



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT AT BUNGOMA**

**ELR CAUSE NO E003 OF 2022**

**BERNARD KRADE YAITE.....1<sup>ST</sup> CLAIMANT**

**LEONARD WANDA OBIMBIRA.....2<sup>ND</sup> CLAIMANT**

**ALLAN EKWENY OMACHARI.....3<sup>RD</sup> CLAIMANT**

**SAMUEL OSERO OMBUI.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**SOSPETER ODEKE OJAAMONG.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BUSIA.....2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY BUSIA COUNTY.....3<sup>RD</sup> RESPONDENT**

**COUNTY ATTORNEY BUSIA COUNTY.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicants together with 1<sup>st</sup> Respondent are jointly charged with offences relating to and under the Anti-corruption and Economic Crimes offences Act (ACECA) in Nairobi Chief Magistrate's Anti-corruption and Economic Crimes Case No. 23 of 2018. During the pendency of the trial they filed a suit and Notice of Motion Application dated 17<sup>th</sup> January 2022 and supported by Affidavit sworn by 1<sup>st</sup> Applicant on 17<sup>th</sup> January 2022 seeking the following orders:-

(i) That the matter be certified urgent and heard Ex-parte in the first instance;

(ii) That pending the hearing and final determination of this application or until the further or other orders of this court, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents, jointly and severally, by themselves, their servants and or agents be restrained and prohibited, from purporting to implement the provisions of Section 62 (1) of the Anti-Corruption and Economic Crimes Act by wrongfully, unlawfully, and in flagrant violation of the said Act preventing or continuing to prevent the applicants and each one of them from accessing their and each of their offices to discharge and perform their contractual responsibilities;

(iii) That pending the hearing and final determination of this application or until further or other order of the court, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents, by themselves, their servants and or agents whether jointly or severally be restrained and prohibited, from purporting to implement the provisions of section 62 (1) of the Anti -corruption and Economic Crimes Act by wrongfully and unlawfully withholding or continuing to withhold the applicants' full salaries and other contractual entitlements.

(iv) That the Respondents be compelled to remit all unpaid salaries and emoluments due to but withheld from the applicants by the Respondents in purported implementation of Section 62 (1) of the Anti-corruption and Economic Crimes Act from the 9<sup>th</sup> of July 2020 to-date.

(v) Any other orders that the court may deem fit to grant in the circumstances.

(vi) The Respondents be ordered to pay the costs of this application.

2. Prayer 1 is spent.

3. The Respondent in response to the Application filed a replying affidavit sworn on the 16<sup>th</sup> February, 2022 by Rtd Judge Mathew John Anyara Emukule, the County Attorney of 2<sup>nd</sup> Respondent in opposition to the Application.

4. The Application was heard with counsel for the parties submitting orally before the court.

#### **5. The Applicant's case.**

The Applicants state that they were arrested together with the 1<sup>st</sup> Respondent and jointly charged sometimes in July 2018 with offences relating to and under the Anti -corruption and Economic Crimes Offences Act in Nairobi Chief Magistrate's Anti -corruption court case No. 23 of 2018.

6. That Section 62 of the Anti-Corruption and Economic Crimes Act (ACECA) provides that where a state/Public Officer is charged with an offence of corruption under the Act such officer shall be suspended from office provided that the case in which the officer or officers are charged shall be concluded within twenty-four ( 24) months. That in compliance with that Section the Applicants were served with suspension letters dated 9<sup>th</sup> July, 2018 suspending them and each of them from office at half salary and they have remained under suspension since then. They argue that the suspension under Section 62 (1) of ACECA ought to last and remain in force for a period not more than 24 months. That the 24 months ended on or about 20<sup>th</sup> July, 2020 but the Respondents in flagrant and unlawful violation of the law, have arbitrarily and without lawful excuse maintained the suspension which now runs into more than forty (40) months.

7. The Applicants submit that the continued suspension is now a continuous violation of the applicants constitutional and labour rights and a flagrant disregard of Section 62 (1) of the ACECA. That the Applicants informed the Respondents of the illegality who have ignored and or refused to respect the law by allowing Applicants back into the office and paying them their full salaries and benefits accruing to their and each of the respective officers.

8. The Applicants are appointed and served as county Executive Committee members of County Government of Busia with contracts extended for 2 years effective 23<sup>rd</sup> March 2020.

9. The Respondent are opposed to the Application and in their Replying Affidavit sworn by Rtd Judge Emukule, the County Attorney, on 16<sup>th</sup> February 2022 avers that the Respondents were not responsible for charging of the Applicants. That they were on being charged immediately suspended at half pay from the day of charge to conclusion of the case. That the Respondents have not been informed of conclusion of the Criminal case hence the Applicants are not entitled to the reliefs sought.

#### **DETERMINATION**

10. The court was invited to interpret the provisions of Section 62 (1) of the Anti-corruption and Economic Crimes Act. Specifically the Applicants opined that the proviso for 24 months was with regard to the suspension from office and not the prosecution and the time having lapsed the Applicants were entitled to return to office with full benefits notwithstanding the fact that the criminal case was still pending. The Respondent's counsel urged the court to be guided by the classic English case on statute interpretation *Exchequer -vs Heydon( Heydon's case) ( 1584) EWHC, 76 ER 63*, where the Barons resolved that '*for the sure and true interpretation of all statutes in general , four things are to be discerned and considered:-*

(i) *What was the common law before the making of the Act.*

(ii) *What was the mischief and defect for which the common law did not provide?*

(iii) *What remedy the parliament hath resolved and appointed to cure the disease of the Common wealth.*

(iv) *The true reason of the remedy.'*

The Barons further stated that, '*the office of all Judges is to always make such construction as shall suppress the mischief and advance the remedy.'* The court finds the Heydon's case to be still relevant in interpretation of statutes today.

11. The impugned provisions of the Anti- corruption and Economici crimes Act provides section (62) reads:-

“(i) A public officer or state officer who is charged with corruption or economic crimes shall be suspended, at half pay with effect from the date of the charge until **conclusion of the case** provided that the case shall be determined within twenty four months.

(2)A suspended Public officer who is on half pay shall continue to receive the full amount of any allowances.

(3)The Public Officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.”

12. There is no dispute that the Applicants are Public Officers employed by the County Government of Busia and are under suspension following their being charged over crimes under ACECA. It was also not in dispute they have not been acquitted or the case withdrawn as against them. They invite court to interpret the proviso under Section 62 (1) to mean they ought to be reinstated to work the 24 months having lapsed since being charged. That the 24 months proviso relate to the suspension and not the trial.

13. The court in interpreting the statute or a provision of a statute must consider the impugned section of the law and adopt an holistic approach. Sub section 3 of the said Section 62 of ACECA states the Public Officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.”.

14. The Applicant submits there is no time limit for Criminal cases prosecution and relies on the decision in *Githunguri -vs- R ( 1984) eKLR* and interprets Section 62 (1) of ACECA to mean that the 24 months are not to limit time for prosecution of corruption cases but a safeguard to protect rights of citizens and the applicants ought to access the safeguard and be reinstated.

15. The applicants relies on decision of the lower court in *R-vs- Lilian Mbogo Omollo Wairuli CM Anti -corruption case No. 10 of 2018* which stated that the suspension is an issue of the labour court. The court will not emphasize on the decision as it not a precedent emanating from a court of record.

16. The court notes that the Applicants are entitled to fair Labour Practices . The court is however at pain to understand how it can order the Respondents to reinstate the Applicants while the criminal case is pending contrary to Section62 (3) of the ACECA.

17. A keen reading of Section 62 of ACECA discloses that the legislature intended Public Officers charged with corruption offences to stay out of office until they are cleared of the offences. That intention comes out clearly under Section 62 (3) ACECA. The court considered several decisions under Section 62 of ACECA. *Wendo J in the case of Gichinge Mwambia & Francis Atanasio Kithure Meru Judicial Review No. 25 of 2016* cited with approval in *Republic -vs Director of Public Prosecutions & 4 others ( 2018)* on the said issue of suspension Justice Wendoh had this to say:-

*“Would the public have faith in such an officer, that he will serve them faithfully when such allegations hang on his head? Granting a stay order in such a case would be sending the wrong message to the public, that even if you indicated for corruption and economic crimes, you can still sit put in your office and transact business as usual even when things are not normal. The applicant should be cleared first. In this case the stay would be against Public Interest’.*

Majanja J in the case of *Thuita Mwangi & 2 others -vs- Ethics & anti – Corruption Commission & 3 others ( 2013) eKLR* stated that:-

*“ Section 62 must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial in the event the person is acquitted the full benefits are restored. If the person is convicted then the suspension merges into a penalty”.*

18. This court upholds the above decisions by Justices Wendoh and Majanja to support its decision that the intention of legislature from reading the entire Section 62 of ACECA is to protect the integrity of the office held by Public Officers consistent with Chapter 6 of the Constitution. This court must also balance individual rights with Public Interest. The individual right is protected by ½ pay subject to restoration of full benefits in event the Applicants are found innocent. In the instant case the Applicants are under an extended of contract of two years effective 23rd March 2020. The two years end today . It is the opinion of the court that the period lapse does affect their rights to be compensated with full benefits under the contract in event they are found innocent.

19. The court interprets the proviso under Section 62 (1) to relate to the suspension . It is the opinion of the court that it will defeat justice and Public Interest if the court were to grant orders sought and have the full benefits restored before conclusion of the Criminal case. The court interprets the Section 62 to mean that the benefits are forfeited if the Applicants are found guilty . The court considered the authority in *Director of Public Prosecutions -vs Tom Ojienda & Associates Advocates & 3 others ( 2019) eKLR* cited by the Applicants and failed to find its relevance to the instant case which is purely on interpretation of suspension under Section 62 (1) ACECA and whether the 24 months having lapsed the applicants ought to be reinstated to office with full benefits . The Tom Ojienda case did not interpret Section 62 of ACECA or concern suspension from office of Public Officers under the Act.

20. Consequently the court finds that the continued suspension of the Applicants from office of the County Government of Busia is lawful and not in violation of any right under the Constitution. The court’s finding is consistent with the decision of the High court in where Justice Gikonyo in *Moses Muteithia & 5 others v Jacob Muthomi Kirera & 4 others [2017] eKLR* upheld the decision of Majanja J in *Thuita Mwangi case ( supra)* and held in part:-

*“ The reasoning of Majanja J in the above case is quite apt and resonate well with the constitutional reality. First of all, the suspension has been provided for in law and is a permissible act within the Constitution, the realm of employment laws and other laws which deal with matters of integrity such as ACECA . Suspension on half pay pending conclusion of the case is not really a violation of the right to be presumed innocent until proven guilty which is guaranteed under the constitution. In any event sufficient safeguards against prejudice have been provided thereto in that, If the case terminates in his favour, he will be entitled to his full benefits and emoluments.....”.* The court upholds the said holding by the two judges of the High Court .

21. Consequently, the court holds that the continued suspension of the Applicants by the Respondents is statutory hence lawful and that there are sufficient safeguards in place to protect their employment rights under the contract they hold with the Respondents. That the suspension of the Applicants is consistent with Chapter 6 of the Constitution and in Public interest and lawful.

22. The Notice of Motion Application dated 17<sup>th</sup> January 2022 is found to be without merit and is dismissed.

23. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF MARCH, 2022.**

**J. W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:-**

**COURT ASSISTANT :-BRENDA WESONGA**

**APPLICANT :- MAKOKHA JP**

**RESPONDENTS :RT JUDGE EMUKULE**