to act in their positions. The said action was termed ultra vires on ground that the said compulsory leave and appointment of new persons was without the resolution or knowledge of the board of directors and without any handing over from the Petitioners.
5. The said action by the 1st respondent was also deemed to amount to constructive dismissal of the petitioners from their employment. They contended that the Respondents lacked the authority to terminate, or interfere with the continuity of their duties as their appointment letters were executed by the chairs of the various boards. They therefore contended that the same was malicious and a means to get them out of employment since they were employed by the previous regime.
6. They contended that they legitimately expected to work for the entire period of their contract but their being sent on compulsory leave exposed them to career stress, mental strain and embarrassment. In that regard, they sought the following orders:
 - a. A declaration that the actions of the respondents of sending the 1st to 4th Petitioners on compulsory leave and causing their replacements is a breach to the petitioners' rights under articles 25, 27, 28, 35, 41, 47, 50 and 236 of the constitution of Kenya and the same is null and void for all intents and purposes.
 - b. An order of judicial review of certiorari be issued to remove into this honourable court for quashing the decision of the respondents sending the 1st - 4th Petitioners on compulsory leave as chief administrative officers as conveyed by each and every letter issued by the respondents and addressed to the petitioners on 6/9/2022, 6/9/2022, 29/8/2022 and 7/9/2022 respectively.
 - c. An order of judicial review of certiorari be issued to remove into this honourable court for quashing the decision of the respondents deploying other personnel to act in the respective positions of the 1st to 4th Petitioners as conveyed by each and every letter issued by the respondents deploying the said personnel.
 - d. Exemplary damages.
 - e. Costs of and incidental to this petition.
7. Following the Court order of 7th October 2022, the Petitioners also filed a Notice of Motion dated 17th October 2022 seeking to enjoin Patrick Mugendi, Tony Kirima, Francis Mungai, Daniel Muthuri and Murega Baichu as interested parties, that the respondents be denied audience until they purge contempt of court and also that summons do issue against the Respondents and the proposed interested parties to appear in person in court to show cause why they shouldn't be committed to civil jail for contempt of court orders and that the Respondents and the proposed parties be cited for contempt of court and committed to civil jail for 6 months until they purge contempt of court.
8. The Respondents on the other hand filed their notice of preliminary objection dated 18th October 2022 wherein they sought dismissal of the Petitioners' application dated 4th October 2022 and the petition. The Respondent premised their objection on the grounds that the Petitioners had not exhausted all the internal dispute resolution mechanisms stipulated under section 77 of the County Governments Act as read with section 85 and 87(2) of the Public Service Commissions Act; that the petition was not in compliance with Articles 162 (2) and 165 (5) of the Constitution as read with section 12 of the Employment and Labour Relations Court Act, since it was an ordinary employment dispute disguised as a constitutional petition; that Petition failed to meet the requirements of a constitutional petition;



and that it was bad in law, incompetent, incurably defective and an abuse of court process. However, after hearing the parties, I dismissed the objection vide a Ruling of 15th December 2022.

9. In addition, the Respondents filed a replying affidavit sworn by Rufus JM Miriti on the 12th January 2023. The Respondents averments were that the Petitioners were still employees and were receiving their full benefits. They averred that despite issuance of the Court order on resumption of duty, the Petitioners never resumed duty. The Respondents averred that they never changed locks nor did they deploy armed goons to deny the petitioners entry into their offices. They averred that, the claim that they assigned the Petitioner's duties to other persons was unfounded and not supported by any evidence. It was therefore argued that the application lacked merit and thus the Court ought to dismiss the same with costs.
10. Before the court heard the said application, the Petitioners filed an application for contempt of court dated 11th April 2023 on grounds that the Respondents prevented them from returning to office and performing their duties. The Respondents replied to the same vide affidavit of Virginia Kawira Nkoroi sworn on 2nd May 2023 wherein they denied having disobeyed the Court orders and in turn argued that it was the Petitioners who refused to resume duty in order to frustrate the new administration. They argued that they could not take disciplinary action against the Petitioners during the pendency of the suit and therefore opted to watch them play out their games.
11. After hearing the application, this Court allowed the application on 29th September 2023 whereby it cited the Respondents for contempt of court orders of 7th October 2022 and summoned Rufus Miriti or his successor in title to attend court on 12th October 2023 to show cause why the Respondents should not be punished for contempt. The court also denied the Respondents audience before the Court until they purged the Contempt.
12. Dr. Atheru, the new County Secretary attended court, and showed remorse and as such the Court ordered him to ensure compliance with court orders. The court further directed the Petitioners to report for duty on 23/10/2023 and meet with Dr. Atheru who would personally escort them to their office and ensure that they were not to be interfered with by the Respondents while discharging their duties. Dr. Atheru was also directed to file sufficient evidence of payment of the Petitioners' salary from May 2022.
13. Following the Court's orders, Dr. Atheru complied and filed his affidavit sworn on 25th October 2023 indicating that all the Petitioners reported to his office as directed by the court, except the 4th Petitioner, and that he personally escorted them to their offices. He attached to the affidavit, the pay slips for the Petitioners showing payment of their salary and all accruing benefits for the months of November 2022 to September 2023. He deposed that he had information that the 3rd Petitioner was an active employee of the Nairobi County Government and thus disciplinary action would be taken against him by the appropriate bodies.
14. The petition was disposed of by written submissions. The petitioners submitted that the 1st respondent acted ultra vires because he had no mandate to send them on compulsory leave without any resolution of the respective Boards which employed them. They further faulted the 1st respondent for sending them on compulsory leave for an indefinite period and withholding their salary. They further faulted the respondents for appointing other persons to act in their positions without any resolution from the respective Boards. According to the petitioners, the indefinite compulsory leave without pay amounted to constructive dismissal from employment.



15. They submitted that the said decision was made without according them an opportunity of being heard and their right to fair labour practices was violated. For emphasis, they relied on Ayubu Kombe Ziro v Umoja Rubber Products limited [2022] eKLR among others.
16. The Respondents, on the other hand framed the following issues for determination:
 - a. Whether the petition is spent and was rendered moot
 - b. Whether the act to send the petitioners on compulsory leave was justified and violated the petitioners' constitutional rights.
 - c. Whether the petition is incurably defective.
17. On the first issue, it was submitted that the 2nd Petitioner's employment lapsed on 15th December 2023 while the 3rd Petitioner resigned on 14th November 2023 and as such their claims is spent. It was therefore contended that there being no contract between the parties, the Respondents were discharged of all their obligations and as such granting the reliefs sought would be in vain. As regards the 4th Claimant, it was submitted that he did not resume duty after obtaining court order and such he is in contempt of court which takes away his right to audience before this court.
18. It was argued that by the Court revoking the letters sending the Petitioners on leave, thus the reliefs sought were cured by the orders of the court. It was submitted that for that reason, the petition was rendered moot as there was no dispute to adjudicate on. In support of their argument, reliance was placed on the case of Evans Kidero v Speaker of Nairobi City County Assembly & Another [2018] eKLR.
19. On the second issue, it was submitted that the petitioners were sent on compulsory leave to enable reorganization of the board of the new county. It was contended that their employment was never terminated nor did their positions be advertised or filled. It was argued that the same was a temporary administrative action meant to pave way for the audit of the boards in order to improve service delivery and thus justified. It was argued that under sections 44 (3) and 56 (2) of the County Government Act, the County Secretary is the head of the County service board and the communicator of the executive decisions. It was further argued that his communication of the compulsory leave to the Petitioners was therefore not illegal and the same did not amount to unfair labour practice.
20. In view of the foregoing it was submitted that the petitioners have not demonstrated violation of any of their constitutional rights. For emphasis, reliance was placed on the case of Bernard Mwaura Mbutia v Nyahururu Water & Sanitation Company Limited; County Government of Laikipia (Interested Party) [2019] eKLR and Hezron Kihumba Kamotho v Teachers Service Commission [2019] eKLR.
21. On the third issue, it was submitted that the suit is defective in form and substance because the Petitioners were employed by different employers being the Meru County Urban Water and Sanitation Services Corporation, CECM Trade, Meru County Revenue Board and Meru County Microfinance Corporation respectively and as such the damages ought to be determined disjunctively. Consequently, the court was urged to dismiss the petition with costs.

Analysis

22. Having carefully considered the pleadings, evidence and submission, the following issues fall for determination:
 - a. Whether the petition is overtaken by events.



- b. Whether the Petition satisfies the required threshold for constitutional petition.
- c. Depending on the answer to (a) above, whether the Petition has merit:
 - i. Whether the respondents violated the constitutional rights of the petitioners.
 - ii. Whether the reliefs sought are merited.

Whether the petition is now moot case.

- 23. The petitioners moved to this court alleging that their constitutional rights were violated by the respondents through compulsory leave letters signed by the 1st respondent in September 2022 without legal mandate. They obtained conservatory orders on 4th October 2022 barring the implementation of the said letters. As indicated above, the orders were disobeyed and a lot of time was spent in contempt proceedings which were completed on 7th November 2023. According to the respondents, the said conservatory orders revoked the impugned compulsory leave letters and the petitioners' case became obsolete.
- 24. In addition, the 1st respondent filed an affidavit sworn on 25th October 2023, stating that the fourth petitioner had failed to report to work as ordered by the court, and that the 3rd petitioner was now employed by Nairobi City County Government. It was further respondents' case that the contract of the 2nd petitioner has since lapsed and as such his case is now moot.
- 25. The petitioners did not contest the foregoing allegations. It follows that the fourth petitioner resigned from the employment of the board he was serving. I have also considered the letter dated 15th December 2020 by which the 2nd petitioner's appointment was extended for three years and confirmed that the said period lapsed on 14th December 2023. Consequently, there is no longer employment relationship between him and Board he was serving.
- 26. It was also alleged that the 3rd petitioner has since gone to work for the Nairobi City County Government but no documentary evidence was tendered. It follows that the 1st and the 3rd petitioners are still in employment by the respective entities of the Meru County. The 3rd petitioner's contract lapses on 31st May, 2024 while that of the 1st petitioner will lapse on 31st July, 2024. Consequently, if the end of employment was the reason for the suit becoming moot, that is not factual because the two petitioners are still in their employment and they were escorted back to their offices by the 1st respondent.
- 27. The other consideration given by the respondent's was the conservatory order issued by the court on 4th October 2022 which stayed the implementation of the impugned compulsory leave letters. However, I do not agree with the respondents on that consideration because the main dispute before the court is whether the compulsory leave letters were unlawful and in violation of the petitioner's rights. The determination of that issue cannot be rendered otiose by the conservatory orders of the court or separation of the parties due to other reasons. I will therefore proceed to determine the petition on merits.

Competence threshold

- 28. The threshold for constitutional claims was laid out by the High Court in the case of Anarita Karimi Njeru v Republic [1979] eKLR when held as follows: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that



justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

29. In the present case, the petitioners have in part C and D of the Petition, pleaded with reasonable clarity what their complaint is and the provisions of *the constitution* which have been violated or threatened with violation. They have pleaded with the same degree of precision the manner in which the said violation has been done or is threatened to be done. Their complaint is about compulsory leave letters which were signed by the 1st respondent without knowledge or resolution of the board of the entities which had employed them. The provisions of *the constitution* violated are Articles 25,27,28,35,41,47,50,232 and 236. The clarity of the infringement complained of has enabled the Respondents to respond to the same. Consequently, I find and hold that the petition has passed the muster of a constitutional pleading.

Violations

30. The impugned letters were written soon after a new county Government was sworn in after the 2022 general elections. The petitioners had served part of their fixed term contracts which started during the reign of the previous county government. The impugned leave letters stated as follows:

“RE; Compulsory Leave

This is to notify you that the government has decided that you proceed on leave pending government re-organization of the board. While on compulsory leave you will be entitled to your full salary and other benefits that go with your contract. Once the government is through with the process, you will be contacted.

Rufus Miriti JM

County Secretary and Head of Public Service.

CC

Secretary Public Service Board”

31. The petitioners deemed that they were being victimized by the new county government and were targets for removal from their offices without wrong doing. They faulted the 1st respondent for writing the said letters without knowledge or resolution of the boards for the entities they were working for. They contended that they were appointed by semi-autonomous entities established by County Statutes. They further averred that they were not receiving any instructions from the respondents but the boards of respective entities that employed them. Consequently, they maintained that the impugned letters were by the 1st respondent without any authority from their respective employers.
32. I have considered the material before me and it is true that the petitioners were employed by semi-autonomous boards established by county statutes. The 1st respondent has not filed any evidence to prove that in deed he had the mandate to send the petitioners to compulsory leave. He just stated that the government has decided! I take judicial notice that the letters were written shortly after the new Governor was elected to office and there is no evidence adduced to prove that the existing boards were due for re-organization or whether there was any proposal by the boards or any other person for such re-organization. Further there is no evidence that was adduced to show that the said re-organization could not take place while the petitioners were on duty.
33. I further take judicial notice that, public officers in the civil service are by law supposed to continue in office regardless of who is elected to office through political process. They are protected by Article



236 of *the Constitution* from any victimization, intimidation or removal from office without the due process of law. A new political regime is bound by the contracts of employment entered between the previous political government and the officers it employed except those specifically excluded by the law. Consequently, an incoming government has no discretion over which employees should work with it and which ones should exit the county public service. Unless there is a justifiable reason for terminating the services of an officer, an incoming government must respect the contracts of the officers it finds in employment or else, it would be engaging in unfair labour practices.

34. In this case, the impugned letters, did not accuse the petitioners of any wrong doing. Rather, they were required to stay away for an indefinite period to enable the newly elected government time to re-organize the concerned boards. I have already observed that there is no indication that the petitioners presence in the office would interfere with the intended re-organization. There was also no indication that there was anything wrong being investigated to warrant the temporary vacation of office by the petitioners. Consequently, I agree with the petitioners that their right to fair labour practices was violated by being sent on compulsory leave without any just cause. The said action by the respondents also amounted to discrimination on grounds of perceived political inclination. It also violated their right to fair administrative action because the administrative decision was taken by persons who had no contractual mandate over them and before affording them any hearing. Consequently, the respondents denied the petitioners their right to protection of the law by sending them to compulsory leave for an indefinite period contrary to Article 236 of *the Constitution*.
35. The petitioners have demonstrated that the respondents were resolute about violating their right to fair labour practices and also right to be treated with dignity because even after obtaining Court orders directing that they do return to work, the respondents resisted, changed office locks and thereby denied them access to their respective work stations. The actions by the respondents were therefore actuated with impunity and contempt of court which has no place in a democratic society governed by law.
36. *The Constitution* embodies the aspiration of all Kenyans for a government based on national values and principles of good governance. Therefore, it behooves any persons forming government to act within the law and be guided by the same law while appreciating that his position is only one of trust. Any deviation from the said edict of *the Constitution*, brings the government organs or officers concerned to the province of judicial review by this court if the action or omissions involved is about employment and labour relations. In my view, it is immaterial for the respondents to allege that the petitioners were entitled to all the benefits connected to their employment contracts during the unjustified indefinite compulsory leave.
37. Article 236 of *the Constitution* provides as follows about protection of public officers from exercise of power by the government:
- “ A public officer shall not be-
- a. Victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law, or
 - b. Dismissed, removed from office, demoted in rank or subjected to disciplinary action without due process of law.”
38. It is trite law that condemning an employee to an indefinite compulsory leave and withholding salary amounts to unfair labour practices and it entitles the employee to quit the employment and sue for constructive dismissal. In this case the petitioners opted not to quit and sue for constructive dismissal but rather sought to have the compulsory leave letters declared unlawful and quashed so as to remain in their employment. Having considered the material presented by the parties, I am satisfied that the



petitioners have proved on a balance of probability that the respondents violated their rights under the Bill of Rights.

Reliefs

39. In answering the question as to what would amount to an appropriate relief in these circumstances, reliance is place on the holding of Mativo J (as he then was) in *EWA & 2 others vs. Director of Immigration and Registration of Persons & another* [2018] eKLR, where he stated as follows:

“... appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights ... The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve this goal.”

40. In view of my holding above and guided by the foregoing decision, I find that the petitioners are entitled to the reliefs sought in the petition and hereby enter judgment for the petitioners in the following terms:

- a. A declaration is hereby made that the actions of the respondents of sending the 1st to 4th Petitioners on compulsory leave is a breach to the petitioners’ rights under articles 27, 28, 41, 47, and 236 of *the constitution* of Kenya and the same is null and void for all intents and purposes.
- b. An order of certiorari is hereby issued to bring into this honourable court for purposes of quashing the decision of the respondents of sending the 1st - 4th Petitioners on compulsory leave contained in letters dated 6/9/2022, 6/9/2022, 29/8/2022 and 7/9/2022 respectively, by the 1st respondent and addressed to the petitioners.
- c. An order of certiorari to bring into this honourable court for purposes of quashing the decision of the respondents of deploying other personnel to act in place of the petitioners is declined because it is overtaken by events.
- d. The prayer for exemplary damages has not been justified and such I award the 1st, 2nd and 3rd petitioners general damages of Kshs. 1000,000 for the violation of their rights to fair labour practices and discrimination. The 4th petitioner did not report back to work in compliance with the court orders and therefore he is also without clean hands.
- e. An award of costs to the petitioners is justified in this petition because they were forced to approach the court and remain there by the conduct of the respondents.

DATED, SIGNED AND DELIVERED AT NYERI THIS 22ND DAY OF MAY, 2024.

ONESMUS N MAKAU

JUDGE

Order



This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

