



**Orre v Office of the Governor, County Government of Marsabit & another
(Petition 19 of 2020) [2023] KEELRC 335 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 335 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION 19 OF 2020
ON MAKAU, J
FEBRUARY 9, 2023**

BETWEEN

JAMES ORRE PETITIONER

AND

**OFFICE OF THE GOVERNOR, COUNTY GOVERNMENT OF
MARSABIT 1ST RESPONDENT**

MARSABIT COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The petitioner was employed by the Marsabit County Public Service Board as the Chief Officer Water Services in the County Government of Marsabit vide Appointment Letter dated 5th December, 2017. He was responsible to the County Executive Member for Water, Environment and Natural Resources in respect of his functions.
2. By a letter dated 17th April 2020, the 1st respondent required the petitioner to show cause in writing why disciplinary action should not be taken against him on account of his alleged poor performance in line of his duties and gross misconduct by disobeying a lawful and proper command issued by the 1st respondent. The letter came as a surprise to the petitioner because it was not done by his direct reporting line, which was the County Executive Committee Member (CECM) for Water, Environment and Natural Resources.
3. The petitioner responded to the show cause letter on 21st April 2020 giving a comprehensive explanation on all the issues raised in the show cause letter and maintained his innocence while pointing an accusing finger to other offices, and Covid-19 Pandemic. The 1st respondent was not satisfied and by a letter dated 22nd July, 2020 dismissed the petitioner from services and offered to pay him one month salary in lieu of notice.
4. The petitioner was aggrieved and brought this petition seeking the following reliefs:-



- a. That a declaration do issue that the purported dismissal of the Petitioner from employment vide the letter dated 22nd July 2020 as well as the entire process leading up to the same, was in breach of the law and the constitutional principles enshrined in Articles 41 and 47(1) and (2) of *the Constitution*, as read together with Section 45 and 59 (1) and (c) of the County Government Act and Section 44 of the *Employment Act*, and therefore void ab initio;
 - b. That an order of certiorari do issue to bring into this court for purposes of being quashed, the termination letter dated 22nd July 2020, as well as the entire process and proceedings leading up to the same, for being in violation of Section 45 of the County Government Act and Section 44 of the *Employment Act* as read together with the letter and spirit of Articles 41 and 47(1) and (2) of *the Constitution*.
 - c. That general damages do issue for violation of the petitioners' constitutional rights under Articles 41 and 47 of *the Constitution*.
 - d. That Costs of the Petition be awarded to the Petitioner.
5. The petitioner also filed a Notice of Motion seeking conservatory orders, and the same was granted by Nzioki J suspending implementation of the letter dated 22nd July 2020 and restraining the respondents from recruiting any person to fill the vacancy caused by the impugned dismissal of the petitioner. The judge confirmed the orders on 22nd September 2020.
 6. The hearing of the petition was delayed when the respondents mounted a challenge on the jurisdiction of this court over the petition. The objection was however dismissed by Marete J vide a ruling rendered on 23rd March 2021. Thereafter parties attempted amicable settlement but it failed and the 1st respondent filed response to the petition on 12th January 2022.
 7. In brief the 1st respondent reiterates the contents in the show cause letter and accused the petitioner of poor performance of his duties contrary to the national values and principles of good governance under Article 73 of *the Constitution*, and willful disobedience and /or neglect to follow up on a memorandum from the Governor dated 7th January 2020 on procurement of goods and services by the County departments, which amounted to gross misconduct.
 8. The 1st respondent avers that the petitioner was accorded a hearing by being served with a show cause letter dated 17th April 2020 containing details of his poor performance and gross misconduct in carrying out his duties. The said mode of hearing according to the 1st respondent is sufficient under Article 41 and 47 of *the Constitution*.
 9. In view of the said offences by the petitioner coupled with the fact that an opportunity was given to him to show cause, the 1st respondent avers that the dismissal of the petitioner on 22nd July, 2020 was justified under Section 44 (3) and 44 (4) (c) and (e) of the *Employment Act*.
 10. The petition was canvassed by written submissions.

Submissions

11. The petitioner's case is two thronged, namely whether due process was followed; and whether the dismissal letter dated 22nd July, 2020 is unlawful. As regards the first issue, it was submitted that Section 51 of the *Interpretation and General Provisions Act* (IGPA) is not applicable where there are statutes and regulations on the issue of disciplinary controls and termination. It was therefore urged that in this case that a governor has no power under Section 45 of the County Government Act (CGA) to exercise



- disciplinary controls or to dismiss a member of County Public Service as that function is well taken care of by Section 59 of the CGA and the Human Resource Policies and Procedures Manual, 2016.
12. Accordingly it was submitted that the 1st respondent failed to follow the due process of law in dismissing the petitioner from public service and unlawfully purported to exercise disciplinary control and removal of a public officer from office. Reference was made to Affidavit sworn on 20th May, 2021 by the Chief Executive officer of the 2nd Respondent, one Guyo Malicha stating that the 2nd respondent was not aware of any process that led to the purported dismissal of the petitioner as the petitioner was never at any time before it for disciplinary process taken for his removal from office.
 13. In view of the foregoing submissions the court was urged to find that the dismissal of the claimant was illegal, null and void because the procedure provided in the law was not followed. For emphasis reliance was placed on the case of *Florence Khadenje Kbaguli v Governor, Vibiga County H.E Wilbur Otichilo & Another* (2017) eKLR, *Grace Kavinya Mulmi v Governor, Kitui County & 2 others* (2018)eKLR and *Kisumu County Public Service Board v Samuel Okuro & 7 Others* (2018) eKLR where the courts held that a governor has no power to dismiss an officer of the County Public Service including Chief Officers because the correct entity with that power is the County Public Service Board in a process that guarantees the public officer the right of appeal to the Public Service Commission under Section 77 of the County Government Act.
 14. The 1st respondent submitted on the following two issues:-
 - a. Whether the dismissal of the petitioner from employment as well as the entire process leading up to the same was in breach of the law.
 - b. Whether the 1st respondent acted in excess of his powers and in breach of any law.
 15. As regards the first issue, it was submitted that the petitioner acted in breach of his contract by failing to perform his duties and neglecting or disobeying directives given to him by the County Executive Committee with respect to a memorandum from the Governor titled Procurement of Goods and Services by County Departments. The said breach in the 1st respondent's view amounted to gross misconduct that justified summary dismissal of the petitioner under Section 44(2) of the *Employment Act*.
 16. In addition, it was submitted that the procedure followed to dismiss the petitioner was fair and in line with Section 41 of the *Employment Act* because the petition was accorded an opportunity to defend himself by being served with a show cause letter dated 17th April, 2020. The show cause letter explained to the petitioner the reason upon which dismissal was contemplated namely, poor performance of duty and gross misconducts. In the 1st respondent's view the procedure followed met the ingredients of the right to fair Labour practices and fair administrative action.
 17. As regards the second issue for determination, it was submitted that the County Government Act does not make provision for removal of a County Chief Officer from offices but only provides for the recruitment under Section 45 of the Act which gives the Governor the power to appoint, to justify the dismissal of the petitioner by the 1st respondent. Reliance was placed on Section 51 of the IGPA which in effect provides that the power to appoint given by a statute means power to remove from office unless a contrary intention appears.
 18. In the end the court was urged to dismiss the petition with costs on ground that the 1st respondent has established that the dismissal of the petitioner was fair and in accordance with the relevant laws.



Determination

19. Having carefully considered the pleadings, evidence and the rival submissions, there is no dispute that the petitioner was employed as County Chief Officer, Water Services Development by the County Government of Marsabit vide a letter of Appointment dated 5th December 2017. It is also common ground that the appointment was made by the 1st respondent and it was to last for 5 years up to “30th November, 2022 unless otherwise communicated by the authority.” There is also no denial that the 1st respondent dismissed the petitioner from service vide the letter dated 22nd July, 2020 for alleged poor performance and gross misconduct but offered a payment of one month salary in lieu of notice. The issues which commend themselves for determination are:-
- a. Whether the 1st respondent acted beyond his legal mandate by dismissing the petitioner.
 - b. Whether the dismissal of the petitioner was done without following the due process of law.
 - c. Whether the remedies sought are merited.

Whether the 1st respondent exceed his mandate

20. The petitioner’s case is that the power of a County Governor with respect to County Chief Officers’ contract is provided under Section 45 of the County Government Act, that is, to nominate persons to the office of County Chief Officer and forward them to the County Assembly for approval, and upon approval, the other power is to appoint the chief officer. Thereafter the chief officer is responsible to the Governor through the line CECM for all his function while the County Public Service Board is the sole independent entity that exercises disciplinary control over the chief officer under Section 59 of the County Government Act.
21. Courts in this country have dealt with similar disputes and affirmed that a Governor has no power to dismiss a County Chief Officer because doing so would be usurpation of the powers of the County Public Service Board. Further it would deny the officer the right of appeal to the Public Service Commission under Section 77 of the County Government Act.
22. One of the said cases, in *Kisumu County Public Service Board v Samuel Okuro & 7 Others* (2018) eKLR where the Court of Appeal held that:-

“We have come to the conclusion that the Governor initiated the removal of the respondents without following the appropriate mechanism. The respondents being County Public Officers, the Governor could not terminate their services without involving the County Board and the County Assembly. In sending the respondents on compulsory leave and terminating the respondent’s contract, the Governor usurped the role of the County Board. This denied the respondent their rights under Section 77 of the County Government Act that allows any County Public Officer that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the Public Service Commission. Further, the respondents’ Constitutional fundamental rights were violated.”

23. The above binding authority is on all fours with the instant petition and I fully follow the same in holding that the 1st respondent acted beyond his legal mandate by dismissing the petitioner vide the letter dated 22nd July, 2020. The allegation that his power to appoint under Section 45 includes power to dismiss by dint of Section 51 of the *Interpretation and General Provisions Act* is misconceived and therefore rejected because there is express provision of the Law and Regulations that provide for the forum and process for dismissing a County Chief Officer.



Procedure

24. The above analysis supports the finding that the procedure followed by the Governor in dismissing the petitioner was alien in the law. Section 45 of the Employment Act provides that:-
- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”
25. Again Section 41 of the Act provides that:-
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
26. The respondent did not have the mandate to dismiss the petitioner and the procedure adopted was illegal. As such the petitioner was denied a hearing which is very central to the right to fair labour practices, and fair administrative action. He was further denied his right of appeal as provided under Section 77 of the County Government Act.

Reliefs

27. Having found that the Governor had no legal mandate to dismiss the petitioner and that the due process of the law was not followed in dismissing him, I find and hold the petitioner is entitled to the reliefs sought in his petition. I gather support from Article 236 of the Constitution which provides that:-
- “ 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.”
28. Accordingly, I grant the prayers sought. First is the declaration that the purported dismissal of the Petitioner’s employment vide the letter dated 22nd July 2020 as well as the entire process leading up to the same, was in breach of the law and the constitutional principles enshrined in Articles 41 and



- 47(1) and (2) of *the Constitution*, as read together with Section 45 and 59 (1) and (c) of the County Government Act and section 45 of the *Employment Act*, and therefore void ab initio;
29. Second an order of certiorari is hereby issued to bring into this court for purposes of being quashed, the termination letter dated 22nd July 2020, as well as the entire process and proceedings leading up to the same, for being in violation of Section 45 of the County Government Act and Section 45 of the *Employment Act* as read together with the letter and spirit of Articles 41 and 47(1) and (2) of *the Constitution*.
30. Finally I award the petitioner general damages of Kshs.2,000,000.00 for violation of his rights to fair labour practices and fair administrative action under Article 41 and 47 of *the Constitution*. The award is made considering that he expected to work more than 2 years before expiry of his contract which did not have a termination clause. I gather support from the case of *Ol Pajeta Ranching Ltd v David Wanjau Muhoro* (2017) eKLR where the Court of Appeal awarded Kshs.7,500,000.00 as general damages for discrimination contrary to Section 5 of the *Employment Act*.
31. The award will be paid less statutory deductions but it will attract interest at court rate from the date hereof. The petitioner will also have costs of the suit plus interest.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF FEBRUARY, 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

