



**Agwa v Governor, Kisumu County & 3 others (Petition E017 of 2024)
[2024] KEELRC 1595 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1595 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E017 OF 2024**

S RADIDO, J

JUNE 26, 2024

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 21, 22, 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 FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF SECTIONS 8 AND 45 OF THE COUNTY
GOVERNMENTS 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, 159(1),
(2) AND (E)(A) AND 258 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

MARYINE YANZAR AGWA PETITIONER

AND

GOVERNOR, KISUMU COUNTY 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

COUNTY ASSEMBLY OF KISUMU 3RD RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KISUMU 4TH RESPONDENT



JUDGMENT

1. On or around 13 December 2022, the Governor, County of Kisumu (the Governor) appointed Maryline Yanzar Agwa (the Petitioner) as the County Executive Committee member for Water, Energy, Environment, Natural Resources and Climate Change.
2. However, on 19 April 2024, the Governor, through his communication team issued a press release announcing the termination of the Petitioner's appointment. The Petitioner acknowledges receipt of a letter terminating her appointment on 19 April 2024.
3. The Petitioner was aggrieved and she instituted this Petition on 30 April 2024, asserting that the Governor had terminated her appointment illegally, unconstitutionally, and in an inhuman and degrading manner.
4. The decision, according to the Petitioner contravened her rights to fair administrative action (Article 47), fair labour practices (Article 41), not to be treated in an inhuman and degrading manner (Article 28), to due process (Article 10) not to be discriminated against (Article 27) and to property (Articles 40, 43 and 46).
5. The Petitioner sought the following reliefs:
 - (a) A declaration that the act of the 1st Respondent and 2nd Respondent in relieving the Petitioner of her duties is a breach of the latter's Constitutional rights under Articles 22(1), 27(1),(2) & (3), 28, 35, 40, 41(1), 43, 46, 47 & 50(1) of the Constitution of Kenya and that the same is null and void for all intents and purposes.
 - (b) An order of certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent relieving the Petitioner of her duties as County Executive Committee member in charge of Water, Energy, Environment, Natural Resources and Climate Change.
 - (c) An order of mandamus compelling the Respondents to reinstate the Petitioner to her position and all benefits whereof. (sic)
 - (d) 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 a County Executive Committee member of Kisumu County Executive Committee member in charge of Water, Energy, Environment, Natural Resources and Climate Change.

In the 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 the term of the contract.
6. Filed with the Petition was a Motion under a certificate of urgency seeking interim interdicts.
7. When the Motion was placed before the Court on 2 May 2024, it issued a conservatory order interdicting the County Assembly from vetting the person who had been nominated by the Governor to replace the Petitioner.
8. The parties appeared for further proceedings on 16 May 2024, and the Respondents urged the Court to allow them time to attempt an out-of-court settlement.



9. The Court agreed to the suggestion and directed that if an agreement was reached, a consent was to be filed before 31 May 2024, otherwise the Respondents were to file and serve responses on or before 7 June 2024.
10. The Court further directed that lacking a consent, the Petitioner files and serves a further affidavit, and submissions before 14 June 2024, and the Respondents before 21 June 2024.
11. No consent was on record by 31 May 2024.
12. The Respondent's responses were not on record by the agreed timeline of 7 June 2024.
13. The Petitioner filed her supplementary affidavit on 19 June 2024 and submissions on 26 June 2024.
14. The Petitioner identified the Issues for determination in the submissions as:
 - i. Whether the conservatory orders sought are merited?
 - ii. Whether the violations cited in the Petition is sufficiently proved?
 - iii. Whether the reliefs sought in the Notice of Motion and Petition are merited?
 - iv. Who bears the costs of this Petition and application?
15. The Respondents did not file any submissions.
16. The Court has considered the Petition, Motion, affidavits and submissions on record and come to the view that only one substantive issue is up for determination.

Unlawful termination of appointment

17. The power of the Governor in the dismissal of a member of a County Executive Committee is now fairly settled and it is anchored in statute.
18. Section 31 of the *County Governments Act* allows a Governor to dismiss a member of a County Executive Committee. The section provides:
 31. Powers of the governor
 - 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;
 - (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.
19. The Courts have applied and interpreted the scope of the powers of the Governor under the above provision.
20. The Court of Appeal had occasion to address the latitude given to the Governor under the aforesaid section of the *County Governments Act* in *County Government of Nyeri & Ar v Cecilia Wangechi*



Ndung'u (2015) eKLR and Narok County Government & Anor v Richard Bwogo Birir & Ar (2015) eKLR.

21. The 2 decisions appeared not to have settled the law and the Court of Appeal had another go at the issue in County Government of Garissa & Ar v Idriss Aden Mukhtar & 2 Ors (2020) eKLR where the Court stated:

..... that the pleasure doctrine was not preserved under Section 31(a) of the CGA. 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.

22. The dismissal of the Petitioner here was an exercise of the power given to the Governor by section 31(a) of the County Governments Act. It was at the initiative of the Governor. The County Assembly was not involved.
23. There was no due procedure accorded to the Petitioner as demanded by Articles 41, 47 and 236 of the Constitution.
24. The decision of the Governor to dismiss the Petitioner fell short of what the law required and the Court finds it was unfair and unlawful.

Remedies

25. The Court outlined hereinabove the remedies which the Petitioner sought.



Certiorari/Mandamus or Reinstatement?

26. The remedies included orders of certiorari and mandamus. In the supplementary affidavit, the Petitioner urged the Court to grant an order reinstating her to the office of County Executive Committee member on the ground that trust and confidence between her and the Respondents was still intact, and that the Governor had not yet filed the office she occupied substantively. She asserted that another officer had only been appointed in an acting capacity.
27. As the Court of Appeal observed in the Idriss Mukhtar judgment, a Governor is a political leader championing a cause, and he appoints persons he believes can champion his cause and whom he has confidence in.
28. Therefore, orders of certiorari and mandamus may not be efficacious or practical.
29. The Petitioner also pleaded for an order prohibiting the Respondents from replacing her. Such an order would serve to undermine the legitimate and statutory agenda of the Governor.

Lost Future Income

30. The Petitioner also prayed for lost income/income she would have earned had she served her full term.
31. In the circumstances of this case, the Court can do no better in this respect than to endorse what was stated by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2008) UGSC 21 that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.

Compensation or Damages?

32. The Court notes that the Petitioner did not plead a relief for compensation or damages.
33. The Court has been given the power by the *Constitution* to fashion an appropriate relief. In fashioning such appropriate relief, the Court should caution itself that it must not overly go beyond the parties' pleadings.
34. However, the Court must be alive to the fact that it must underscore the need to maintain the interests of justice.
35. The Court would award damages of Kshs 1,500,000/-.
36. Before final orders, the Court deeply regrets that this is once again another case where a county government or public organ has failed to defend or file any responses at all to an action challenging the constitutionality of its decisions thus risking wastage of public funds.

Orders

37. Flowing from the above the Court orders:
 - i. A declaration is hereby issued that the act of the 1st Respondent in relieving the Petitioner of her duties as member of the County Executive Committee is a breach of the latter's Constitutional



rights under Articles 27(1) and (2), 40, 41(1), 47(1) and (2), and 236 of the Constitution of Kenya.

ii. Damages Kshs 1,500,000/-

38. The Petitioner to have interest on the award from date of judgment and costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF JUNE 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances;

For Petitioner Mr Biko/Ms Ohayo instructed by Ohayo & Co. Advocates

For Respondents Mr Ouma Njoga/Ms Omondi Office of the County Attorney

Court Assistant Chemwolo

