



Muia v Clerk, Machakos County Assembly & 4 others; County Public Service Boards National Consultative Forum (Interested Party) (Constitutional Petition 3 of 2022) [2023] KEELRC 1394 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1394 (KLR)

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CONSTITUTIONAL PETITION 3 OF 2022**

B ONGAYA, J

JUNE 2, 2023

IN THE MATTER OF ARTICLES 2, 10, 19, 20, 22 (1), 38, 41, 47, 48, 165, 174, 175, 176, 232, 233, 234, 236, AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SECTIONS 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73,

74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, AND 86 OF THE COUNTY GOVERNMENT ACT 2012

IN THE MATTER OF IMPEACHMENT OR REMOVAL FROM OFFICE OF THE PETITIONER ON 29.11.2022

BETWEEN

ONESMUS MUTISYA MUIA PETITIONER

AND

CLERK, MACHAKOS COUNTY ASSEMBLY 1ST RESPONDENT

SPEAKER, MACHAKOS COUNTY ASSEMBLY 2ND RESPONDENT

MACHAKOS COUNTY ASSEMBLY 3RD RESPONDENT

GOVERNOR, MACHAKOS COUNTY GOVERNMENT 4TH RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS 5TH RESPONDENT

AND

COUNTY PUBLIC SERVICE BOARDS NATIONAL CONSULTATIVE FORUM INTERESTED PARTY



RULING

1. The petitioner (applicant) is Onesmus Mutisya Muhia. He filed on 06.12.2022 a petition and an application by way of a notice of motion dated 06.12.2022 and through Mutai, Maina, Kimeu & Company Advocates. Subsequently he changed the Advocates to M/s Kamende D.C & Company Advocates by the notice of change of advocates dated 28.04.2023 and filed on 03.05.2023.
2. The application invoked sections 1A, 1B, & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 51 Rules 1 of the Civil Procedure Rules, section 2, 3, and 34 of the *Labour Institutions Act*, Articles 41, 50 and 159 of *the Constitution* and all enabling provisions of the law. The application was for orders:
 - a. (spent).
 - b. (spent).
 - c. (spent).
 - d. (spent).
 - e. That pending the hearing and determination of the petition the honourable Court be pleased to issue an order suspending the resolution of the 3rd respondent passed on 29. 11.2022, the gazette notice number 14710 and dated 30.11.2022 removing the petitioner from office and the subsequent letter dated 29.11.2022 published by the 4th respondent communicating the removal from the office of the Machakos County Public Service Board.
 - f. That pending the hearing and determination of the petition the Honourable Court to issue an order barring the respondents from recruiting or filling the position of secretary of the Machakos County Public Service Board.
 - g. That pending the hearing and determination of petition the Honourable Court be pleased to issue an order reinstating the petitioner as the secretary of the Machakos County Public Service Board.
 - h. That costs of the application be paid by the applicants.
3. The application is based upon the supporting affidavit of the applicant sworn on 06.12.2022 and upon the following grounds:
 - a. The petitioner was appointed as secretary of the County Public Service Board of Machakos in 2020 pursuant to a competitive recruitment per sections 55, 56, 57, and 58 of the *County Governments Act*, 2012.
 - b. On 10.11.2022 about 4.00pm the respondents and in particular the 4th and 5th respondents instructed the County Inspectorate Officials and hired goons under their direction and supervision to illegally storm the County Public Service Board offices. They terrorized, threatened and ordered all the staff of the Board to stand up and leave the offices immediately. The petitioner was then barred from accessing the office since that date.
 - c. On 15.11.2022 the majority leader of the 3rd respondent one Hon. Nicholas Nzioka tabled a motion before the 3rd respondent seeking the removal of the petitioner from office based on numerous accusations before the 3rd respondent. The motion was hurriedly approved for



debate. A select committee was scheduled to commence its hearings on 21.11.2022 whereby the petitioner and other Board members were required to appear.

- d. The grounds for support of the motion passed by the majority leader were completely identical to the ones tabled and investigated by the select committee that rendered its recommendation around May 2022. The petitioner states it amounted to double jeopardy. The same applied to three other individuals namely George Kioko Luka; Cecilia Mbinya Sereka; and, StellaMarris Ndinda Muthoka. The actions by the majority leader were vindictive against the petitioner and the three others because the four had played a role in the majority leader's suspension from the Public Service Board for gross misconduct. Thus the investigations focused on the four and not all the six members of the Public Service Board.
 - e. The select committee proceedings of 21.11.2023 were unfair in breach of Article 50 because some members were biased; the office was an accessible and the petitioner could not access document needed to exculpate, and, the outcome was predetermined.
 - f. The 3rd respondent hurriedly convened on 29.11.2022 and voted to remove the applicant from office by wholly adopting the select committees' report and recommendations. Subsequently the applicant received the removal letter by email of 29.11.2022 signed by 4th respondent.
 - g. The applicant was to serve for a non-renewable term of six years per section 58 (4) the Act.
 - h. Allegations made against the applicant included approval of payment of extraneous allowances to 24 officers; and in August 2021 accusations of sexual harassment were tabled as against the petitioner by two officers namely Caroline Nzioka and Hellen Musau. In May 2022 the 3rd respondent appointed a select committee to investigate the matter. The select committee returned that the allegations as levelled had not been substantiated, he got exculpated and, continued in office.
 - i. The same charges could be levelled against the applicant only after lapsing of 6-months per 3rd respondent's standing order 46(1). The applicant states that said order 46 (1) is unconstitutional because it allows the same accusations to be levelled countless times and violated Article 236 of the Constitution on protection of public officers.
 - j. The 1st respondent has violated Articles 27 and 47 by arbitrarily evicting and dismissing the applicant from office.
 - k. The 4th respondent issued on 31.10.2022 an executive order that all recruitments and promotions done between 01.08.2021 and 30.10.2022 alongside their respective financial benefits be reviewed. Only the Board and not the 4th respondent has legal mandate or powers to sack, review salaries, or promotions of employees. The said executive order also formed a taskforce to investigate and recommend appropriate actions about any form of malpractice in the human resource practices in Machakos County.
 - l. The applicant and the other three members of the Board filed Machakos ELRC Petition E2 OF 2022 which sought to stop the impeachment and removal but the same was withdrawn on 29.11.2022. They had also filed Machakos ELRC Judicial Review No. E4 of 2022 which is pending hearing and determination.
4. The 4th and 5th appointed Otieno Ogola & Company Advocates to act in the matter. They opposed the application by filing the replying affidavit of the County Secretary Dr. Victor Muya Ndambuki sworn on 23.01.2023. it was urged as follows:



- a. The petition and application raises similar matters as in the previously filed Machakos ELRC Judicial Review No. E4 of 2022 which is pending hearing and determination application.
 - b. There are no sufficient grounds to support the application.
 - c. The chairperson and one member of the Board voluntarily resigned and the vacancies have been advertised and the process is underway to fill them accordingly. The Court should not issue a blanket order to stop filling of vacancies in the membership of Machakos County Public Service Boar.
 - d. Reinstatement is a final order to be issued only after hearing all the parties.
 - e. Gazette notice No. 14710 cannot be stayed because it has been acted upon by filling the accruing vacancies competitively and persons appointed to office.
 - f. The removal from office of the applicant and three other members of the Board was in accordance with the law.
 - g. The removal from office was gazetted, it took effect and accruing vacancies declared.
 - h. If the petition succeeds, the applicant would be entitled to damages and the orders if granted will slow down county government operations, unnecessarily so.
 - i. The orders as prayed presuppose the applicant will be successful in the petition.
 - j. The recruitment process to fill the accruing vacancies is at the tail end, being, appointments by the Governor. It is uneconomical use of public resources to stop the process. Public interest be considered in the process.
5. The 1st, 2nd and 3rd respondents appointed Brian Nzioka Muthusi to act in the matter per the notice of appointment of Advocates dated 23.01.2023. They filed the replying affidavit of Joseph Laban Mutisya the County Assembly Clerk and Accounting Officer of the 3rd respondent. It was urged and stated as follows:
- a. The motion for removal of the petitioner from office was dated 14.11.2022 and received by the 3rd respondent on 15.11.2022. It was pursuant to section 58(5) of the [County Governments Act, 2012](#), Article 25(1) of [the Constitution](#); and standing order 62 of the County Assembly of Machakos.
 - b. The applicant was invited before the select committee as stated for the applicant. He appeared represented by two counsel.
 - c. The first inquiry against the applicant was about allegations of sexual harassment. The investigation leading to his removal was about sexual harassment, improperly enriching himself and abuse of office by conferring upon himself and others extraneous allowances; failure to promote equity in county public service; failure to report on the extent of compliance by the county public service the values and principles in Articles 10 and 232 of [the Constitution](#). Thus there was no double jeopardy. The earlier inquiry had not been a removal process but it was a process generally investigating complaints by the public against the Board and allegations of sexual harassment were made against the applicant.
 - d. The applicant has filed multiplicity of legal proceedings abuot the same claims.
 - e. The petitioner has been investigated by a competent committee of the 3rd respondent and found culpable.



- f. The application be dismissed with costs.
6. Submissions were made for the parties in writing or orally. The Court has considered the parties' respective positions and returns as follows.
 7. First it is true that there is a pending Machakos ELRC Judicial Review No. E4 of 2022. It is urged for the 4th and 5th respondents that the Court lacks jurisdiction in that regard. However, petition 2 of 2022 which sought to challenge and stop the applicant's removal was withdrawn without consideration on merits. It is found for the applicant that section 7 of the *Civil Procedure Act* on res judicata does not apply because there is no previous final decision on the dispute rendered by a court of competent jurisdiction. As for the pending Judicial Review application, it is a waning practice in our courts that litigants are at liberty to seek judicial review orders in a separate appropriate application while at the same time seek other remedies about the same cause of action by way petition or ordinary action. Thus, the applicant cannot be faulted in the instant case and the sub judice rule does not chain the instant petition. It could be that for efficient use of judicial time, the parties may consider consolidating the judicial review application proceedings and the instant petition. The preliminary objections dated 9.12.2022 and 7.12.2022 would therefore be dismissed as unmerited.
 8. Second, as urged for the respondents, the prayers sought in the application seek to reinstate the applicant or presuppose the petition will be successful entitling the petitioner to the reinstatement. As submitted for the respondents, the order of reinstatement should ordinarily issue after full hearing as it is a final order. The Court also considers that it is in the nature of a mandatory injunction or an order for specific performance to issue only in the clearest or obvious cases that the applicant would succeed in the dispute. That is not the case. In the instant case the relations are seriously strained and it appears the vacancy has been filled – both of which factors when taken into consideration operate as a bar to an order of interlocutory reinstatement or preservation of the vacancy. An order in the nature of a stay order as sought appears as well demonstrably overtaken in view of the steps taken by the respondents to fill the vacancies.
 9. Third, each party to bear own costs of the application and preliminary objections taking into account the margins of success.

In conclusion, the application dated 07.12.2022 and the preliminary objections for the respondents are hereby dismissed with orders each party to bear own costs and, parties to fix a date for further directions for expeditious hearing and determination of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 2ND JUNE, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

