



REPUBLIC OF KENYA



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**Arithi v County Secretary, County Government of Meru & 3 others (Employment and Labour Relations Petition E004 of 2022) [2023] KEELRC 53 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 53 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**  
**EMPLOYMENT AND LABOUR RELATIONS PETITION E004 OF 2022**  
**ON MAKAU, J**  
**JANUARY 20, 2023**

**BETWEEN**

**LAWRENCE KIAUTHA ARITHI ..... PETITIONER**

**AND**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU .... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR, COUNTY GOVERNMENT OF MERU ..... 2<sup>ND</sup> RESPONDENT**

**MERU COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MERU ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner was employed by the respondents as the County Executive Committee Member (CECM) in charge of the Department of Legal Affairs and Public Service Management from the year 2017. Upon coming into force of the Office of the County Attorney Act the petitioner was appointed the County Attorney for 6 years running from December 2020 to December 2027. However on November 15, 2022, he received a letter dated November 10, 2022 purportedly terminating his services.
2. He now brings this petition alleging that his rights as an employee were infringed by the said termination letter and seeks the following reliefs:
  1. A declaration that the 1<sup>st</sup> Respondent's Notice dated November 10, 2022 dismissing the petitioner from employment infringed the petitioner's fundamental rights and the same is illegal, null and void an initio for being in contravention of Articles 25 (c), 28, 31, 41, 47, 48, 50, 10, 73, 232 and 236 of the *Constitution* of Kenya, 2010.



2. An order for Judicial Review quashing and/or setting aside the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to dismiss the Petitioner from employment as contained in the letter dated November 10, 2022 and any other consequential subsequent actions emanating there from.
  3. An order of prohibition and injunction to issue restraining the Respondents by themselves their servants, employees, agents or anyone acting on their behalf from terminating the petitioner from employment based on the same allegations contained in the letter dated November 10, 2022.
  4. An order directing the Respondents to unconditionally reinstate the petitioner back to his employment as a County Solicitor.
  5. General damages, punitive and exemplary damages for dismissal for breach of the petitioner's rights guaranteed under Articles 25 (c), 28, 31, 41, 47, 48, and 50 of the Constitution of Kenya, 2010.
  6. Costs of the Petition and any other relief that the Honourable Court may deem fit and just to meet the ends of justice.
3. The respondents have opposed the petition vide the Replying Affidavit sworn on December 1, 2022 by Mr Joseph Rufus Miriti Mwerera, who is the first respondent. In brief the respondents aver that the dispute herein is mere employment case which does not meet the threshold of constitutional matter.
  4. Further, the respondents aver that the appointment of the petitioner as the County Attorney was absurd and an illegality first because it gave the petitioner two jobs contrary to section 35(6) of the County Government Act and section 34 (3) of the Public Service Act. Secondly, because the appointment went beyond the Gubernatorial term contrary to section 42 (1) of the County Government Act. Thirdly, the appointment was not done in accordance with the procedure set by the law which required nomination followed by approval by the County Assembly before the appointment. Fourthly, the County Attorney being an ex-officio of the County Executive Committee, the petitioner who was already an CECM could not validly become the county Attorney without first resigning from the position of CECM. Accordingly, the respondents are in denial that the petitioner was an acting CECM.
  5. Finally the respondents aver that the petitioner was paid all his benefits on time and therefor the letter dated November 10, 2022 was just a polite reminder that his tour of duty had ended.

### **Submissions**

6. The petitioner's case was argued by Mr Maranya Advocate who submitted that the petitioner was employed by the 4<sup>th</sup> Respondent as CECM vide letter dated September 7, 2017 but in December 2020 he was appointed the County Attorney for 6 years upon coming into force of the office of the County Attorney Act. He was issued with appointment letter and changed office, duties, salary, supervisor and staff but also continued to act as CECM.
7. On November 15, 2022 the petitioner was served with the letter dated November 10, 2022 notifying him that his contract had lapsed. The letter cited the decision in the case of Commission for Human Rights and Justice v Michelle Bibi Fondo & 2 others (2021) eKLR where Ongaya J ruled that the tenure of office of a County Attorney is pegged on that of the Governor's term.
8. It was submitted that the petitioner was never accorded any hearing before his contract was terminated. It was argued that the termination should be quashed because it is unconstitutional and unjudicious.



- Further, the termination was signed by the 1<sup>st</sup> respondent without the legal mandate and therefore it was ultra vires.
9. It was submitted that the petitioner has not been accused of integrity or poor performance and even if there was such accusation then prior hearing would be mandatory. The court was therefore urged to protect the petitioner's rights that accrue to him by virtue of being human.
  10. It was further argued that the Replying Affidavit did not mention the Michelle Bibi Fondo case or the issues of law under Article 47 of the Constitution yet the termination of the petitioner's contract was based on that court decision.
  11. Besides, it was submitted that in relying on the Michelle Bibi Fondo case, the respondents herein never considered the fact that the decision of Ongaya J was stayed by Manani J on November 16, 2021.
  12. Mr Kimaita learned counsel argued the respondent's case and relied on the Replying Affidavit sworn on December 1, 2022. He submitted that the petition falls short of the threshold set out by *Anarita Karimi Njeru v Republic (1976-1980) eKLR*. He submitted that the petitioner has not given particulars of the allegation of violations or the third parties allegedly involved in his removal from office.
  13. As regards the merits of the case, it was submitted that the appointment of the petitioner by the Governor as CECM on September 7, 2017 is not in dispute. The respondent also contend that the petitioner served through his full term as CECM since the letter appointing him county Attorney stated that he would continue serving as CECM.
  14. It was submitted that section 35(6) of the County Government Act bars a CECM from holding any other office. It was submitted that the petitioner has not adduced evidence to prove that he was appointed CECM in acting capacity. Further it was submitted that section 35 of the said Act does not contemplate a situation where the County Attorney an ex-officio can act as a CECM.
  15. As regards the procedure of appointment, it was submitted that section 5 (1) of the Office of County Attorney Act provides that a County Attorney shall be appointed by the Governor with approval of the County Assembly. However in this case such procedure was never followed. It was contended that after the nomination of the petitioner as the County Attorney, the Governor should have subjected him to vetting by the County Assembly to ascertain his suitability to serve in that position.
  16. It was further submitted that the petitioner was never employee of the 3<sup>rd</sup> respondent but rather served as CECM until his contract lapsed. It was contended that the letter dated November 10, 2022 was not a termination letter but a polite reminder that his term of service had lapsed as per section 42 of the County Government Act.
  17. The court was urged not to condone illegality because it is admitted that the petitioner was appointed CECM. Reliance was placed on the case of *Nicholas Rono v County Secretary County Government of Bomet & 3 others (2020) eKLR* where recruitment of a County Public Service Board member was nullified and all the payment received surcharged since the proper procedure was not followed in the recruitment.
  18. Further reliance was placed on the case of *Susan Wangari Mburu v Eldoret Water & Sanitation Co Ltd & Another (2021) eKLR* where the court held that public good in a matter outweighs individual interest. In the instance case it was argued that the public good is that a County Attorney must be vetted before appointment and a CECM cannot hold two offices.



19. Finally, it was argued that the petitioner should not get any reliefs from the court because he has lied under oath that he was appointed as CECM on acting capacity yet the appointment letter clearly appointed him to the substantive position.
20. In his rejoinder, Mr Maranya Advocate submitted that the petition meets the competence threshold enunciated by the court in the Anarita Karimi Njeru case because the provision violated have been set out. It was submitted that the respondents have not addressed the issued that the petitioner was not accorded hearing before termination.
21. As regards vetting before appointment, it was submitted that the petitioner did not require a second vetting since he was vetted by the county Assembly before being appointed as the Legal Affairs CECM. It was further submitted that the respondents have not shown that the petitioner was paid twice for allegedly holding two offices.
22. It was admitted that the office of County Attorney is in the County Public Service and therefore under the authority of County Public Service Board. Accordingly it was submitted that only the said Board can alter or terminate the contract for the County Attorney and not the 1<sup>st</sup> Respondent. Consequently, it was argued that the letter reminding the petitioner about the exit provision of the law came too late and it was malicious and unconstitutional.

### **Analysis and Determination**

23. The issues for determination are:
  - a. Whether the petition meets competence threshold of a constitutional petition.
  - b. Whether the appointment of the petitioner as county Attorney complied with the statutory procedure.
  - c. Whether the petitioner held two substantive position from December 2020.
  - d. If the answer to (c) above is in the affirmative, whether the appointment of petitioner as County Attorney was valid.
  - e. Whether the letter dated November 10, 2022 violated the petitioner's fundamental rights and freedoms.
  - f. Whether the reliefs sought are merited.

### **Competence threshold**

24. The respondents fault the petition for alleged lack of particulars of the provisions of the Constitution violated. I have carefully considered the petition, and I am certain that the petitioner has pleaded with some degree of clarity the provisions alleged to have been infringed. The petitioner has also pleaded with some degree of clarity some particulars of the manner in which his fundamental rights and freedoms have allegedly been violated. For example allegation that he was not accorded any hearing before the impugned letter dated November 10, 2022 was written to him. I believe that the court should seek to sustain a petition rather than strike it out if the petition disclosed some iota of particulars of the constitutional provision alleged to have been infringed and some particulars of the manner in which the infringement is alleged to have manifested.



## **Procedure of Appointment as County Attorney**

25. The respondents contend that the procedure for appointment of a County Attorney set out in Section 5 of the Office of the County Attorney Act was not followed since the petitioner was never vetted by the County Assembly after nomination by the Governor. The petitioner has however argued that there was no need for a second vetting because he had already been vetted in 2017 when he was nominated as the CECM in charge of Legal Affairs.
26. I have considered the above contentions. Section 5(1) of the Office of the County Attorney Act provides that:-
- ' The County Attorney shall be appointed by the Governor with the approval of the County Assembly.'
27. Section 31 of the Act is the transition provision and stated that;
- (1) Upon the coming into effect of this Act, members of staff employed by the County Executive to perform the functions of the office under this Act shall;
- a. Be deemed to be members of staff of the office in their respective capacities;
  - b.
  - c. The County Public Service Board, where a person employed by the County Executive to perform the functions of the County Attorney, County Solicitor or County Legal Counsel does not meet the qualifications specified in this Act, redeploy such person to the highest position that is vacant and to which such person qualifies for appointment.'

28. In this case there is no evidence that the petitioner did not possess the qualifications set out in the Act. Once it is established that a person possessed the qualification, the Parliament did not contemplate there to be afresh vetting by the County Assembly during the transition. Such vetting is only intended for fresh recruits after the enactment of the statute.

29. Even if vetting was required, I would find the same unnecessary in the circumstances of this case because the petitioner was vetted by the County Assembly in 2017 when he was nominated as the CECM in charge of Legal Affairs.

## **Two substantive positions**

30. The respondents contend that the petitioner held two substantive offices contrary to the law being that of CECM and the County Attorney. Section 35(6) of the County Government Act and section 34(3) of the Public Service Act were cited to support the above submissions.
31. However, the correct provision of the County Government Act is section 35(4) which provides that;
- ' A member of the County Executive shall not hold any other state or public office.'
32. A County Attorney has equal status and rank with a member of County Executive Committee and even the procedure of appointment is the same save for those affected by the transition provision under section 31 of the office of County Attorney Act. Section 6(2) of the Act provides that;
- ' The County Attorney shall have the status and rank of a member of the County executive committee.'



33. The above two provisions purposively interpreted mean that a person serving as a County Attorney or CECM cannot hold any other State or Public service office. Doing so would be contrary to the law and the principles of good governance and the principles of public service as contemplated by the Constitution of Kenya, 2010.

34. The letter appointing the petitioner as the County Attorney is dated December 15, 2020 and it states as follows in part;

' I hereby appoint you to the office of the County Attorney for a period of 6 years from the date hereof. You shall also continue to serve as the CEC member in the Department of Public Service Management and Administration.

As a County Executive Member, you will assist and advise the Governor and you will also be collectively responsible to the County Assembly of Meru for all decisions taken by County Government and done under the authority of the Governor, the Deputy Governor or any other County Executive Committee member in execution of his or her office as provided for in Article 183 of the Constitution of Kenya and Section 39 of the County Government Act (cap 265), and the Office of the County Attorney Act 2020.

Pursuant to Article 179(6) of the Constitution, you shall be accountable to the Governor for the performance of your functions and exercise of your powers.

Further as a County Executive Committee Member, you are bound by the principle of Collective Responsibility which means that you share with your County Executive Committee collective responsibility for the policy and administration of County Government. You are therefore not at liberty to criticize or differ from the Government outside immediate Government circles, neither are you at liberty to announce major policy decisions without having put the matter in question before the County Executive Committee.'

35. The above letter expressly appoints the petitioner to two positions, first as a state officer (CEC Member) in the Department of Public Service Management and Administration, and second as Public Officer (County Attorney). The petitioner accepted the appointment in the two positions by signing at the bottom of the letter.

### **Validity of Appointment as County Attorney**

36. The court takes judicial notice that both the Governor and the petitioner are lawyers who presumably were conversant with the law surrounding the appointments under both the County Government Act and the Office of the County Attorney Act. By the letter of appointment dated December 15, 2020, the said two lawyers deliberately blundered for reasons best known to them. What I would infer from the letter is that there was some inertia or some strange force that held the two together to an extent of not wanting to part ways despite the existence of clear provisions of the law.

37. The appointment was pursuant to section 31 of the office of the County Attorney which provides for the transition from staff of the County Executive to staff of the Office of the County Attorney. The said provision never contemplated a situation where the former staff of the County Executive would continue holding the positions held in the County Executive after transitioning to the Public Service under the County Service Public Board.

38. In this case there is evidence that the petitioner continued serving as CEC Member in charge of Public Service Management and Administration Department. He was part and parcel of the County



Executive Committee bound by the principle of Collective Responsibility in respect of the decisions of the Executive Committee. That state of affairs was contrary to the law and therefore the second appointment of the petitioner as a County Attorney was a nullity.

39. The roles in the office of the County Attorney are not compatible with those of the CEC Member Department of Public Service Management and Administration. Besides, he was supposed to remain an ex-officio member of the County Executive Committee with no vote in the decision making. He could not also be bound by the principle of Collective Responsibility as purported by the appointment letter.

### **Violation of Rights**

40. The petitioner alleges that the letter dated November 10, 2022 came to him as a surprise and it violated his fundamental rights and freedoms because he was not accorded any hearing and he was treated differently from the other staff who were appointed in like manner. The respondents maintain that the impugned letter was not a termination letter but just a polite reminder that his tour of duty had ended with coming into office a new government.
41. The letter clearly notified the petitioner that his appointment to the position of County Attorney and CEC Member department of Public Service Management and Administration was not tenable and it ceased with the exit of the appointing Governor by operation of section 42(1) of the County Government Act. The letter then informed him to hand over immediately to the new CEC Member in charge of Legal Affairs, Public Service Management and Administration who had assumed office on November 2, 2022. The letter also directed him to clear and avail several documents needed for processing of his gratuity by the County Pension Fund (CPF).
42. Having considered the said letter and my finding above that the petitioner never transitioned to the office of the County Attorney but remained a CEC Member Public Service Management and Administration, I must hold that the letter dated November 10, 2022 never violated any constitutional rights of the petitioner as alleged.
43. The letter was not a termination letter but a notice that the term of office of the petitioner as CEC Member Legal Affairs, Public Service Management and Administration had lapsed by operation of the law after a new Governor was elected and appointed a new CEC Member Legal Affairs, Public Service Management and Administration on November 2, 2022.
44. It would be a big mischief for a person to hold two public offices but freeze one of them conveniently until the term of the other position lapses. Such officer cannot legitimately rush to the court seeking protection from consequences of a choice he made deliberately by accepting a public office on top of a state office contrary to the law.
45. Without prejudice to the foregoing, even if the appointment of the petitioner as County Attorney was valid, I would agree with Ongaya J in the case of Commission for Human Rights and Justice v Michelle Bibi Fondo & 2 others (2021) eKLR that the term office of a County Attorney should be commensurate with that of the appointing Governor. I say so because the said Attorney is equal in status and rank to a CEC Member and the procedure for appointment are the same. Accordingly the term of office for a County Attorney ends with that of the appointing Governor like the term of a CEC member.
46. The said position is also contemplated in the case of Attorney General in the National Government. The foregoing view would reduce cases of mischief in appointments in the public service. I therefore hold that whenever a person is offered the job of a County Attorney, he should always accept it fully



alert to the fact that his term depends on the term of the appointing Governor or the pleasure of the new Governor who is elected to office before the six year term lapses.

### **Reliefs**

47. In view of the findings and observations made herein above, the reliefs sought by the petitioner are not tenable as the alleged violations have not been substantiated. Besides, the petitioner's second appointment was not done in accordance with the law and was a nullity. Consequently, I dismiss the whole petition with costs for lack of merits.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF JANUARY, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties 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**

*5 MERU ELRC PET NO. E004 OF 2022*

