



Castro v Clerk, Nairobi City County Assembly & another (Petition E082 of 2022) [2023] KEELRC 1415 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1415 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E082 OF 2022
NZIOKI WA MAKAU, J
MAY 10, 2023**

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF: SECTIONS 4, 5, 7 AND 9 OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015

IN THE MATTER OF: VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS PROTECTED UNDER (INTER ALIA) ARTICLES 10, 27, 29, 32, 41, 47 & 50 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: SECTIONS 5 AND 29 OF THE COUNTY ASSEMBLY SERVICES ACT, 2017

IN THE MATTER OF: THE NAIROBI CITY COUNTY ASSEMBLY HUMAN RESOURCE POLICIES AND PROCEDURE MANUAL

BETWEEN

GAVIN ROMEO CASTRO PETITIONER

AND

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY & ANOTHER RESPONDENT

JUDGMENT

1. Through his Petition dated May 24, 2022, the Petitioner instituted the Petition herein against the 1st and 2nd Respondents seeking the following Orders:
 - a. a declaration that the Respondents' actions of placing the Petitioner on interdiction and subsequently summarily dismissing from employment are null and void;



- b. a declaration that the Respondents' decision to summarily dismiss the Petitioner from employment violated the Petitioner's rights and fundamental freedoms protected under Articles 41, 47, 50, and 236 of the Constitution;
 - c. an order be and is hereby issued quashing the decision to summarily dismiss the Petitioner from employment as contained in the 1st Respondent's letter dated May 6, 2022;
 - d. an order be and is hereby issued pursuant to Article 23 of the Constitution, reinstating the Petitioner to the service of the Nairobi City County Assembly as a Senior Clerk Assistant with back-pay and no loss of benefits;
 - e. the OCS, KICC Police Station is hereby directed to oversee the implementation of order (d) above;
 - f. an order be and is hereby issued directing the Respondents to pay the Petitioner monetary damages for breach of his fundamental rights and freedoms;
 - g. an Injunction is hereby issued restraining the Respondents, whether acting directly or through third parties, agents and/or proxies, from illegally or irregularly removing the Petitioner from office without due process of law;
 - h. the costs of and incidental to this Petition;
 - i. interest on (f) and (h) above at court rates from the date of filing this Petition to the date of full and final settlement; and
 - j. such other, farther, incidental or alternative reliefs as the Honourable Court may deem just and expedient.
2. The Petitioner avers that the 1st Respondent was recruited and appointed the Clerk of the Nairobi City County Assembly (hereinafter 'Clerk of the Assembly') in June 2020 under the directions of the then Speaker of the Nairobi City County Assembly (hereinafter 'Speaker of the Assembly'), Hon Beatrice Elachi. That at the time of his purported appointment, this Honourable Court had issued orders on October 30, 2019, barring the Speaker of the Assembly and the 2nd Respondent herein from filling the position of the Clerk of the Assembly pending the determination of ELRC Petition No. 194 of 2019: The Clerk, Nairobi City County Assembly v The Speaker, Nairobi City County Assembly & Another. That on August 5, 2020, the Honourable Lady Justice Maureen Onyango found that the 1st Respondent's appointment as Clerk of the Assembly was null and void, having been carried out in contravention of court orders. That the 1st Respondent subsequently preferred an application for stay in the Court of Appeal which struck out the 1st Respondent's Notice of Appeal and dismissed his application for stay on December 18, 2020. That the result of the Court of Appeal's Ruling means that the finding of August 5, 2020 on the nullity of the 1st Respondent's appointment as Clerk of the Assembly still stands. Accordingly, the 1st Respondent has no authority to exercise the functions of the office of the Clerk of the Assembly or transact any business on behalf of the Assembly.
 3. It is the Petitioner's averment that the 1st Respondent has however in blatant disregard of court orders continued holding himself out as the Clerk of the Assembly. That after the Court of Appeal further delivered a Ruling in Civil Application No E351 of 2021 injuncting the 1st Respondent from exercising the functions of the said office, the Speaker of the Assembly issued letters to him in June and November 2021 directing him to handover to Ms Adah Onyango. However, the 1st Respondent declined to handover as directed and greatly hampered the functions of the Assembly. That accordingly, the Speaker of the Assembly wrote to the Central Bank of Kenya on January 17, 2022 seeking guidance



on how best to proceed with control of the Assembly's accounts as the 1st Respondent had refused to hand over the internet banking tokens to the Petitioner, who had since been appointed Acting Clerk of the Assembly.

4. The Petitioner avers that on January 14, 2021, he lodged formal complaints with the DCI seeking their intervention in having the 1st Respondent surrender the internet banking mandates for the County Assembly's accounts. He then lodged a criminal complaint against the 1st Respondent on April 4, 2022 after he was physically and verbally attacked within the County Assembly's premises on the same day.
5. It is the Petitioner's averment that by an Interdiction Letter dated April 12, 2022, the 1st Respondent accused him of gross misconduct, required him to show cause why he should not be dismissed from the County Assembly's service and interdicted him. That the Interdiction Letter was illegal, invalid and untenable because the 1st Respondent had no authority to exercise the functions of Clerk of the Assembly. Furthermore, the procedure leading to his interdiction was flawed as it did not involve the Staff Advisory Committee, which is the body that advises the 2nd Respondent on matters relating to interdiction of staff of the County Assembly and his response time to the same had been reduced from 21 days to 14 days. He avers that the decision to place him on interdiction was motivated by malice and ill-will since he had only been the Acting Clerk of the Assembly for about three (3) months and it was an attempt to remove him from office and from the employ of the County Assembly.
6. The Petitioner avers that through an email sent to him on May 7, 2022, the 1st Respondent sent him a letter dated May 6, 2022 informing him that the 2nd Respondent had made a decision to summarily dismiss him from employment with effect from May 5, 2022. The reasons for the summary dismissal were that he had allegedly refused to issue a response to the Show Cause and Interdiction Letters. That these reasons were different from those communicated in the said Interdiction and Show Cause Letters, to effect that he was facing disciplinary action for failing to hand over to the 1st Respondent. He asserts that the Respondents' decision to summarily dismiss him from employment is unfair in substance because the dismissal is not based on valid and fair grounds, the alleged grounds for dismissal are false and different from those that were the basis of the disciplinary proceedings instituted against him. Furthermore, that summary dismissal is not available under the County Assembly's Human Resource Manual and that the Respondents simply usurped the role of the Staff Advisory Committee. According to him, the decision to summarily dismiss him is a retaliation for his decision to lodge complaints with the DCI on the 1st Respondent's refusal to handover and his participation as a witness in the criminal proceedings brought against the 1st Respondent.
7. The Petitioner avers that the Respondents' decision to summarily dismiss him from employment is unconstitutional for offending the provisions of the Constitution, inter alia:
 - i. Article 236(a) which proscribes victimisation or discrimination of public officers for having performed functions of their office in accordance with the law;
 - ii. Article 236(b) which precludes the dismissal of public officers without due process of law;
 - iii. Article 10 which enjoins all state organs, public and state officers to observe the principles of good governance, integrity, transparency and accountability;
 - iv. Articles 27(4) and (5) and 32(1) which prohibit the Respondents from discriminating on grounds of conscience;
 - v. Article 47 which protects the Petitioner's right to fair administrative action and specifically, administrative action that is lawful, reasonable and procedurally fair;



- vi. Article 50(2) which protects the Petitioner's right to fair hearing and specifically the right to have adequate time and facilities to prepare a defence, to adduce and challenge evidence; and
 - vii. Article 41 which guarantees the Petitioner's right to fair labour practices.
8. It is the Petitioner's averment that the Respondents' actions have caused grave irreparable, immeasurable and inestimable loss, harm and damage to him and innocent staff of the County Assembly that includes: mental and psychological trauma; job insecurity and loss of employment; and financial hardship and destitution.

Respondents' Case

9. In reply, the Respondents filed a Response averring that the 1st Respondent is the substantive Clerk of the Assembly having been duly recruited and appointed as such on July 23, 2020 by the 2nd Respondent. They assert that the position of the interim directions issued in ELRC Petition No 194 of 2019 has since been clarified in the Court's judgment in ELRC Petition No E057 of 2022, Fredrick Mwangi Macharia & 13 others v Edward Ombwori Gichana and Another (annexure EOG-1) and did not invalidate his employment. That the Petitioner has not demonstrated the relevance and/or nexus between the directions in ELRC Petition No 194 of 2019 to his claim and the reliefs he has sought in his Petition. That it is therefore disingenuous for the Petitioner to assert that the consequence of the December 18, 2020 Ruling was to the effect that the appointment of the 1st Respondent was a nullity.
10. It is the Respondents' averment that upon the 1st Respondent being told to step aside by the Ruling of the Court of Appeal in Civil Application No E351 of 2021, the 2nd Respondent, in its meeting of June 7, 2022, deliberated on the effect of the Ruling and subsequently passed a resolution that the 1st Respondent steps aside from the position of the Clerk of the Assembly until determination of the Appeal filed by Mr Jacob Muvengei Ngwele. That the 1st Respondent thereafter officially handed over to Ms. Pauline Sarah Akuku on the same day, gave a press statement to clear any doubts, and issued an internal Memo to all members of staff of the 2nd Respondent on the hand over. That the 1st Respondent equally communicated to officials of CBK, IFMIS at the National Treasury, Controller of Budget and Cooperative Bank of Kenya. That considering the foregoing, the Petitioner was therefore misguided when he lodged a formal complaint to the DCI, who in any event did not find the 1st Respondent culpable of any wrongdoing. It is the 1st Respondent's averment that he immediately resumed his position as Clerk of the Assembly after the Court of Appeal delivered its judgment in Civil Appeal No E255 of 2021 upholding the judgment and decree of the Maureen Onyango J delivered on October 16, 2020 in ELRC Petition No 194 of 2019.
11. The 1st Respondent avers that consequently, on April 1, 2022 he did a Memo to the Petitioner informing him to hand over to him with immediate effect but he wilfully, deliberately and intentionally refused and/or declined to handover despite being aware of the 1st Respondent's return to the Office. That it should therefore not be a surprise that on April 12, 2022 he, with the direction of the 2nd Respondent, interdicted the Petition for wilful disobedience of lawful instructions. That the Petitioner should not hide behind the excuse that he was on study leave doing exams at the Kenya School of Law because he has not attached the alleged study leave form and examinations card to prove his allegations.
12. The Respondents aver that the Petitioner never responded to the Interdiction Letter and Show Cause and that it is not a prerequisite in law that the Staff Advisory Committee must be consulted before disciplinary action is taken against a member of the County Assembly Service. According to the Respondents, 14 days was sufficient notice for the Petitioner to respond if he was desirous to do so. That however the Petitioner having not showed cause why he shouldn't be dismissed, the 2nd



Respondent made the decision to dismiss him. The Respondents urged the Court to dismiss the Petition with costs.

13. The Petition was disposed of by way of written submissions.

Petitioner's Submissions

15. It is the Petitioner's submission that the Respondent's decision to summarily dismiss him also contravened the express statutory provisions of: section 29 of the [County Assembly Services Act](#) 2017, which places the mandate of advising the 2nd Respondent on matters of interdiction and termination of staff on the Assembly's Staff Advisory Committee; section 5 of the [Public Service \(Values and Principles\) Act](#) 2015, which requires the 1st Respondent and members of the 2nd Respondent to observe the rule of law, maintain high standards of professional ethics and display high standards of integrity in their dealings; sections 4(1), (2), (3) and (4) of the Fair Administrative Actions Act, which entitle the Petitioner to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; section 6 of the [Public Service \(Values and Principles\) Act](#) 2015, which enjoins the Respondents to use public resources in an efficient, effective and economic manner; and sections 41, 43, and 45 of the [Employment Act](#), which entitle the Petitioner to substantive and procedural fairness before his employment is terminated.
15. The Petitioner submits that the Respondents further violated the following provisions of the Nairobi City County Assembly Human Resource Manual including:
- a. Clause A.5.3.1 which vests the function of advising the Respondents on matters relating to termination of the Assembly's employees on the Staff Advisory Committee;
 - b. Clause N.5.2 (b) (iv) which required that the Petitioner be given 21 days to issue a formal response to the Notice to Show Cause/Interdiction Letter;
 - c. Clause N.11.0 (a) which required the Respondents to establish an investigating committee to look into the allegations of gross misconduct against the Petitioner;
 - d. Clause N.11.0 (c) which required that the Petitioner be interviewed by the investigating committee; and
 - e. Clause N.11.0 (f) and (g) which required the investigating committee to prepare a report and submit it to the CAHRMAC.
16. The Petitioner submits that paragraph 14 of the 1st Respondent's Replying Affidavit is misleading because Exhibit 'EOG-2', which the 1st Respondent is attempting to pass off to the Court as his handover letter to the Deputy Clerk is a letter dated April 1, 2022, requiring the Petitioner to prepare a comprehensive handing over report and personally submit it to him on April 4, 2022. According to the Petitioner, there was no basis for the 1st Respondent to require him to handover to him before his status was officially considered and communicated by the 2nd Respondent. That the 1st Respondent still did not have the authority to exercise the functions of the Clerk of the Assembly, much less author the Interdiction Letter in April 2022 as the decision of Maureen Onyango J in ELRC Petition No 194 of 2019 that he relies on to cement his position as the Clerk of the Assembly was only delivered in October 2022.
17. It is the Petitioner's submission that determination of whether his termination was fair involves interrogating whether the Respondents had valid and fair reasons for terminating his services as they did. That from the outset, the purported termination of his services cannot be allowed to stand because 'summary dismissal' is unknown in law. Without prejudice to the foregoing, he submits that he has



- demonstrated in his Petition that the Respondents did not have any valid reason(s) to terminate his employment. That the proper cause of action would have been for the Respondents to undertake another disciplinary process before terminating his services for reasons not contained in the original Show Cause Letter. The Petitioner invites this Court to adopt the holding of the Court of Appeal in [*Judicial Service Commission & another v Njora \(Civil Appeal 486 of 2019\) \[2021\] KECA 366 \(KLR\)*](#) that it is not for nothing that the duty to show that the dismissal was justified is, by statutory command, always on the employer. The Petitioner submits that he has proved to the required standard that the Respondents' decision to terminate his services is substantively unfair and unconstitutional.
18. As regards his right to fair hearing under Article 50 of the [*Constitution*](#), he submits that the Respondents denied him an opportunity to make oral representations on the charges levelled against him, contrary to the provisions of Part N.2.2 (b) (iii) and (iv) of the County Assembly's HR Manual. That in [*Godfrey Ajoung Okumu & another v Engineers Board of Kenya \[2020\] eKLR*](#), the Court of Appeal stated that disciplinary proceedings that may lead to loss of career must follow the laid down steps with scrupulous care. He urges this Court to note that the Respondents have not contested that they did not allow him the required 21 days to respond to the Show Cause Letter as per policy. He further submits that he was not interviewed by an investigating committee tasked, under statute and the Assembly's Human Resource Manual, with investigating the charges of gross misconduct levelled against him. That the Respondents' failure to strictly abide by the provisions of the County Assembly's Human Resource Manual renders his termination an unfair labour practice and illegal and cites the case of [*Bramuel Dibondo Musundi v Kenya Revenue Authority \[2018\] eKLR*](#).
19. The Petitioner submits that this is a proper case for the grant of an order for reinstatement to his position as Senior Clerk Assistant of the Nairobi City County Assembly because:
- a. the three-year limit prescribed under section 12(3) of the [*Employment and Labour Relations Court Act*](#) has not lapsed;
 - b. the Petitioner has not been out of the County Assembly's employment for a long time;
 - c. failing to grant the order of reinstatement will reward the Respondents for their gross abuse of power and illegal termination of the Petitioner's employment;
 - d. failing to grant the reinstatement order will set a dangerous precedence for public and state officers abusing public office by illegally terminating the employment of their perceived enemies, in the knowledge that such termination cannot be overturned by the courts;
 - e. failing to grant the reinstatement order will unnecessarily burden taxpayers with paying monetary compensation awarded to public officers illegally removed from office;
 - f. the Petitioner's dismissal is a consequence of unwarranted abuse of office, witch hunt and retaliation on the part of the 1st Respondent and his proxies;
 - g. the Petitioner has many years left to serve and may not secure comparative employment if the reinstatement order is not issued.
20. Further, that public and state entities that are subject to the [*Constitution*](#) and their founding Statutes cannot escape an order of reinstatement where a determination has been made that they have acted unlawfully, disproportionately and irrationally in terminating the services of an employee. He cites the cases of [*Judicial Service Commission & another v Njora \(supra\)*](#) and [*Stephen Pareno v Judicial Service Commission of Kenya \[2014\] eKLR*](#). The Petitioner submits that the Respondents' breach of his fundamental rights and freedoms entitles him to an award of monetary damages and given his length of service, he proposes an award of Kshs 7,000,000/- in this regard. He relies on the decision of the Court



of Appeal in [Peter M Kariuki v Attorney General \[2014\] eKLR](#) wherein the appellant was awarded Kshs 15,000,000/- as damages for breach of his constitutional rights by his employer.

Respondents' Submissions

21. The 1st Respondent submits that the Petitioner is yet to respond to the show cause letter and that the response he refers to was never sent to the Respondents. That the Petitioner's dismissal was not a one-off event but a process that included inter alia a Show Cause that enumerated the allegations against the Petitioner. That the 2nd Respondent was therefore in order to dismiss the Petitioner for the reason that he refused to give any response whatsoever to the allegations in the Show Cause Letter. That when the Petitioner failed to respond to the Show Cause, he withdrew himself from the seat of justice and cannot be seen to cry wolf. It is the 1st Respondent's submission that the termination of the Petitioner's employment was lawful and the Petitioner is consequently not entitled to the reliefs sought.
22. The 2nd Respondent submits that sections 41 and 43 of the [Employment Act](#) elucidate on the process of termination of employment. That in the case of [John Otieno Mukabi v Kenya Builders & Concrete Company Limited \[2014\] eKLR](#), the Court held that an employer is required to provide the reason for termination of employment of an employee in the course of the internal disciplinary process which is triggered by a notice to show cause and that the reason for the termination must be clearly stated in the letter of termination. The 2nd Respondent asserts that in the instant case, the termination letter served on the Petitioner set out with sufficient detail the reason for his termination and that it has dispensed with the burden placed upon it under section 47(5) of the Act. It further submits that insubordination falls under section 44[4][d] and [e] of the [Employment Act](#) and is a valid ground for summary dismissal covering both verbal and non- verbal insubordination.
23. The 2nd Respondent submits that an order for reinstatement is not automatic and is allowed only in very exceptional circumstances depending on the facts and circumstances of each case and cites [Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others \[2014\] eKLR](#) cited with approval in the Court of Appeal's decision in [Joshua Rodney Marimbah v Kenya Revenue Authority \[2021\] eKLR](#). It invites the Court to find that the Petitioner is not one deserving of the order for reinstatement, owing to the long passage of time since he was dismissed and his incompatible nature of one who cannot take lawful instructions and has the potential of bringing the Respondent and her other staff into disrepute.
24. Further, that an employee whose contract of employment is terminated has no reason to sit and wait to enjoy remuneration which they have not worked for and the Petitioner has failed to show that he mitigated his loss during the duration after his services were terminated. That it will therefore be unfair for him to be paid any moneys in form of damages allegedly on violation of his rights or otherwise. That in any event, the Petitioner has failed to cite with precision the relevant provisions of the [Constitution](#) alleged to have been violated and the manner in which the Respondents have violated the same to warrant the intervention of this Honourable Court. That as such, the Petition herein fails the substantive test set in the [Annarita Karimi Njeru v Attorney General \[1979\] KLR 154; \[1976-80\] 1 KLR 1272](#) cited with approval in [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others \[2013\] eKLR](#), which makes the declaratory relief sought incompetent and fatally defective. The Respondents thus urge the dismissal of the Petition with costs.
25. The position of Clerk, Nairobi City County has been chequered. My sister Onyango J gave a Ruling which was challenged in the Court of Appeal. She had barred Mr Jacob Ngwele from holding the office and the position was filled by Mr Edward Gichana. This was suspended by the Court of Appeal as the matter was articulated at the apex Court and the appointment of Ms Adah Onyango took place before the Petitioner was appointed in acting capacity as Clerk. His appointment was affected by the Court



of Appeal decision where Mr Edward Gichana was held to be the Clerk and his position reverted to him. It would seem the Respondents then undertook a disciplinary process to remove the Petitioner.

26. The matters of discipline at the County of Nairobi are required to follow a precise process enumerated in the Nairobi City County Assembly Human Resource Manual. The Petitioner was not accorded the processes set out therein as his dismissal is not even among the dismissals contemplated in the manual for his position. As such, he had a legitimate expectation that his termination would follow the law. The Respondents did a shoddy job in that they dispatched the Petitioner without giving the Petitioner 21 days for his formal response to the Notice to Show Cause/Interdiction Letter, no investigating committee to look into the allegations of gross misconduct against the Petitioner was established and the Petitioner was not interviewed by the investigating committee. No report was given by the investigating committee nor was any report submitted to the County Assembly HRMAC. In essence he was not given a fair hearing in terms of section 41 of the Employment Act as well as Article 41 of the Constitution and the rules of natural justice.
27. As his termination has been found unlawful for not following the law, what remedies lie? The Petitioner seeks an order of reinstatement as a Senior Clerk at the County Assembly. He posits that the period for reinstatement, which is permitted under the law, has not lapsed and he should therefore be allowed to resume his position. The Court is of a different view, despite the period for reinstatement having not lapsed, I do not think that would be the appropriate remedy to give. The Petitioner is able to obtain other gainful employment and is, from his evidence recently minted as a lawyer. As the Court has been invited to award damages for the infringement of his rights, the appropriate remedy would be an award of Kshs. 5,000,000/- for the infarctions of the law and for recompense for his abrupt and unlawful dismissal by the Respondents.
28. The final analysis is that the Petitioner is entitled to the following:-
- a. Kshs. 5,000,000/- as compensatory damages;
 - b. Costs of the Petition
 - c. Interest on the sum in a) above at Court rates from the date of judgment till payment in full.
- 29 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY 2023

NZIOKI WA MAKAU

JUDGE

