



Kulei v Governor, Kajiado County, Hon Joseph ole Lenku & another (Petition E017 of 2024) [2024] KEELRC 13563 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13563 (KLR)

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

B ONGAYA, J

DECEMBER 19, 2024

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA
IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS ACT
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS
OR BREACH OF EMPLOYMENT RIGHT OER ARTICLES 27(1)(2) & (3),
28, 35,41,47,50 AND 236 OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF COUNTY GOVERNMENT ACT NO. 17 OF 2022
IN THE MATTER OF THE COUNTY PUBLIC SERVICE BOARD**

BETWEEN

JONATHAN MARIMA KULEI PETITIONER

AND

**THE GOVERNOR, KAJIADO COUNTY, HON JOSEPH OLE
LENKU 1ST RESPONDENT**

THE KAJIADO COUNTY, PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 01.02.2024. The petitioner prayed for:
 - a. A declaration that the 1st respondent’s decision to invoke sections 31(a) and 45 of the County Government Act, 2012 to terminate the petitioner from employment in his own capacity was ultra vires and therefore unlawful on account of violation of and inconsistent with the provisions of Articles 10,27,28,47,50 and 236 of *the constitution* and provisions of County Government Act.



- b. A declaration that the rights of the petitioner guaranteed and protected under Articles 27,28,41,47,50 and 236 of the Constitution have been violated by the respondents.
 - c. An order of certiorari be issued to bring to the Honourable Court for purposes of quashing forthwith the letter of termination of contract of employment dated 16/08/2023 and reinstate the Petitioner forthwith.
 - d. A declaration that the process employed by the respondents in terminating the petitioner was prejudicial, unconstitutional and in gross violation of the petitioner's right as guaranteed under Articles 10, 27, 28, 47, 50 and 236 of the Constitution.
 - e. General damages for violation of the petitioner's constitutional rights.
 - f. The petitioner be paid his salary and accompanying benefits from the month of August, 2023.
 - g. In the alternative; the petitioner be paid salary in full for the remaining period of his contract.
 - h. Costs of the petition and interest at court rate be granted to the petitioner.
 - i. Any other relief that the court deems fit.
2. The petition was based upon the petitioner's supporting affidavit filed together with the petition and the further affidavit sworn on 25.11.2024 and exhibits thereto. The petitioner's case is as follows:
- a. That he was appointed as County Chief Officer, Public Service and Social services for a period of two (2) years effective 21.01.2021 and that on 15.02.2021 he was designated as an accounting officer.
 - b. On 30.07.2021, he was redeployed from being County Chief Officer, Public Service and Social services to County Chief Officer, Medical Services.
 - c. Upon expiry of his contract, the same was extended for a period of three years, effective 27.09.2022. The three years were lapsing on 27.09.2025.
 - d. The petitioner alleges that the contract was unfairly, illegally and unlawfully terminated on 16.08.2023 by the 1st respondent, and that his termination letter did not give reasons for the termination. The letter of termination was dated 16.08.2023. it referred to the appointment letter dated 21.01.2021 and the letter of extension dated 27.09.2022. it stated thus "Pursuant to Section 31(d) and 45 of the County Government Act 2012 and subsequently in accordance with the provisions of your contract, I hereby terminate your contract as a County Chief Officer – Health Services." The letter further stated that he would be entitled to payment equivalent to an aggregate period of three months basic salary in lieu of notice as the termination took effect immediately. The letter further stated that he was entitled to payment of gratuity equivalent to 31% of his basic salary for the period served, inclusive of the period of notice of severance. The letter concluded thus, "I wish you well in your future endeavours."
 - e. At the time of termination of the contract, the petitioner was earning a basic salary of Kshs.150,410 plus allowances making a gross of Kshs.199,616.00 per the payslip of August, 2023.
 - f. The petitioner worked continuously without any warning letter or any disciplinary action brought against him and at the time of termination, he was not subjected to any disciplinary process or informed the reasons for termination of his employment and he was not given an opportunity to be heard as regards to any allegations.



- g. The 1st respondent invoked sections 31(d) and 45 of the County Government Act, 2012 in terminating the petitioner's employment, which provisions the petitioner alleges did not give the 1st respondent the authority to terminate his employment contract as a County Chief Officer.
 - h. That the 1st respondent does not have the powers to terminate the contract of employment of County Chief Officer and it is only the County Public Service Board that has powers to remove persons holding or acting in offices in the county public service pursuant to section 59 of the County Government Act.
 - i. The respondents' failure to exercise due process as stipulated in section 40 of the County Government Act violated Articles 10, 27, 28, 47, 50 and 236 of *the Constitution* of Kenya, 2010.
3. The 2nd Respondent filed grounds of opposition dated 13.11.2024 through Odhiambo Oronga & Company Advocates and opposed the petition on the following grounds:
- a. That the petition is a misnomer, frivolous and abuse of process.
 - b. That the 2nd respondent was never involved in the employment of the petitioner.
 - c. That the petitioner cannot therefore be a beneficiary of a process he terms as flawed.
 - d. That by dint of the respondent not having participated in the petitioner's extension of contract, the same was therefore null and of no legal effect.
 - e. That as such no employment lies capable of being terminated.
 - f. That the orders sought cannot therefore be granted in view of the want of a legal relationship with the petitioner.
4. The 1st respondent filed the replying affidavit of H. E. Joseph Ole Lenku sworn on 13.11.2024, the Governor of Kajiado County, through Odhiambo Oronga & Company Advocates. It was stated and urged as follows:
- a. That upon redeployment of the Petitioner from the department of Public Service and Social services to the department of medical services, the petitioner refused to report to his new office and assume his duties fully. He alleged that the appointment was unlawful, as it should have been done by the 2nd respondent.
 - b. Upon employing the petitioner and granting him a contract, the 1st respondent expected the petitioner to assist him carry out his functions as the Governor by professionally and diligently rendering professional services.
 - c. The petitioner being accountable to the 1st respondent in the exercise of his duties and responsibilities, the 1st respondent had the power to remove him without undue delay once he formed the opinion that he was not discharging his duties professionally and diligently.
 - d. The petitioner's dismissal was informed by the need to deliver efficient services to the people of Kajiado County and to protect and preserve the interests of the people of Kajiado under the powers donated to him by dint of Article 132 of *the Constitution* and section 31(1) of the County Government Act.
 - e. The petitioner cannot allege having been removed unlawfully whereas he is a beneficiary of an appointment by the governor and not the 2nd respondent.



- f. The petitioner’s termination was lawful and proper in accordance with *the Constitution* and the County Government Act.
 - g. In certain circumstances, a Governor may lose confidence in an officer and due to the sensitivity and urgency of the matter at hand the Governor may dismiss the member without giving notice of his intention to do so.
 - h. That section 31(a) of the *County Governments Act* does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal, he can only dismiss if he considers it appropriate or necessary.
 - i. The 1st respondent exercised his powers reasonably and that the petitioner’s dismissal was for the benefit of the County of Kajiado and in accordance to the principles of devolution.
 - j. The law grants the 1st Respondent power as the Governor to dismiss an officer appointed by him at any time, that is, at his pleasure and that the petitioner as a County Chief Officer was his right hand in his respective office, hence he has to have confidence in the officer. Where such confidence is lost, the Governor ought to have the capability of removing such a member without undue delay to enable the county to function for the benefits of the people of the county.
 - k. That political appointees whose assumption of office, tenure and removal from office hinges on the political mandate granted by the appointing authority, the governor and who has the prerogative to dismiss and in this case the petitioner’s dismissal was lawful and proper.
 - l. The petitioner is not entitled to the orders sought as they were aimed at defeating the role bestowed on the respondents thus killing the spirit and object of devolution as outlined under article 174 of *the Constitution*.
5. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
 6. The 1st issue is whether the 1st respondent acted ultra vires by dismissing the petitioner under sections 31(a) and 45 of the *County Governments Act*, 2012.
 7. Section 31 (a) of the Act states as follows “31. 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. The section applies to dismissal of county executive committee member and to chief officers. the Court finds that as urged for the petitioner, it did not apply to the petitioner’s contract of service.
 8. Section 45 of the Act provides as follows:
 - “ 45.
 - (1) The governor shall—
 - (a) nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and
 - (b) with the approval of the county assembly, appoint county chief officers.



- (2) The office of a county chief officer shall be an office in the county public service.
 - (3) A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46.
 - (4) The county chief officer shall be the authorized officer in respect of exercise of delegated power.
 - (5) The governor may re-assign a county chief officer.
 - (6) A county chief officer may resign from office by giving notice, in writing, to the governor.
9. Section 2 of the Act states that “county public service” means the collectivity of all individuals performing functions within any department of the county government or its agency, but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly.
10. The Court observes that section 45 of the Act does not confer upon the Governor the power to dismiss the Chief Officer. The Court upholds the holding of Onyango J in *Okuro & 7 others – Versus- Kisumu County Public Service Board, The Government Kisumu County & Another* [2017] eKLR also upheld in *Jane Chepkorir Barua –Versus- County Assembly of Baringo, Speaker County Assembly of Baringo, Governor Baringo Baringo County & Baringo County Public Service Board (Petition7 of 2019)* [2021] KEELRC 1512 (KLR) (15 June 2021) (Judgment)
11. Part VII of the Act provides for the County Public Service. Section 59 (1) (c) thereof provides for the power of the County Public Service Board to include the exercise of disciplinary control over, and remove, persons holding or acting in offices in the County Public Service as provided for under this Part. The Court finds that the County Public Service Board therefore exercises the function and power of disciplinary control over the Chief Officers.
12. Section 76 of the Act prohibits punishment contrary to *the Constitution* in the following terms:
- “
- “76.
- (1) In exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice.
 - (2) No public officer may be punished in a manner contrary to any provision of *the Constitution* or any Act of Parliament.
 - (3) Nothing in this section shall limit the powers conferred on the county government or any other lawful authority discharging a disciplinary function from retiring an officer from the county public service on the ground of public interest.
 - (4) In this section, retirement on the ground of public interest may be imposed instead of any other punishment if the decision maker considers that although the misconduct has been proven — (a) the officer has nevertheless raised a mitigation factor that



renders imposition of a punishment too harsh in view of the circumstances of the case; or,

- (b) the length of service benefits accrued and previous good record of the officer justifies the retirement; or,
 - (c) imposing a punishment against the officer is likely to adversely affect the reputation of the public body concerned or the county public service generally.
- (5) If criminal proceedings are instituted against a county public officer, disciplinary proceedings against the officer for dismissal or imposition of any other punishment on any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom has been made.
- (6) Nothing in subsection (5) shall be interpreted as prohibiting or restricting the power of the county government or the concerned county chief officer or other lawful authority to interdict or suspend or take any interlocutory decision against the public officer.”

The Court finds that the provisions apply as safeguards for due process in disciplinary control of the County Chief Officer like the petitioner. It is alleged for the 1st respondent that the petitioner declined to take up the reassigned department. The allegation, in the opinion of the Court amounted to an alleged misconduct and the 2nd respondent’s power and function to exercise disciplinary control over the petitioner accrued. The 2nd respondent’s case and submission that it had nothing to do with the petitioner’s contract of service was a misdirection and misconception of the statutory provision as found. Indeed, where a Governor alleges misconduct or poor performance against a County Chief Officer, it appears to the court that the allegations should be processed by the county public service board in a fair procedure as envisaged in section 76 of the Act and Article 236 of *the Constitution* and the Court holds as much accordingly. Thus, the Court finds that *the Constitution* of Kenya 2010 in numerous provisions such as Chapter Six on leadership and integrity on servanthood public and state service, Article 10 on values and principles of public service, Article 232 on values and principles of public service, Article 41 on the right to fair labour practices, Article 236 on protection of public officers, and Article 1 on sovereignty of the people, all confirm that the pleasure doctrine died and was buried in the former Republic and, was replaced with the doctrine of due process, in the new Republic. The 1st respondent had no unchained discretionary power to remove the petitioner and the law is that indeed he had no established authority, power or function to remove the petitioner in view of the alleged misconduct. Such are the checks and balances surrounding the contract of service of County Chief Officers.

To answer the 1st issue for determination, the Court finds that the 1st respondent acted ultra vires in the manner he terminated the claimant’s employment.

13. To answer the 2nd issue for determination and in view of the findings on the 1st issue, the Court finds that the petitioner has established that his rights, fundamental freedoms, and cited constitutional provisions were violated. The submissions made for the petitioner are upheld.



14. To answer 3rd issue the Court returns that the petitioner is entitled to the remedies as prayed for with full payment of the withheld monthly payment. In view of that payment, the Court considers that the end of justice is adequately served and, in the circumstances, it would be oppressive to the respondents and the taxpayer to make a further award on the heading of compensation for violation of the cited provisions of the Bill of rights.

15. The petitioner has succeeded and the respondents will jointly or severally pay the costs of the petition.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

- a. The declaration that the 1st respondent's decision to invoke sections 31(a) and 45 of the County Government Act, 2012 to terminate the petitioner from employment in his own capacity was *ultra vires* and therefore unlawful on account of violation of and inconsistency with the provisions of Articles 10, 27, 28, 47, 50 and 236 of *the Constitution* and provisions of County Government Act.
- b. The declaration that the rights of the petitioner guaranteed and protected under Articles 27,28,41,47,50 and 236 of *the Constitution* have been violated by the respondents.
- c. The order of certiorari hereby issued to bring to the Honourable Court for purposes of quashing forthwith the letter of termination of contract of employment dated 16/08/2023 and reinstate the petitioner forthwith with full benefits and deployed appropriately in the same or similar capacity without loss of remunerative scale and benefits.
- d. The declaration that the process employed by the 1st respondent in terminating the petitioner was prejudicial, unconstitutional and in gross violation of the petitioner's right as guaranteed under Articles 10, 27, 28, 47, 50 and 236 of *the Constitution*.
- e. The petitioner be paid his salary and accompanying benefits from the month of August, 2023 being Kshs.199,616.00 x 15 months as at December 2024 making Kshs.2,994,240.00 (less PAYE) and thereafter to continue working and earning per terms of service unless lawfully separated.
- f. The amount in (e) above be paid by 01.03.2025 failing interest be paid thereon at Court rates from the date of this judgment until full payment.
- g. The respondents to jointly or severally pay the costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER, 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

