



Koech & 2 others v Mutai, Governor Kericho County & another; County Assembly of Kericho (Interested Party) (Employment and Labour Relations Petition E008 of 2023) [2024] KEELRC 13596 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13596 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2023
DN NDERITU, J
DECEMBER 19, 2024**

BETWEEN

**ERICK KIPNG'ETICH KOECH 1ST PETITIONER
LAWRENCE BII 2ND PETITIONER
DANIEL K ROP 3RD PETITIONER**

AND

**DR ERICK K MUTAI, GOVERNOR KERICHO COUNTY ... 1ST RESPONDENT
COUNTY GOVERNMENT OF KERICHO 2ND RESPONDENT**

AND

THE COUNTY ASSEMBLY OF KERICHO INTERESTED PARTY

RULING

I. INTRODUCTION

1. In a petition dated 1st November, 2023 filed in court on 16th November, 2023 through C & K Advocates LLP, the petitioners are seeking the following reliefs –
 - a. A declaration That the termination of the Petitioners' from employment as County Executive Committee Members of the County Government of Kericho in the Department of Public Service Management, Trade, Industrialization, Co-operative Management, Tourism and Wildlife, Information, Communication, E-Government, Youth Affairs, Gender and Sports respectively on 6th November 2023, was irregular, unlawful, unfair, wrongful, capricious, unreasonable in law, unconstitutional, and void ab-initio.



- b. AN ORDER of mandamus commanding the 1st and 2nd Respondents to reinstate the Petitioners to their office as Kericho County Executive Committee Members with all the benefits appurtenant thereto pursuant to the Petitioners' employment contracts dated 4th November, 2022, 28th March, 2023 and 4th November, 2022 respectively.
- c. A DECLARATION That the act of the 1st Respondent in terminating the Petitioners from employment is in breach of their constitutional rights under Articles 10, 27, 28, 35, 41(1), 47(1), 50(1), 73, 232 and 259 of *the Constitution* and also in breach of Sections 32(a) and 40(2) of the *County Governments Act*, Section 4 of the Fair Administrative Actions Act and Sections 41, 43, and 45 of the *Employment Act* thus the said action is null and void.

In the Alternative and without prejudice to prayers (i) to (ii) above: -

- d. AN ORDER That each Petitioner is entitled to payment by the Respondents of all salaries, benefits and alludes That the Petitioners would have earned for the remainder of their contract term from 6th November, 2023 to 10th September, 2027 tabulated as hereunder: -
- a. 6th November, 2023 – 6th November 2026 – 36 months x Kshs.404,250 = Kshs.14,553,000/=
- b. 6th December, 2026 – 10th September, 2027 – 10 months x Kshs.404,250 = Kshs.4,042,500/=
- c. Payment in lieu of annual leave for 4 years to 10th September, 2027 = Kshs.1,617,000/=
- d. Add gratuity at 31% at Kshs.18,595,000/= = Kshs.5,764,605.

Grand Total – Kshs.25,976,605/=

Less applicable taxes.

SUBPARA e.

Compensation and/or damages for violation of the Petitioner's constitutional rights and for their unfair termination.

SUBPARA f.

Interest on (iv) above at court rates from 6th November, 2023 till payment in full.

SUBPARA g.

AN ORDER awarding costs of the Petition and interest thereon to the Petitioners at court rates.

SUBPARA h.

This Honourable Court be pleased to issue such further orders, writs and directions That this court may consider appropriate in the circumstances.

2. Contemporaneously, the petitioners filed a notice of motion of even date (the application) under certificate of urgency, seeking the following orders –
1. Spent
 2. That pending the inter-partes hearing and determination of this application, this Honourable Court be pleased to issue a conservatory order staying the decision of the 1st Respondent communicated vide the letters dated 6th November 2023, unlawfully terminating the Petitioners/Applicants herein as County Executive Committee Members (CECM) in



the Department of Public Service Management Trade, Industrialization, Co-operative Management, Tourism and Wildlife Information, Communication, E-Government, Youth Affairs, Gender and Sports respectively.

3. That pending the hearing and determination of the petition, this Honourable Court be pleased to issue a conservatory order staying the decision of the 1st Respondent communicated vide the letters dated 6th November, 2023 unlawfully terminating the Petitioners/Applicants herein as County Executive Committee Members (CECM) in the Department of Public Service Management Trade, Industrialization, Co-operative Management, Tourism and Wildlife Information, Communication, E-Government, Youth Affairs, Gender and Sports respectively.
 4. That pending the inter-partes hearing and determination of this application, this honourable court be pleased to issue a conservatory order restraining the Interested Party from vetting the nominees listed by the 1st Respondent namely;- Malel John Kiplangat – Department of Information, Communication E-Government, Youth Affairs, Gender and Sports and Jackson Rop Kipkorir – Department of Trade, Industrialization, Co-operative management, Tourism and Wildlife to fill the position of the Petitioners in their respective departments.
 5. That pending the hearing and determination of the petition, this honourable court be pleased to issue conservatory order restraining the Interested Party from vetting the nominees listed by the 1st Respondent namely;- Malel John Kipruto – Department of Public Service Management, Kemoi Ronald Kiplangat – Department of Information, Communication, E-Government, Youth Affairs, Gender and Sports and Jackson Rop Kipkorir-Department of Trade, Industrialization, Co-operative Management, Tourism and Wildlife to fill the position of the Petitioners in their respective departments.
 6. That this honourable court be pleased to issue any other orders and/or directions That the court may deem fit to grant.
 7. That the costs of this Application be in the cause.
3. In a ruling delivered on 5th April, 2024 the court denied the application. In paragraphs 45 and 46 of That ruling the court raised the issue of the jurisdiction of this court to deal with this petition. The court stated as follows –
45. Neither of the parties has raised the issue of the jurisdiction of this court to hear and determine the application and by extension to hear and determine the petition. The court also notes That the respondents and the interested party have not responded to the petition besides their responses to the application as discussed in a preceding part of this ruling. However, from the responses to the application the court can easily discern the positions That the respondents and the interested party are likely to take in response to the petition.
 46. However, when the time comes the court shall wish to have this issue heard and determined. Is the subject matter of the petition a political question or a legal one? Is the dispute herein justiciable? The court is not at this point suggesting That it has no jurisdiction over the subject matter but down the road the parties need to address those concerns vis a vis the contract of employment issue to the petitioners and the implication thereof vis a vis the pleasure doctrine as viewed from the provisions of Section 40 of the [County Governments Act](#). For now, I will leave the issue at That to avoid prejudicing the same at this point.



4. On 24th June, 2024, by consent of all the parties, the court directed That the issue of the jurisdiction of the court be dealt with first before the petition is settled for hearing. Further, it was directed That the issue be canvassed by way of written submissions.
5. Counsel for the petitioner's, Miss Cheronon, filed her written submissions on 30th July 2024. Counsel for the respondents Miss Mueni, filed her written submissions on 16th July, 2024.
6. This ruling therefore is in regard to the above issue as framed by the court on 24th June, 2024. Does this court (ELRC) possess the requisite jurisdiction to hear and determine this petition?

II. BACKGROUND

7. In summary, the petitioners' case as contained in the petition is That the 1st petitioner was appointed county executive committee member of the department of public works, roads, and transport on a periodic contract That was to run from 2nd November, 2022 to 10th September, 2027. The 2nd petitioner was appointed county executive committee member of the department of trade, industrialization, cooperative management, tourism and wildlife on a contract That was to run from 28th March, 2023 to 10th September, 2027. The 3rd petitioner was appointed county executive committee member of the department of agriculture, livestock, and fisheries on a contract running from 2nd November, 2022 to 10th September, 2027.
8. Of course, the above appointments were made by the 1st respondent as the governor of the 2nd respondent with the approval of the interested party. During the period of the respective contracts the petitioners also served in other departments as and when moved by the 1st respondent.
9. On 6th November, 2023 all the petitioners were served with notice of termination of their respective contracts issued by the 1st respondent dated 6th November, 2023. In the material part the notice read as follows –

RE: NOTICE OF TERMINATION OF CONTRACT AS COUNTY EXECUTIVE COMMITTEE MEMBER

You are hereby given a notice of termination of contract as CEC, from 6th November, 2023.

The termination of contract is in accordance with the County Government Act of 2012 Section 31(a) read with Section 40(1), which provides That the Governor may dismiss a member of the County Executive Committee from office, if the Governor considers it appropriate or necessary to do so. However, it has been noted That you have failed to discharge duties as directed and assigned as per executive order 1 of 22 and number 1 of 2023.

You are hereby served with one-month notice of termination of your employment contract with effect from 6th November, 2023, you shall be paid up to and including 5th December, 2023 and paid service gratuity of 31% of your salary for the period worked subject to handing over the clearance of any County Government property in your possession.

I take this opportunity to wish you well in your future endeavors.

Yours sincerely,

H.E Dr. Erick K. Mutai (PhD)

Governor



10. In their respective affidavits in support of the petition the petitioners opine That the above notice is unlawful for several reasons. Firstly, they state That the same was issued against the rules of natural justice and in contravention of the constitutional and statutory provisions upon which the application is expressed to be brought as cited above. They also advance That they were not given a hearing before the termination. Secondly, they state That the termination was malicious and lacking in substance and procedure (due process). Thirdly, it is stated That the termination was based and founded on provisions of the law That had been repealed and as such the termination notices were of no legal consequences, null and void ab initio.
11. In their joint responses, the respondents state That although the notices erroneously cited repealed law, Section 40(1) of the *County Governments Act*, the petitioners were lawfully terminated by the 1st respondent as the appointing authority. It is alleged That the petitioners were terminated for poor performance and lack of professionalism and misconduct in the execution of their duties.

III. SUBMISSIONS BY COUNSEL

12. On the one hand, counsel for the petitioners submitted That the petition is based on contracts of employment as exhibited by the petitioner's in their pleadings. It is submitted That this court (ELRC) is established under Article 162(2)(a) of *the Constitution* and the jurisdiction spelt out in Section 12(1) of the *Employment and Labour Relations Court Act* (ELRC Act). It is further submitted That the dispute between the parties as presented in the petition is one "arising out of" an employment relationship under Section 12(1)(a) of the ELRC Act.
13. The court is urged to be guided by the Supreme Court holding in Kenya Tea Growers Association & 2 Others V The National Social Security Fund Board of Trustees & 13 Others (2024) eKLR. The court is further urged to adopt the reasoning in United States International University (USIU) v Attorney General [2012] KEHC 5516 (KLR) to the effect That employment rights are part of the Bill of Rights and are protected under Article 41 of *the Constitution*.
14. It is reiterated That based on the exhibited contracts of employment this court has the necessary jurisdiction and is properly seized of the matter to hear and determine the issues in controversy.
15. It is further submitted That the petitioners are state officers based on the definition in Section 2 of the *County Governments Act*. It is submitted That while the 1st respondent has the prerogative to dismiss the petitioners with the approval of the interested party, the petitioners are challenging the manner and style in which they were dismissed and seeking remedy therefor.
16. It is further submitted That the petitioners are exempt from the disciplinary procedure overseen by the county public service board under Section 59(2) of the *County Governments Act* and as such there is no internal, or alternative mechanism That the petitioners ought to have exhausted before filing the petition in court. The court is urged to follow the reasoning in Nyagah Wambora v County Government of Embu & 2 Others (2023) eKLR. It is therefore submitted That the petition is properly before the court.
17. On the other hand, counsel for the respondent argued and submitted That the petition as presented is without the jurisdiction of this court. It is submitted That the petition was filed prematurely as the petitioners did not exhaust the alternative dispute resolution mechanisms provided for under Section 77 of the County Government Act and Section 87(2) of the *Public Service Commission Act*.
18. In support of the foregoing argument counsel for the respondent cited among other decisions the court of appeal in Nakuru County Assembly & 3 Others v Odongo & 7 Others (2023) eKLR wherein it was



held That Section 87(2) of the *Public Service Commission Act* is couched in mandatory terms and as such any party coming to court should have exhausted the provisions of Part XV of the Act.

19. Further, counsel cited Speaker of the National Assembly v Njenga Karume (1992) KECA 42 to the effect That where the law or *the constitution* provides for alternative dispute resolution mechanism a party has no audience with a court as a first port of call. The court is thus urged to desist from entertaining the petition for lack of jurisdiction as warned by the Supreme Court in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR. The court is urged to strike out the petition under Section 77 of the County Government Act and Section 87(2) of the *Public Service Commission Act*.

IV. ANALYSIS AND DETERMINATION

20. As stated in the introductory part of this ruling there is only one issue for determination – Is this petition properly before this court?
21. The status obtaining is That the petitioners are no longer in employment. Most likely their positions have long been assigned to and taken over by other persons as the court in the ruling of 5th April, 2024 disallowed an application That intended to halt their replacement. In any event, whether lawfully or unlawfully the petitioners were terminated vide notices issued by the 1st respondent on 6th November, 2023 which took effect on 5th December, 2023 almost one year ago.
22. The petitioners are seeking for the orders set out in the introductory part of this ruling. For sure they are free to amend the petition based on the status now obtaining.
23. The petitioners were appointees of the 1st respondent, with the approval of the interested party under Section 30 & 31 of the County Government Act and Article 179(2)(b) of *the Constitution*. It is important to note That a County Public Service Board plays no role in either the appointment or termination or dismissal of County Executive Committee members.
24. The foregoing provisions clearly demonstrate That members of a County Executive serve at the pleasure of the appointing authority, the governor. This is the essence of the pleasure doctrine.
25. The substrum of this petition is distinguishable from That in Nakuru County Assembly & 3 Others v Odongo & 7 Others (Supra) That concerned chief officers who are subject to the jurisdiction of County Public Service Board.
26. By reason of the foregoing, the subject matter, in my view, cannot be subject to the jurisdiction of the Public Service Commission under Sections 85, 86, 87 & 88 of the *Public Service Commission Act*. In any event the orders sought by the petitioners cannot be granted by the Public Service Commission.
27. As stated above it is almost one year since the petitioners were terminated and the lawfulness or otherwise of the dismissal can only be determined in a competent court of law and not by the commission.
28. The court agrees with the submission by the counsel for the petitioners That this court is seized of the jurisdiction to hear and determine the petition on merits. As stated elsewhere in this ruling the parties are free to amend the pleadings to reflect the obtaining status.
29. For all the forgoing the petition shall now be fixed for mention before a judge for directions on the hearing.
30. The issue addressed herein was raised by the court suo motto and hence there is no order as to costs.



**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 19TH DAY OF
DECEMBER, 2024.**

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DAVID NDERITU

JUDGE

