



**Migwi & another v County Assembly of Kirinyaga & another (Employment and Labour Relations Petition 16 of 2020) [2023] KEELRC 52 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 52 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**EMPLOYMENT AND LABOUR RELATIONS PETITION 16 OF 2020**  
**ON MAKAU, J**  
**JANUARY 20, 2023**

**BETWEEN**

**MOSES MAINA MIGWI ..... 1<sup>ST</sup> PETITIONER**

**COUNTY GOVERNMENT OF KIRINYAGA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE COUNTY ASSEMBLY OF KIRINYAGA ..... 1<sup>ST</sup> RESPONDENT**

**SPEAKER OF THE COUNTY ASSEMBLY OF KIRINYAGA .. 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The main issue in dispute in this petition is whether the resolution passed by the County Assembly of Kirinyaga on 2<sup>nd</sup> June 2020 adopting recommendations of sectoral committee on Finance Economic, Planning and ICT that they had no confidence with 1<sup>st</sup> Petitioner herein had the effect of his summary dismissal or removal from office as County Executive Committee Mamber. The petitioners have brought this petition alleging that the said resolution amounted to a termination of 1<sup>st</sup> petitioner's appointment without following fair procedure and it has violated his fundamental rights and freedoms. The petition seeks the following reliefs:

1. A declaration that the resolution passed by the County Assembly of Kirinyaga on 2<sup>nd</sup> June 2020 adopting the recommendations of the report of the sectoral committee on Finance Economic Planning and ICT to terminate the appointment of the 1<sup>st</sup> Petitioner herein, Moses Migwi Maina, as County Executive Committee Member (CECM) –Finance Economic Planning and ICT, Kirinyaga County Government is unconstitutional, illegal, null and void.
2. A declaration that any arbitrary suspension, expulsion and or removal of the 1<sup>st</sup> petitioner from his position as County Executive Committee



Member (CECM)- Finance Economic Planning and ICT, Kirinyaga County Government without considerations of due process and all the tenets of natural justice is a violation of Article 27 and 47 of the *Constitution*, therefore, null and void an initio.

3. An order stopping, halting and/or staying the implementation of the resolution adopted by the County Assembly of Kirinyaga on 2<sup>nd</sup> June 2020 terminating the appointment of Moses Migwi Maina as the County Executive Committee Member (CECM)- Finance Economic Planning, Kirinyaga County Government and further restraining the Respondents from appointing and/or advertising and/or shortlisting any such persons to the said position as a replacement of Moses Migwi Maina.
4. A declaration that the actions of the Respondents of seeking to terminate the 1<sup>st</sup> Petitioner's employment while he is on duty and before his contract terms expire is malicious, illegal, unfair, unlawful and therefore null and void.
5. Any other order that this Honourable court may deem fit and just to grant to ensure that rule of law is upheld by the Respondents in exercise of its legislative function.
6. The costs of the Petition.

### **Petitioners' Case**

2. The petitioners avers that on an unspecified date the sectoral committee of Finance Economic planning and ICT chaired by Hon.Peter Njomo, presented a report to 1<sup>st</sup> Respondent recommending for resolution that the County Assembly lacks confidence in the 1<sup>st</sup> petitioner CEC member in charge of Finance Economic Planning and ICT. The basis for the proposed resolution was that the 1<sup>st</sup> petitioner had blatantly shown contempt of the Assembly resolutions; and that he has no respect for the law, namely, the *Constitution* of Kenya, *Public Finance Management Act* 2012 and *County Governments Act* 2012 among others.
3. The petitioners aver that the 1<sup>st</sup> respondent adopted the proposed resolution which according to the petitioners had the effect of summarily dismissing the 1<sup>st</sup> petitioner from employment without following the due process of law since he was not accorded fair hearing by the 1<sup>st</sup> respondent. The petitioners aver that the 1<sup>st</sup> petitioner's right to fair administrative action, right to fair hearing and right to equal protection of the law were violated. Further the right to legitimate expectation that he would only be removed from office in accordance with the law and the dictates of the constitution was also violated.
4. The petitioners aver that the impugned resolution was unlawful because it was passed without according the 1<sup>st</sup> petitioner a fair hearing as envisaged by the law. Therefore the petitioners urged the court to intervene in the process to arrest the illegality and violations of the constitution and the law with respect to the impugned resolution which had the effect of summarily dismissing the 1<sup>st</sup> petitioner from employment without following the due process of law. Further it was urged that the impugned resolution amounts to exercise of power contrary the National values and principles under Article 10 of the *Constitution* and values and principles of Public Service under Article 232 of the *Constitution*.
5. The petitioners further aver that the impugned resolution breached Article 236 of the *Constitution* which provide that a public officer shall not be dismissed or removed from office without being subjected to the due process of law. They aver that the respondents breached section 41, 43, 44 and



- 45 of the *Employment Act* by passing a resolution that will terminate the 1<sup>st</sup> petitioner's employment without a valid reason and without following the laid down procedure.
6. The petitioners also aver that the petitioners have violated section 40(4) of the *County Governments Act* since the sectoral committee did not invite the 1st petitioner to appear before it before concluding the investigation. According to the petitioners, the said default amounted to violation of Article 25, 27, 28, 47 and 50(1) and (2) (g) of the *Constitution*, and section 4 of the *Fair Administrative Actions Act* (FAA Act).
  7. The petitioner further aver that the sectoral committee was not properly constituted as provided under section 40(3) (a) of the *County Government Act*. The said provision contemplates a select committee of five members but the impugned resolution was recommended by a sectoral committee of 9 members of which only 6 signed the recommendation.
  8. Further, the petitioners aver that there is no evidence that the sectoral committee tabled its report within 10 days as required by section 40 (3) (b) of the *County Government Act*. In view of the alleged procedural lapses, the petitioners reiterate that the respondents exercised their powers contrary to, and in violation of the constitutional values and principles under Article 10 of the constitution, and the values and principles of public service under Article 232, with emphasis on Article 236 of the *Constitution*. They further allege that the said exercise of power has violated section 9(2), 45(2) and 59 of the *County Government Act* by interfering with the executive functions of the County Government and delivery of services.
  9. The petitioners view the impugned resolution as arbitrary termination of the 1<sup>st</sup> petitioner's employment without following the procedure envisaged under the law and aver that the 1<sup>st</sup> respondent has overstepped its mandate in recommending for the removal or otherwise of the 1<sup>st</sup> petitioner from a public officer.

### **Respondents' Case**

10. The respondents have filed Grounds of opposition and a Replying Affidavit sworn by the 2<sup>nd</sup> respondent, Antony Waweru Gathumbi to oppose the petition. In brief the respondent aver that they are constitutionally mandated pursuant to Article 185 (3) of the *Constitution* to exercise oversight role over the County Executive committee and other County Executive organs. Further they are enabled by Article 195 of the Constitution read with section 8 of the *County Governments Act* to summon the 1<sup>st</sup> Petitioner to attend and appear before a committee of the 1<sup>st</sup> respondent, and in their attendance, answer any question relating to the CEC members responsibilities.
11. The respondents further aver that they are enabled by section 22 of the *County Assembly Powers and Privileges Act* to make a resolution constituting a ground for removal from office of the County Public Service in the event that an officer has failed to comply with the provisions of the said section 22 of the Act. The respondent aver that the exercise of the said constitutional and statutory mandate cannot be termed as termination of the 1<sup>st</sup> petitioner's employment since the respondents are not his employing entity.
12. The respondents aver that removal of the 1<sup>st</sup> petitioner from office by them can only be done pursuant to section 40 of the *County Government Act* which has not yet been invoked. Under the said provision a motion has to be filed proposing removal/dismissal of the 1<sup>st</sup> petitioner supported by one-third of the members of the Assembly. Consequently, the respondent aver that the petition herein is premature and untimely since the impugned resolution was passed under section 22 of the *County Assemblies*



*Powers and Privileges Act* in which Case the discretion is upon the County Executive to remove the 1<sup>st</sup> petitioner from office.

13. The Respondents further aver that in exercise of their constitutional mandate to oversee the County Executive it has the power to summon any person to answer questions, be examined and cross examined as well as be compelled to produce documents. They aver that the 1<sup>st</sup> petitioner was served with summons on 27<sup>th</sup> May 2020, to appear before the 1<sup>st</sup> respondent's sectoral committee on Finance Economic Planning, Marketing and ICT to respond to inter alia; unimplemented resolution in contravention of section 39(2) of the County Government Act, undertakings given by the executive and whether legislation given by the 1<sup>st</sup> respondent had been operationalized and the extent of the operationalization in his docket.
14. Specifically the committee sought the following information but the 1<sup>st</sup> petitioner failed to provide;
  - a) Information sought by the committee letter CAK/CEC/VOL III/121 dated 25<sup>th</sup> February 2020.
  - b) Request by the committee for a comprehensive list of all pending bills made via a letter referenced CAK/CEC/VOL.III dated 8<sup>th</sup> April 2020.
  - c) Failure to avail information requested through a letter on payment to KRB roads dated 17<sup>th</sup> March 2020.
  - d) Request to provide information regarding employees KRA deductions amounting to Kshs.58,637,117 that had already been deducted but the 1<sup>st</sup> petitioner had failed to provide.
  - e) The request to provide the committee with all the paid and unpaid pending bills despite numerous efforts from the committee.
  - f) Provision of adjustments in supplementary budget 2 for 2019/2020.
15. The respondent confirm that the 1<sup>st</sup> Petitioner appeared before the committee but neither gave a substantive response nor submissions accompanied by documents, reports, records and/or information as required. As a result the committee found him to be in contempt of the legislature because under section 22 of the *County Assemblies Powers and Privileges Act* he was required to produce before the Assembly or its committee any document, information, paper, book or record as sought.
16. The respondents aver that under section 22 of the *County Assemblies Powers and Privileges Act*, it is an offence for any public officer to fails to produce information, document or record as required under the section and further it makes it a mandatory requirement for the 1<sup>st</sup> respondent to pass a resolution constituting a ground for removal of the public officer who failed to comply with the section.
17. The respondent maintained that the impugned resolution was arrived at by the 1<sup>st</sup> respondent while exercising its oversight mandate and did not recommend for removal of the 1<sup>st</sup> petitioner from office. Consequently, they aver that this court has no jurisdiction to determine the petition because it is about exercise of constitutional mandate of overseeing the executive and its organs, and not labour dispute as the discretion to dismiss the 1<sup>st</sup> petitioner after the resolution was on the employing entity.
18. Finally the respondents aver that they exercised their mandate guided by the national values and principles of good governance, and values and principles of public service as per Article 10 and 232 of the *Constitution* in seeking to have the 1<sup>st</sup> petitioner guarantee that financial management is responsibly exercised as per Article 201(c) of the *Constitution*.



## Analysis and determination

19. Having considered the pleadings and submissions on record, the following issues commend them for determination;-
- a) Whether the court has jurisdiction to determine the petition.
  - b) Whether fundamental rights and freedoms were violated by the resolution made against the 1<sup>st</sup> petitioner by the 1<sup>st</sup> respondent on 2<sup>nd</sup> June 2020.
  - c) Whether the petitioners are entitled to the reliefs sought.

## Jurisdiction

20. The suit before the court alleges that the 1<sup>st</sup> petitioner's employment has been unlawfully terminated or is about to be terminated if a resolution by the respondents is implemented. That averment beckons this court to look into the dispute and make a determination pursuant to Article 162 (2) (a) and 165 (5) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act*. Consequently this court is not convinced that it should decline the invitation to determine the petition because it has the necessary jurisdiction to inquire into the allegation of threat of removal from office without following the due process of law. Further it is now well settled that this court has jurisdiction to interpret the constitution in employment and labour relations disputes.

## Violation of Fundamental Rights and Freedoms

21. The petitioners case is that the 1<sup>st</sup> petitioner was condemned unheard when the impugned resolution was passed. They allege that the resolution was proposed by a committee that was not properly constituted and the report of the committee was not presented to the County Assembly within 10 days.
22. The respondent have denied any wrong doing and maintained that the proposal and the impugned resolution against the 1<sup>st</sup> petitioner emanated from the sectoral committee in charge of Finance Economic, Planning, Marketing and ICT in exercise of oversight mandate as donated by Article 195 of the Constitution and section 39 (2) of the *County Government Act*.
23. I have carefully considered the facts of the case as set out by the parties and I am clear in my mind that I am not dealing with a case of removal of a CEC member from office under the provisions of section 40 of the *County Government Act*. The matter before the court is a resolution made by the 1<sup>st</sup> respondent against the 1<sup>st</sup> petitioner pursuant to section 22 of the *County Assemblies Powers and Privileges Act* which relate to the 1<sup>st</sup> respondents constitutional mandate of overseeing the county executive and its organs.
24. There is no dispute that the county Assembly has the said constitutional mandate of overseeing the County executive and its organs. It has also not been denied that the County Assembly and its committees have the power to summon CEC member to answer to questions and give information.
25. Section 39 (2) of the *County Government Act* provides that;
- “ A committee of the County Assembly may require a member of the County Executive committee to
- a. attend or appear before the committee; and
  - b. answer any question relating to the member's responsibilities.”



26. The foregoing is in line with the oversight mandate dated by Article 195 of the Constitution as follows;
- “(1) a County Assembly or any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information.
- (2).....”
27. Section 22 of the County Assemblies powers and Privileges Act then provides that;
- “(1) No public office shall refuse to produce before a county assembly or a committee, any paper, book, record or document.
- (2) Any County public officer who contravenes subsection (1). Commits an offence.
- (3) Where a county assembly passes a resolution that a county public officer has contravened subsection (1), the resolution of the county Assembly shall constitute a ground for removal from office of the county office in accordance with the constitution or any applicable law.”
28. The foregoing provisions of the constitution and statutes expressly provide for the oversight mandate of the county assembly either directly or through its committees. They expressly provide that the county assembly or its committees have the power to summon any county public officer to appear before it to give information concerning his/her responsibilities. Finally section 22 of the County Assemblies Powers and Privileges Act provide that failure to comply with the provisions of the same section is an offence and a resolution made against the officer in that regard constitutes a ground for removal from office.
29. There is no denial that the 1<sup>st</sup> petitioner was summoned to appear before the Sectoral committee in charge of Finance Economic Planning, Marketing and ICT on 27<sup>th</sup> May 2020 to provide information which had earlier been requested by the committee via several letters, and which the 1<sup>st</sup> petitioner had failed to avail. There is no denial that the 1<sup>st</sup> petitioner attended but failed to produce the required information and documents and did not give satisfactory explanation for the default.
30. As a result of the foregoing matters, the sectoral committee prepared a report recommending to the County Assembly to pass a resolution of lack of confidence in the 1<sup>st</sup> petitioner as CEC member in charge of Finance, Economic Planning, Marketing and ICT. The proposed resolution was passed. The resolution read as follows;
- “That, the Assembly resolves it lacks confidence in Mr.Moses Migwi Maina, the CEC member in charge of Finance, Economic Planning and ICT sector.”
31. The above resolution was passed according to the law and it did not recommend for removal of the 1<sup>st</sup> petitioner from office. It only formed a ground for removal from office at the discretion of the Governor upon compliance with the due process of law. It also formed a ground for removal through the procedure set out under section 40 of the County Government Act which provide for investigation by a select committee and resolution by the County Assembly.
32. The petition as pleaded, wrongly suggests that the impugned resolution was made under section 40 of the County Government Act. It’s obvious that the petitioners are misconceived or they are deliberately on mission to mislead the court. The court finds that the petition is premature to the extent that it



purports that the 1<sup>st</sup> petitioner was removed from office or a resolution to remove him from the office was passed pursuant to section 40 of the County Government Act.

33. Likewise, the court finds that the allegation that the sectoral committee was illegally and improperly constituted was incorrect. The said allegation springs from the said misconception that the impugned resolution was a recommendation for removal from office under section 40 of the County Government Act. The said allegation is therefore dismissed as being not well founded.
34. In view of the foregoing findings and observations that the impugned resolution was anchored on section 22 of the County Assemblies Powers and Privileges Act, and that the 1<sup>st</sup> Petitioner was summoned to appear to provide required information and documents but failed to comply, the court holds that the due process of law was followed in passing the impugned resolution and the reason for the said resolution was valid.
35. The 1<sup>st</sup> petitioner committed an offence under section 22 of the Act by failing to avail the required information and records concerning his responsibilities as CEC Finance, Economic Planning, Marketing and ICT department. Consequently, the alleged violation of the 1<sup>st</sup> petitioner's fundamental rights and freedoms as guaranteed under Article 27, 28, 41, 47, 50 and 236 of the Constitution have not been substantiated by evidence.

### Reliefs

36. In view of the finding and observations made herein above, it must be clear that the Court does not see any merits in the petition herein. Consequently, the reliefs sought are not merited and the petition stands dismissed with no costs since parties involved are organs of the same government and they all used Government funds to finance the suit. This decision shall apply to Petition No.15 of 2020 filed by John Mukami Ngangu and County Government of Kirinyaga versus the County Assembly of Kirinyaga and Speaker of the County Assembly of Kirinyaga and Petition No.17 of 2020 filed by Joe Ngatia Muriuki and County Government of Kirinyaga versus the County Assembly of Kirinyaga and Speaker of the County Assembly of Kirinyaga whose facts are the same as in this suit.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 20<sup>TH</sup> 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**

