



**Miriti v Governor, Meru County & another (Petition E002 of 2024)
[2024] KEELRC 2564 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2564 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
PETITION E002 OF 2024
ON MAKAU, J
OCTOBER 24, 2024**

BETWEEN

VIRGINIA KAWIRA MIRITI PETITIONER

AND

THE GOVERNOR, MERU COUNTY 1ST RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

Introduction

1. This petition arises from revocation of appointment of the petitioner as Secretary/CEO of the 2nd respondent, by the 1st respondent on 8th March 2024. The petitioner seeks the following reliefs.
 - a. A declaration that the petitioner is and has been duly appointed as the Secretary/CEO of the Meru County Public Service Board in accordance with the provisions of Section 58 (1) (c) of the County Governments Act and can only be removed from Office in accordance with the provisions of section 58(5) of the County Governments Act read with Article 251 of the Constitution;
 - b. A declaration that the petitioner’s appointment as Secretary/CEO of the Meru County Public Service Board was done procedurally and in accordance with the law;
 - c. A declaration that a Member of the County Public Service Board (including the Secretary to the Board) once appointed under the provisions of Section 58 (1) of the County Governments Act can only be removed from Office in accordance with the provisions of section 58(5) of the County Governments Act read with Article 251 of the Constitution;
 - d. A declaration that the purported decision by the 1st respondent, purporting to revoke the appointment of the petitioner as the Secretary/CEO of the Meru County Public Service

Board as communicated to the petitioner by the 1st Respondent through a letter addressed to the Petitioner and dated 8th March 2024, is illegal, irregular, malicious, irrational, in-procedural, unlawful, arbitrary, capricious, discriminative and thereby constitute a violation to the Petitioner's Constitutionally rights protected under Articles 10 (2) (b), 27, 28, 29, 41 (1), 47 and 236 of the Constitution and statutory rights protected under the provisions of sections 58 (4), 58 (5) & 59A of the County Governments Act, section 5 of Fair Administrative of Action Act and sections 5 (3), 35, 43 and 45 of the Employment Act;

- e. An order of certiorari quashing the purported decision by the 1st Respondent, purporting to revoke the appointment of the petitioner as the Secretary/CEO of the Meru County Public Service Board as communicated to the Petitioner by the 1st respondent through a letter addressed to the Petitioner dated 8th March 2024;
 - f. A permanent Injunction restraining the 1st Respondent, whether acting directly or through third parties, agents and/or proxies, from revoking the appointment of and/or otherwise from interfering with the Petitioner's contract of Employment as the Secretary/CEO of Meru County Public Service Board;
 - g. A finding and holding that the 1st Respondent has engaged in a malicious scheme of orchestrating the unlawful and unfair termination and/or removal of the Petitioner from the Office of the Secretary/CEO of County Public Service Board;
 - h. An order for damages against the 1st respondent to the Petitioner, for violation to the Petitioner's Constitutional rights and Fundamental rights and Freedom protected under Articles 10 (2) (b), 27, 28, 29, 41 (1), 47 and 236 of the Constitution and statutory rights protected under the provisions of sections 58 (4), 58 (5) & 59A of the County Governments Act, section 5 of Fair Administrative of Action Act and sections 5 (3), 35, 43 and 45 of the Employment Act;
 - i. The costs of and incidental to this petition;
 - j. Interest on (h) and (i) above at court rates from the date of filing this Petition to the date of full and final settlement; and
 - k. Such other, further, incidental or alternative reliefs as the Honourable court may deem just and expedient.
2. The petition is supported by the petitioner's Affidavits sworn on 19th March 2024 and 30th April 2024. The 1st Respondent opposed the petition vide a Replying Affidavit sworn by County Secretary Meru on 8th April 2024 but the 2nd respondent supported the petition vide a Replying Affidavit sworn by the 2nd Respondent's chairman Mr. Julius Kainga Mitu.

Facts

3. The petitioner's case is that she was employed by the County Government of Meru on 4th November 2015 as the County Health Finance Manager. She was based at Meru Teaching and Referral Hospital but by a letter dated 3rd August 2018, she was deployed by the County Secretary to the Department of Finance, Economic Planning & ICT. On 13th December 2018 she was assigned the role of Assistant Director Accounting services and while there, she was confirmed to permanent and pensionable terms vide a letter dated 8th September 2020.
4. By a letter dated 3rd October 2022, the County Secretary deployed her to the 2nd respondent as acting Secretary/CEO until a substantive Secretary/CEO was appointed. On 26th July 2023, the petitioner

saw an advertisement for the position of Secretary/CEO of the 2nd respondent and she applied. She was then shortlisted, interviewed and nominated by the 1st Respondent. She was subsequently vetted by the County Assembly of Meru and her nomination approved on 9th August 2023.

5. On 30th August 2023, the petitioner was sworn in as the Secretary/CEO of the 2nd respondent and thereafter gazetted on 29th September 2023 in the Kenya Gazette. By a letter dated 2nd October 2023, she requested the Board to grant her leave of absence for the period she was appointed to serve as Secretary/CEO of the Board and the request was granted vide letter dated 3rd October 2023. Since the said appointment, the petitioner served diligently until 8th March 2024 when she received a letter from the 1st respondent revoking her appointment as the Secretary/CEO of the 2nd Respondent and giving her the liberty to resume her position of Senior Principal Finance Officer in the County Public Service.
6. The petitioner averred that the said decision to revoke her appointment as the Secretary/CEO of the 2nd respondent was contrary to section 58 (4) and (5) of the County Government Act and Article 41 (1), 47, 236 and 251 (1) of *the Constitution* of Kenya, 2010 because the procedure laid down by the law for removal of a member of County Public Service Board was not followed.
7. She further averred that other officers of the County Government had been given leave of absence including Mr. Jackson Muthamia Munoru (County Executive Committee member), Charles Mwenda Kaibiria (Chief Officer), Joseph Mukundi Wahome (Chief Officer) and George Kimathi Kobia (Chief Officer). Consequently, she contended that the impugned decision was discriminatory contrary to section 5 of the *Employment Act*, 2007 and Article 10 (2) (b) and 27 of *the Constitution* of Kenya, 2010.
8. In view of the above matters, the petitioner averred that the 1st respondent has violated her rights as protected under Article 10 (2) (b), 27, 28, 29, 41, 47, 236 and 251 of *the Constitution*. She further averred that the decision by the 1st respondent was illegal, irregular, malicious, irrational, un-procedural, unlawful and unconstitutional and therefore the reliefs sought ought to be granted.
9. The 2nd respondent supported the petition contending that the petitioner was lawfully deployed and released to the Board on 12th October 2022; that on 1st September 2023 she was lawfully appointed as the substantive Secretary/CEO of the Board; and that she was given a leave of absence on 3rd October 2023 in accordance with the Public Service Guidelines.
10. It is further 2nd respondent's case that the petitioner enjoys security of tenure under section 58 (4) of the County Government Act and the procedure for removal from office is prescribed under Article 251 (1) of *the Constitution* of Kenya, 2010. Therefore the 2nd respondent averred that the Governor acted ultra vires because she had no legal mandate to revoke the appointment of the petitioner to the Board. Further, it averred that there are four officers including Chief Officers and a Member of County Executive Committee who were also on leave of absence.
11. On the other hand, the 1st respondent admitted the facts set out by the petitioner above, but averred that the petitioner was only given an appointment letter after promising to resign from her earlier position. However, after the appointment the petitioner failed to resign and instead sought leave of absence unprocedurally through the 2nd Respondent.
12. The 1st respondent averred that under Regulation 38 (1) of the Public Service Regulations, 2020, the leave of absence ought to be discussed at the departmental level and passed through the County Human Resource Advisory Committee (CHRAC) chaired by the County Secretary. Had the leave of absence been sought through the CHRAC, the same would have been declined because the law, expressly prohibits such leave for the position being left behind by the petitioner.

13. The 1st respondent averred that before revoking the petitioner's appointment, she called the petitioner for meeting to discuss the matter but the petitioner failed to turn up. According to the 1st respondent, it was not possible to freeze the position of the Senior Principal Finance Officer for six (6) years to await the petitioner to return after serving through her contract as Secretary/CEO of the 2nd respondent. She averred that petitioner should relinquish her position in the finance department to create room to appoint another person.
14. The 1st respondent averred that the law allows public officers and state officers to serve as Chief Officers and County Executive Committee members but it expressly disqualifies them from holding positions in the County Public Service Board. Therefore, she averred that the alleged discrimination did not arise and the alleged leave of absence does not amend the law.
15. She further averred that the petitioner is an ex-officio of the 2nd respondent and therefore the procedure under Article 251 of *the Constitution* does not apply to her. Accordingly, she averred that she had not violated any of the petitioner's rights. In her view, the petitioner was trying to enforce an illegal contract which was void ab initio, contrary to public policy and therefore unenforceable. Consequently, she contended that the petition ought to be dismissed with costs.

Submissions

16. It was submitted for the petitioner that she was appointed as the Secretary/CEO of 2nd respondent in accordance with Section 58A of the County Government Act and therefore she is validly in office. It was further submitted that under section 58 (1)(c) she is a member of the 2nd respondent and not an ex-officio member as contended by the 1st respondent. Reliance was placed on John Saul Nariara v Franklin Espila & 3 others (2020) eKLR where the court held that Secretary/CEO of the County Public Service Board is a member of the Board.
17. It was further submitted that once a member of County Public Service Board is appointed, he/she can only be removed from office through the procedure set out under section 58(5) of the County Government Act read with Article 251 of *the Constitution*. The grounds for removal are also set out under Article 251 (1) of *the Constitution*. It was submitted that decision by the 1st respondent was tainted with procedural impropriety, irrationality and illegality because the grounds for removal and the procedure followed fell short of the requirement of section 58 and Article 251 above. Reliance was then placed on the Ugandan case of Pastoli Kabale District Local Government Council & others (2008).
18. It was further submitted that the revocation of the appointment was discriminatory contrary to Article 27 and 236 of *the Constitution* because she was treated differently from other employees of the County who had been granted leave of absence including an Executive Committee member and three Chief Officers.
19. It was submitted that the petitioner was entitled to leave of absence under Regulation 38(2) of the PSC Regulations, 2020, upon receipt of the appointment letter to serve as the Secretary/CEO of the 2nd respondent. It was urged that leave of absence for over three years under Regulation 38 (2) does not require recommendation of the CHRAC as is the case when the leave is sought under Regulation 38(1) to serve for a period of less than three years.
20. It was further submitted that leave of absence is applicable for employees appointed to positions of County Secretary, Member of County Executive Committee, Chief Officer, personal staff of the Governor, Member of County Public Service Board and County Assembly Service or other contractual appointments in other bodies of the County Public Service. It therefore urged that the

- action by the 1st respondent towards the petitioner amount to violation of her rights as they were discriminatory, malicious, capricious and arbitrary.
21. Finally, the court was urged to grant the reliefs sought including general damages of Kshs.10,000,000 for constitutional violations. Reliance was placed on the case of Arnacherry Limited v Attorney General (2014) eKLR, Mak Onyango v Attorney General & another (2013) eKLR, Esther W.Keige & another v Kenya Forest Service & another (2018) eKLR, and Mundia Njeru Gateria v Embu County Government & 5 others (2015) eKLR.
 22. On the other hand, it was submitted for the 1st respondent that the petition does not meet the competence threshold set by Anarita Karimi Njeru v Republic (1979) KLR 154 because it merely cited constitutional provisions without particulars of the alleged violations. It was submitted that the petition does not elaborate how the cited provisions have been violated. Reliance was placed on Julia Mwenje Nyinkuri v Kenya County Government Workers Union (2021) eKLR.
 23. It was further submitted that the appointment of the petitioner was contra-statute, illegal, against public policy and void ab initio because the petitioner was holding two state jobs. It was argued that holding a permanent and pensionable job in the County Government and another non-renewal contract of six (6) years on the 2nd respondent was illegal. It was urged that even with a leave of absence, the petitioner remained an employee of the 1st respondent even without receiving any salary or other benefits.
 24. It was submitted that section 58 (3) (b) disqualified state and public officers from appointment as members of County Public Service Board. Consequently, since the petitioner was still the Senior Principal Finance Officer of Meru County Government, she was not qualified for appointment as Secretary/CEO of the 2nd Respondent by dint of section 58 (3) (b) of the County Government Act and ought to resign from her position as Senior Principal Finance Officer.
 25. It was further submitted that holding two full time state jobs was illegal by dint of Article 77(1) of *the Constitution* as read with section 52 of the *Leadership and Integrity Act*. It was therefore submitted that the petitioner was prohibited from participating in any other gainful employment. Reliance was placed on Nicholas Rono v County Secretary Government of Bomet & 3 others (2020) eKLR, Dr.Agnes Wanjiru Njeru Gatama v EACC, County Assembly of Kirinyaga & other (2023) eKLR, Lawrence Kiutha Arithi v County Secretary County Government of Meru & 3 others (2023) eKLR and Esther Nyaguthii Wanjau v Governor Laikipia County & another (2020) eKLR where court dealt with illegal appointment of public officers to the County Board.
 26. It was further submitted that the court must enforce the doctrine that illegal contract ought not to be enforced. Reliance was placed on Centurion Engineers & Builders Ltd v Kenya Bureau of Standard (2017) eKLR, Hapatulla v Noor Mohamed (1994) eKLR and D.Njogu & Co.Advocates v National Bank of Kenya Ltd (2016) eKLR.
 27. In view of the foregoing matters, it was submitted that the revocation of the appointment of the petitioner as Secretary/CEO of the 2nd Respondent was lawful and as such she was not entitled to the reliefs sought.

Issues for determination

28. There is no dispute that the petitioner was duly appointed the secretary/CEO of the 2nd respondent for a non-renewable term of six years from 1st September 2023. It is also a fact that she is a public officer employed in the Meru County public Service on a permanent and pensionable terms but has taken

leave of absence during the whole contract term with the 2nd respondent. The issues for determination are :

- a. Whether or not the petition meets the competence threshold.
- b. Whether or not petitioner is a substantive member or an ex officio member of the 2nd respondent.
- c. Whether or not the revocation of the petitioner's appointment as the Secretary/CEO violated the law and *the Constitution*.
- d. Whether the petitioner is entitled to the reliefs sought.

Whether the petition meets the competence threshold

29. The 1st respondent's case is that the petition has not been pleaded with the degree of precision as guided by the High Court in the case of Anarita Karimi Njeru v Republic [1979] eKLR, thus: -

“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.”

30. I have considered the petition keenly and found that the Petitioner has clearly outlined her complaint, the provisions of the law that she alleged to have been infringed and the manner in which they were allegedly infringed. She has cited Article 27, 28, 41, 47, 236 and 251 read together with statutes and pleaded how the impugned revocation of her appointment was tainted with illegality, irrationality and procedural impropriety. Consequently, I am satisfied that the Petition meets the competence legal threshold established in the above case.

Whether the petitioner was an ex – officio member of the 2nd respondent

31. The 1st Respondent further argued that the Petitioner was never a substantive member of the Board but only an ex-officio member of the board. However, the petitioner and the 2nd respondent maintains that the secretary/CEO of the Board is a substantive and not just an ex-officio member pursuant to section 58 of the *County Governments Act*.

32. Section 58 states that:

“ 58. Composition of the County Public Service Board

1. The County Public Service Board shall comprise-
 - a. a chairperson nominated and appointed by the county governor with the approval of the county assembly;
 - b. not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and

- c. a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.”
33. Having considered the above express provision of the law, I am satisfied that the Secretary/CEO is one of the persons who constitute the County Public Service Board. If the legislature intended the Secretary/CEO to be ex-officio, the same would have been expressly provided. In 2018, I arrived at the same position in the case of Shukuri Alawo Muhamed v Wajir County Secretary Ahmed Sahal Omar & another, after considering section 58 of the County Government Act and the Advisory given by the Transition Authority and the Attorney General. Nduma J in John Saul Naviava v Franklin Espila & 3 others [2020] eKLR cited the said decision with approval.

Whether the revocation of the petitioner’s appointment violated the Constitution

34. The petitioner’s case is that she was duly appointed as the Secretary/CEO of the 2nd respondent and as such the procedure for removing her from office was not through revocation by the Governor. She contended that the proper procedure is provided under Article 251 of the Constitution read with section 58 of the County Government Act. On the other hand, the 1st Respondent argued that the Petitioner was not a member but an ex officio member and thus she did not enjoy the protection of Article 251 and the other statutory provisions cited.
35. Article 251 provides as follows:

“Removal from office.

251.

- (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for-
 - a. serious violation of this Constitution or any other law, including a contravention of Chapter Six;
 - b. gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;
 - c. physical or mental incapacity to perform the functions of office;
 - d. incompetence; or
 - e. bankruptcy.
- 2. A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

3. The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.
4. On receiving a petition under clause (3), the President-
 - a. may suspend the member or office holder pending the outcome of the complaint; and
 - b. shall appoint a tribunal in accordance with clause (5).
5. The tribunal shall consist of-
 - a. a person who holds or has held office as a judge of a superior court, who shall be the chairperson;
 - b. at least two persons who are qualified to be appointed as High Court judges; and
 - c. one other member who is qualified to assess the facts in respect of the particular ground for removal.
6. The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.
7. A person suspended under this Article is entitled to continue to receive one half of the remuneration and benefits of the office while suspended.”

36. Section 58 of the [County Governments Act](#) then provides as follows:

“ 58. Composition of the County Public Service Board

1. The County Public Service Board shall comprise-
 - a. a chairperson nominated and appointed by the county governor with the approval of the county assembly;
 - b. not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and
 - c. a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.
2. The appointment of the members of the Board shall be through a competitive process.

3. A person shall be qualified to be appointed as a member under subsection (1) if that person-
 - a. satisfies the provisions of Chapter Six of *the Constitution*;
 - b. is not a state or public officer;
 - c. in the case of chairperson or vice-chairperson, possesses a minimum qualification of a bachelor's degree from a recognized university and working experience of not less than ten years; and
 - d. in the case of any other members-
 - i. possesses a minimum of a bachelor's degree from a recognized university and working experience of not less than five years; and
 - ii. is a professional, demonstrates absence of breach of the relevant professional code of conduct.
4. A member of the Board shall-
 - a. hold office for a non-renewable term of six years; and
 - b. may serve on a part-time basis.
5. The members of the Board may only be removed from office—
 - a. on grounds set out for the removal of members of a constitutional commission under Article 251(1) of *the Constitution*; and
 - b. by a vote of not less than seventy five percent of all the members of the county assembly.
6. The board shall elect a vice-chairperson from amongst its members. (7) The chairperson and vice-chairperson shall be of opposite gender.” (Emphasis added)

37. I have carefully considered the evidence before the court and I am satisfied that the 1st Respondent did not follow the procedure for the removal of members of the Board as expressly laid down in the said provisions of *the Constitution* and the Statute. The Governor merely wrote a letter to the petitioner revoking her appointment as the Secretary/CEO of the 2nd respondent. The letter dated 8th March 2024 stated as follows:

“Dear Madam

RE: REVOCATION OF YOUR APPOINTMENT AS A SECRETARY/CEO MERU COUNTY PUBLIC SERVICE BOARD

The above matter refers.

Whereas the undersigned in exercise of the mandate under section 58 of the County Government Act appointed you to the position of the Secretary to the Meru County Public Service Board, the appointment was on the presumption of your qualifications as set forth in the law.

It has now been brought to my attention that apparently you did not relinquish your position in the County Public Service before assuming this role in your appointment. The County Government Act expressly disqualifies state officers and public officers from the position created under section 58(1) of the Act. Being a public officer, you are thus disqualified from the position of the secretary to the Board.

The purpose of this letter is to communicate the revocation of your appointment which appointment was void for the above stated reason. You shall be at liberty to resume your position of the senior principal finance officer in the County Public Service.”

38. It is clear to me that the decision communicated through the above letter was not only premature but also ultra vires. The essence of the express provisions of Article 251 of *the Constitution* and section 58 of the County Government Act is that, as any other member of the 2nd respondent, the petitioner is clothed with security of tenure. This means that upon assumption of office, the only procedure to remove her was the one provided under section 58 of the Act and upon any or all of the grounds set out under Article 251 of *the Constitution*.

39. I gather support from *Mundia Njeru Gateria v Embu County Government & 5 others* [2015] eKLR, where Ongaya J held that:

“The person desirous that the chairperson is removed from office must satisfy the substance and procedure first, alleging the details of the grounds that satisfy any of those enumerated in *the constitution* and secondly, submitting the appropriate petition to the county assembly’s consideration and resolution. There is no exception of the application of the procedure where removal is to be desired by the county governor.”

40. I appreciate that the 1st respondent accused the petitioner of breaching Article 77 of *the Constitution* by holding the office of a member to the Board while being a public officer appointed on permanent and pensionable terms, and thereby violating Chapter 6 of *the Constitution*. However, I must hold that the law prescribed a mandatory procedure for removal of the petitioner from office if the ground was substantiated. Her right to fair administrative action is guaranteed under Article 47 and 236 of *the Constitution* and amplified by section 4 of the *Fair Administrative Action Act* thus:-

- “1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for administrative action that is taken against him.
3. Where administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. Prior and adequate notice of the nature and the reasons for the proposed administrative action;

- b. An opportunity to be heard and to make representations in that regard;”

41. In view of the foregoing matters I am satisfied that the petitioner has proved on a balance of probability that the decision by the 1st respondent revoking her appointment as the Secretary/CEO of the 2nd respondent violated her fundamental right to fair labour practices and the right to fair administrative action as guaranteed under Article 41, 47 and 236 of *the Constitution*. The said provisions state that:

“ 41 Every person has the right to fair labor practices.

(1)
47. Fair administrative action

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

236. Protection of public officers.

A public officer shall not be –

- a. ...
- b. Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

42. In addition to the foregoing, the Petitioner contended that the impugned decision was discriminatory since there are three County Chief Officers and a County Executive Committee Member who have been given leave of absence to serve contractual offices without relinquishing their substantive positions in the public service. The petitioner contended that regulation 38 (2) of the PSC Regulation 2020 allowed the 2nd respondent to give a leave of absence to a public officer if on a contractual appointment for over three years. The 2nd respondent supported the petitioner’s leave citing an Advisory from the PSC.

43. The 1st respondent relied on the same regulation of the PSC Regulations 2020, and averred that under Regulation 38(1), the leave of absence ought to have been discussed at the departmental level and passed by the CHRAC which is chaired by the County Secretary. In addition, it maintained that Article 77(1) of *the Constitution* and section 52 of the *Leadership and Integrity Act* bars the petitioner from holding two state jobs.

44. Leave of absence is a matter that can only be traced from the terms of an employee’s contract of employment. Most public service contracts of employment are contained in appointment letters, HR manuals, Memos, regulations, statutes and even *the constitution*. I have perused the PSC Regulations 2020, but saw no indication that they were intended to apply to the County public Service.

45. It follows that the Advisory/Legal opinion given by the Secretary/CEO of the PSC vide the letter dated 16th February 2023 was not based on any law or regulation. In my view, the 2nd respondent should have sought the intended advisory from the Attorney General or the Supreme Court and not from the PSC. As the law stands now, public officers serving in the county public service are not entitled to leave of absence upon getting contractual appointments in the public service, public entities or at all, unlike their counterparts in the national government.

46. I say so because there is no legal or regulatory framework to govern the said benefit in the devolved units. Until such framework is established, the said status quo shall remain unless the respective HR Policy and Procedures Manuals permit leave of absence to a category of officers or if a request for such leave is discussed and recommended by the CHRAC and approved by the County Public Service Board.
47. The foregoing leaves the concerned employee with the option of either resigning from the public service or the contract appointment if the leave of absence is declined. The court has not been told whether the said chief officers and the County Executive Committee member sought their leave of absence in the same manner as the petitioner. Consequently, there is no sufficient grounds upon which to conclude that the petitioner was discriminated against since there is nothing to prove differential treatment contrary to Article 27 of *the Constitution* and section 5 of the *Employment Act*.
48. I gather support from *Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others* [2018] eKLR where the Court of Appeal held that:
- “ ... Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description....
- Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
49. Consequently, the claim for discrimination is not proved. However, I am satisfied that the petitioner has proved on a balance of probability that the decision to revoke her appointment without following the due process of law was cruel, inhumane, and degrading treatment, that is prohibited under Article 28, 29 and 236 of *the Constitution*.

Reliefs

50. I have already made a finding of fact that the petitioner was duly appointed as the Secretary/CEO of the 2nd respondent and that the impugned revocation of her appointment was made without following the mandatory procedure set out in article 251 of *the constitution* read together with section 58 of the County government Act. Consequently, I now hold that the petitioner is entitled to the declaratory orders sought prayer in (a), (b) and (c) in the petition.
51. For the said reason, I hold that the petitioner is entitled to declaration that the purported decision by the 1st respondent to revoke her appointment as the Secretary/CEO of the 2nd respondent through the letter dated 8th March 2024 is illegal, irregular, un-procedural, unlawful, capricious and amounts to violation of her rights under Article 41, 47 and 236 of *the constitution*. The impugned decision also amounted to cruel, inhumane and degrading treatment of the petitioner as a person and more so as a public officer contrary to Articles 28, 29, and 236 of *the Constitution*.
52. I further find that the petitioner has laid a proper basis upon which an Order of Certiorari should issue to quash the decision by the 1st respondent contained in the letter dated 8th March 2024, purporting to revoke the appointment of the petitioner as the Secretary/CEO of the 2nd respondent. I gather support

from the Ugandan case of *Pastoli v Kabale District Local Government Council & others* (2008) 2 EA 300, where illegality, irrationality and procedural impropriety were defined and the court held:-

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision.”

53. The petitioner is further entitled to a permanent injunction restraining the 1st respondent and/or third parties, agents and/or proxies from removing the petitioner from office without the due process of law or in any manner interfering with her contract as the Secretary/CEO of the 2nd respondent.
54. I have also made a finding of fact that the 1st respondent has violated the petitioner’s constitutional rights to fair labour practices and fair administrative action as provided under Article 41, 47 and 236 of *the Constitution* which forms a basis for awarding compensatory damages. The petitioner prayed for Kshs.10,000,000 and cited several authorities for guidance. In *Esther W.Keige & another v Kenya Forest Service & another* (2018) eKLR, the court awarded Kshs, 2,000,000 and *Mundia Njeru Gateria v Embu County Government & 5 others* (2015) eKLR the court awarded Kshs. 5,000,000 for similar violations. Guided by the latter decision which involved the chairman of the County Board, I find that an award of Kshs. 3,000,000 would be reasonable compensation to a Secretary/CEO of the board.

Conclusion

55. I have found that the petition meets the competence threshold of a Constitutional pleading. I have further found that the petitioner being appointed as the Secretary/CEO of the 2nd respondent was indeed a substantive member of the Board by dint of section 58 of the County Government Act. I have also found that the revocation of her appointment as Secretary/CEO of the Board by the 1st respondent was unlawful and unconstitutional as it was contrary to Article 251 of *the Constitution* read with section 58 of the County Government Act. Finally, I have found that the revocation amounts to violation of the petitioner’s rights under Article 28, 29,41, 47 and 236 of *the constitution* and the petitioner is entitled to remedy.
56. Consequently, I allow the petition and enter judgment for the petitioner as against the 1st respondent as follows:

- a. A declaration that the petitioner is and has been duly appointed as the Secretary/CEO of the Meru County Public Service Board in accordance with the provisions of Section 58 (1) (c) of the County Governments Act and can only be removed from Office in accordance with the provisions of section 58(5) of the County Governments Act read with Article 251 of the Constitution;
- b. A declaration that the petitioner's appointment as Secretary/CEO of the Meru County Public Service Board was done procedurally and in accordance with the law;
- c. A declaration that a Member of the County Public Service Board (including the Secretary to the Board) once appointed under the provisions of Section 58 (1) of the County Governments Act can only be removed from Office in accordance with the provisions of section 58(5) of the County Governments Act read with Article 251 of the Constitution;
- d. A declaration that the purported decision by the 1st respondent, purporting to revoke the appointment of the petitioner as the Secretary/CEO of the Meru County Public Service Board as communicated to the petitioner by the 1st Respondent through a letter addressed to the Petitioner and dated 8th March 2024, is illegal, irregular, un-procedural, unlawful, arbitrary, capricious, discriminative and thereby constitute a violation to the Petitioner's Constitutional rights protected under Articles 28, 29, 41 (1), 47 and 236 of the Constitution and statutory rights protected under the provisions of sections 58 (4), 58 (5) & 59A of the County Governments Act, section 5 of Fair Administrative of Action Act and sections 35 and 45 of the Employment Act;
- e. An order of certiorari quashing the purported decision by the 1st Respondent, purporting to revoke the appointment of the petitioner as the Secretary/CEO of the Meru County Public Service Board as communicated to the Petitioner by the 1st respondent through a letter addressed to the Petitioner dated 8th March 2024;
- f. A permanent Injunction restraining the 1st Respondent, whether acting directly or through third parties, agents and/or proxies, from unlawfully revoking the appointment of and/or otherwise from interfering with the Petitioner's contract of Employment as the Secretary/CEO of Meru County Public Service Board;
- g. An award of Kshs. 3,000,000 as damages against the 1st respondent to the Petitioner, for violation of the Petitioner's Constitutional rights and Fundamental rights and Freedom protected under Articles 28, 29, 41 (1), 47 and 236 of the Constitution and statutory rights protected under the provisions of sections 58 (4), 58 (5) & 59A of the County Governments Act, section 5 of Fair Administrative of Action Act and sections 35 and 45 of the Employment Act;
- h. The costs of and incidental to this petition;
- i. Interest on (g) and (h) above at court rates from the date of this judgment.
- j. For avoidance of doubt, the petitioner has the option of resigning from either job in order to be compliant with the law.

DATED, SIGNED AND DELIVERED AT NYERI THIS 24TH DAY OF OCTOBER, 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.

ONESMUS N MAKAU

JUDGE