



**Malibe v County Assembly of Tana River; James & 2 others (Interested Parties)
(Petition E003 of 2024) [2024] KEELRC 1357 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1357 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
PETITION E003 OF 2024**

M MBARÚ, J

JUNE 6, 2024

BETWEEN

FRANCIS HIRIBAE MALIBE PETITIONER

AND

COUNTY ASSEMBLY OF TANA RIVER RESPONDENT

AND

RASHID O JAMES INTERESTED PARTY

YASSIN HASSAN INTERESTED PARTY

FRANKHEART DDAIDO INTERESTED PARTY

RULING

1. The petitioner filed an application dated 18 April 2024 seeking order;

Pending hearing and determination of the petition herein or until further orders, this court be pleased to issue a conservatory order by way of a temporary injunction restraining the respondent or any of its committee from hearing, discussing or debating the petition against the petitioner for allegedly gross misconduct and abuse of office.
2. The application is supported by the petitioner’s application and on the grounds that on 20 March 2024, the interested parties presented a petition against the petitioner for alleged gross misconduct and abuse of office, the import of the petitioner is disciplinary proceedings against the petitioner which proceedings have the effect of removing the petitioner from office for alleged gross misconduct and abuse of office. The petition was received on 4 April 2024 and the respondent established an ad hoc committee of 11 members to hear the petitioner against the petitioner for alleged gross misconduct and abuse of office.

3. The petitioner in his affidavit avers that he is reliably informed that the ad hoc committee is scheduled to start formal hearings on 22 April 2024. He was appointed as an officer of the respondent. As such an officer, the only institution authorized by law to exercise disciplinary control over him is the County Public Service Board (Board) under the provisions of Sections 59(2), 76(2) of the County Government Act and Article 236(2) of the Constitution.
4. The petitioner avers in his affidavit that under the Standing Orders of the County Assembly, procedures for removal from office of the Speaker, the Governor, the Deputy Governor, and Member of the County Executive Committee Member. These Standing Orders do not make provision for the removal from office of other officers which the Board should do under the provisions of the County Government Act.
5. Without the statutory or constitutional power to address disciplinary control over the petitioner, the respondent and interested parties should be stopped from ongoing ad hoc committee proceedings until the petition herein is heard and determined.
6. In reply, the respondent filed the Replying Affidavit of Abdullahi Dayib Hussein the Clerk to the respondent and given authority to respond herein.
7. He avers that on 22 March 2022, the interested parties being representatives of the Tana River CSOs Network submitted a petition against the petitioner, Chief Officer for Lands and Physical Planning. The petition was submitted under the provisions of Section 15(1) of the County Government Act which allows a person the right to petition a country assembly. The petitioner submitted against the petitioner related to alleged gross misconduct and abuse of office contrary to Articles 10, 73, 75, 201 and 232 of the Constitution and Sections 3, 104 and 102 of the Public Finance and Management Act.
8. Under the provisions of Section 6 of the Tana River County Petition to County Assembly (Procedure) Act and the County Assembly Standing Orders, the speaker of the county assembly tabled the petition before the assembly and directed the County Assembly Committee on selection to nominate members to form an ad hoc committee to consider the petition against the petitioner herein.
9. On 4 April 2024, the County Assembly approved the members nominated to investigate, inquire into and report the issues raised in the petition against the County Chief Officer for Lands and Physical Planning. Under Article 185 of the Constitution, the role of the County Assembly includes and vests it with authority to legislate and undertake matters incidental to, the effective performance of the functions and exercise powers of the county government under the Fourth Schedule. This includes oversight over the county executive and any other county executive organs in the management of resources of the county.
10. Mr. Hussein aver that the prayers sought in the petition that was submitted to the County Assembly include that the petitioner herein is investigated for illegal land transactions in Kalaule, Malindi and Hola and that he should provide clear land allocations in Tana River County that have been approved by the County Assembly, especially in Kalaule, Bula Secondary School, Bula Salama and other areas of the county. The petition also calls upon the petitioner to provide the County Assembly with a land adjudication programme, survey and backing exercise and to submit names of the beneficiaries thereof.
11. The interested parties therefore raised a petition with several issues that needed the intervention and oversight of the respondent and not only relating to his removal from office. Section 15 allows the interested parties to petition the County Assembly to consider any matters within its authority. The petitioner as an accounting officer and an authorized officer from the department of the County Executive is subject to the oversight of the County Assembly as required under the Constitution. The

matters now before the County Assembly have not been addressed with any recommendations and the position herein is premature and filed in bad faith.

12. Mr. Hussein avers that the petition before the Assembly is not meant to punish or discipline the petitioner but raises issues that fall within its mandate as they affect the people that the members of the respondent represent. The issue is not whether or not the respondent can remove the petitioner from office but whether the county assembly can consider a petition within its authority as mandated under Section 15 of the County Government Act. The orders sought are without merit and should be dismissed with costs.

Both parties attended and made oral submissions.

Determination

13. The sole question herein is whether a conservatory order by way of a temporary injunction restraining the respondent or any of its committee from hearing, discussing or debating the petition against the petitioner for allegedly gross misconduct and abuse of office should be issued.
14. Another issue which arose during oral submissions in court is whether this is a proper petition.
15. The orders sought in the application and petition are similar to the extent that the petitioner is seeking to quash the resolution of the respondent in constituting an ad hoc committee to hear and determine the petition filed by the interested parties and also seeking a permanent injunction against the respondent from receiving, debating, investigating or hearing the petition on his alleged gross misconduct and abuse of office. The two are therefore interrelated and intricately connected.
16. Whether to file a petition or not has had a long history from the case of Anarita Karimi Njeru v Republic B1979] eKLR that if a person is seeking redress from the court on a matter which involves a reference to the Constitution, he must set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and how they are alleged to be infringed. It is not sufficient to cite various constitutional provisions. See Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR.
17. In employment and labour relations, the courts have been firm and held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed as held in the case of Speaker of the National Assembly v Karume [2008] KLR 425.
18. Whereas the court has jurisdiction to hear petitions with regard to the alleged violation of the Bill of Rights and constitutional provisions, there exists the *Employment and Labour Relations Court Act*, 2011 and the *Employment Act*, 2007 and the Employment and Labour Relations Court (Procedure) Rules, 2016 to regulate claims filed before the Court. Therefore, Article 41 of the Constitution rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms as held by the Court of Appeal in the case of Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR.
19. As a matter of practice and procedure, the constitutional questions advanced by the Petitioner, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016. Under the Rule, a party is allowed to raise any dispute regarding the enforcement of any constitutional rights and freedoms or any constitutional provision through a Memorandum of Claim without the needless invocation of the constitutional petition route.

This is not a proper petition.

20. On the orders sought, whether to issue a conservatory order or not should be to preserve the subject matter until the petition is heard and determined. It is in other words an order of status quo ante so that the substratum of the petition is preserved, or so that the same is not rendered an academic exercise.
21. The Supreme Court in *Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR, in addressing the nature of conservatory orders held that;

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.
22. At the core of the application and indeed the petition herein is alleged gross misconduct of the petitioner and abuse of office which is the subject of the petition filed by the interested parties with the respondent on 22 March 2022. This petition by the interested parties is allowed under the provisions of Section 15(1) of the County Government Act;
 - (1) A person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation.
23. Under its Standing Orders and rules of procedures, the respondent is allowed in addressing the petition to establish an ad hoc committee. This is in exercising the right to oversight the County as required under Article 185 of the Constitution. Under Article 185(3) the respondent is mandated to;
 - (3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.
24. The respondent in submissions acknowledges that they are not the employers of the petitioner to exercise disciplinary authority over him. Save, as the representatives of the people, the petition filed by the interested parties raises issues which require the respondent to address. The ad hoc committee is required to make recommendations upon which the Board as the employer may act.
25. Indeed, under the provisions of Article 236(2) of the Constitution, a public officer shall not be dismissed, removed from office, demoted in rank or otherwise be subjected to disciplinary action without due process of the law. This is in recognition that, whatever recommendation may arise from the petition before the respondent, the petitioner herein will have his rights secured under the constitution and the County Government Act.
26. Hence, the ad hoc committee established by the respondent to hear the petition by the interested parties is just but a procedural requirement under the functions of the County Assembly, as dictated by the provisions of Section 15 of the County Government Act, read together with Article 185 of the Constitution. The County Assembly cannot be gaged by the court from undertaking its constitutional role and functions without justified cause. Whatever the outcome of the findings and recommendations to the respondent, the petitioner, called upon by the employer to address will have his rights secured.

Article 236 (2) of the Constitution protects the Petitioner from;

- i. victimization or discrimination for having performed the functions of his office in accordance with the Constitution or any other law; and
 - ii. dismissal, removal from office, demotion in rank or subjection to disciplinary action without the due process of the law.
27. Upon the respondent undertaking its constitutional and statutory duty and through its select committee, its recommendations can be acted upon by the Board as necessary. At this stage, the petition by the interested parties is procedural and lodged under Section 15 of the County Government Act. The Board retains the disciplinary control over the petitioner within the principles and protections of Article 236(2) of the Constitution as outlined above.
28. The different tiers of oversight under the County Government which is allowed to have checks and balances take into account that the County Assembly as the house comprised of the people's representatives can receive petitions such as the one filed by the interested parties and address it with recommendations. The other level is the Board which is vested with disciplinary powers over county officers such as the petitioner. These checks and balances have so far been addressed by the respondent.
29. For the court to stop the respondent from undertaking its constitutional and legal mandate without justified cause would impede its role to the detriment of the people of Tana River County.
30. The petitioner has not been removed from office. The respondent is properly constituted to undertake its role under Article 185 of the Constitution. Any recommendations thereof will be to the Board with the mandate to address under the tenets of Article 236(2) of the Constitution. Upon the recommendations of the respondent, the motions of Sections 59 and 76(2) of the County Government Act come into effect. See *Abdikadir Suleiman v County Government of Isiolo and Another* [2015] eKLR and *Mike Sonko Mbuvi Gidion Kioko v Clerk, Nairobi City County Assembly & 4 others* [2020] eKLR.
31. Therefore, Orders sought at this stage are premature and without justification.
32. This is not a proper petition, application dated 18 April 2024 without merit and both are hereby dismissed. Costs to the respondent. Interested parties did not attend and therefore to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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