



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.246 OF 2018**

***(Before D.K.N.Marete)***

**PETER MUCIRA KARUGUMI.....CLAIMANT**

**VERSUS**

**KIRINYAGA COUNTY GOVERNMENT.....1ST RESPONDENT**

**THE COUNTY GOVERNOR KIRINYAGA COUNTY.....2ND RESPONDENT**

**J U D G M E N T**

This matter was originated by way of an Amended Memorandum of Claim dated 28th January, 2018. It does not disclose an issue in dispute on its face.

The Respondents in a 1st and 2nd Respondents Amended Statement of Response dated 15th February, 2019 deny the claim and pray that it be dismissed with costs.

The Claimant's case is that at all material times in this cause, he was an employee of the Respondent and held the post of County Executive Committee member, Transport, Roads and Public Works from 12th October, 2017. This service was held to the term of the County Governor.

The Claimant's further case is that he from the onset served dutifully and diligently as expected until the 28th June, 2018 when he was issued with a suspension letter signed by the County Governor.

The Claimant's other case is that he was sent on suspension due to alleged incompetence and under performance but there was no particulars provided in the letter. It was too vague and did not raise any matter that would warrant summary action without giving the claimant a hearing.

A further sequence of events comprising the claimant's case is as follows;

- On 30th July, 2018, the 2nd Respondent did a letter requiring him to show cause as to why he should not be dismissed.
- He responded to the show cause vide a letter dated 6th August, 2018.
- His employment was terminated vide a letter dated 7th August 2018, signed by the 2nd Respondent.
- That it was with impunity and utter disregard of the court and due process for the 2nd respondent to terminate his services being aware of the pendency of this suit.
- Termination was malicious in that the claimant had furnished the letter of 6th August, 2018, in defence.
- That he had been denied access to documents to facilitate an answer to the allegations against him.
- That on 19th April, 2018, at a cabinet meeting, he was coerced to sign a document titled, resignation letter. This was open and undated and was signed by eight other participants but under protest.

His further contention is that his letter of suspension and the letter dated 7th June, 2018 terminating his employment were illegal, malicious, discriminatory, unfair, wrongful and irregular for want of form and procedure. This is as follows;

#### **PARTICULARS OF ILLEGALITY, MALICE AND IRREGULARITY**

- a) *Failing to adhere to the procedure established by statute particularly the Employment Act.*
- b) *Failing to inform the claimant of the reasons for sending the claimant on suspension and termination and failing to advance a credible reason thereof.*
- c) *Making a decision based on malice, ill-will and spite and a politically instigated decision.*
- d) *Failing to follow due process and failing to give the Claimant a hearing.*
- e) *Using unlawful and discriminatory criteria of selecting the employees to be suspended, and terminated.*
- f) *Compelling the claimant to sign a “resignation letter” which amounted to blackmail, intimidation and harassment.*

He prays as follows;

- a) *A declaration that the letter dated 28th June, 2018 by the 2nd respondent sending the Claimant on suspension is unfair, irregular and unprocedural, and hence null and void for all intent and purposes.*
- b) *A declaration that the act of the 2nd Respondent in relieving and terminating the claimant’s duties is a breach of the claimant’s constitutional rights under Article 27(1), (2) and (3), 28, 41 and 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.*
- c) *In the alternative and without prejudice to prayers (a) and (b) above if the claimant is removed/sacked an order for payment of all salaries allowances and all other dues payable to the claimant on the remainder of the term and general damages for wrongful termination of employment.*
- d) *Any other relief that the court may deem fit to grant and costs of this claim.*

The Respondents’ case is a denial of the claim.

It is their further case that the Claimant failed to perform his mandate to the expectation of the Respondents and on various occasions failed to take instructions from the 2nd Respondent and on consultation seek the approval of the 2nd Respondent with prior to making decisions in his department which decisions had an impact on the operations of the 1st Respondent. This amounted to insubordination and therefore the warning and show cause letters issued to the claimant.

It is their further case that the dismissal of the Claimant was in accordance with Section 31 (a) of the County Government Act and the Claimant was given an opportunity to defend himself against the complaints levelled against him through the show cause letter dated 30th July, 2018 but failed to do so within the stipulated period.

Again, the Claimant was fully aware of the circumstances that led to his suspensions and had access to the documents and information he was requesting for. This is expressed as follows;

*13. The 1st and 2nd Respondents deny the contents of paragraph 16 of the Amended Memorandum of Claim and put the Claimant to strict proof thereof. The Respondents in response state that the dismissal of the Claimant was in accordance with Section 31 (a) of the County Government Act and the Claimant was given an opportunity to defend himself against the complaints levelled against him through the show cause letter dated 30th July, 2018 but failed to do so within the stipulated period.*

The Respondents other case is as follows;

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*ii) In June 2018 or thereabout the County Assembly of Kirinyaga County in exercising its oversight role over the County Executive Committee pursuant to Article 185 (3) of the Constitution launched investigations on the Claimant’s performance in his docket of Transport Roads and Public Works.*

*iii) The investigations by the County Assembly of Kirinyaga found that the Claimant was incompetent as he failed to implement the ‘200km’ to tender road projects, amongst others despite commensurate budgetary allocations for the same and a lapse in the financial Year 2017/2018. The County Assembly prepared a report on the outcome of the investigations, which is within the knowledge of the Claimant.*

*vii. The 1st and 2nd Respondents further conducted their own preliminary independent investigations from the one conducted by the County Assembly which prima facie established that the Claimant’s department had failed to deliver on its mandate to the*

expectation of the 1st and 2nd Respondents and thereby necessitating the 2nd Respondent to suspend the Claimant from office on grounds of incompetence/underperformance.

viii. *The suspension of the Claimant was not a terminal punishment but rather an interim measure undertaken by the Respondents for reasons of good administration to ensure that investigations on the Claimant's performance in terms of delivery of his department proceeded seamlessly and without any hindrance or interference, in the first instance, and to protect the interests of the Respondents.*

ix. *Further the Claimant's suspension did not amount to summary action as it is not a dismissal and as such the Respondents were not under any legal obligation to afford the Claimant a hearing before the suspension took effect.*

Their other case is as follows;

ii. *The purpose of the claimant's suspension as stated in the letter dated 28th June, 2018 was for the Respondents to set the wheels of their own investigation in motion so as to determine the Claimant's suitability to hold the office of County Executive Committee Member Transport, Roads and Public Works.*

iii. *That the Claimant suspension was for a determinate term being one month from the 28th day of June, 2018 and as such the Claimant herein will not suffer irreparable harm and damage as alleged*

The Respondents in further buttressing their case come out as follows;

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i) *The Employment Act does not apply to the instant matter as the process in which the Claimant is employed and removed from the office is governed by the provisions of the Constitution and the County Government Act.*

ii) *That the letter of suspension date 28th June 2018 specified the reasons for the Claimant's suspension being incompetence/under performance and the particulars of the Claimant's incompetence/under performance are set out in the Report of the County Assembly of Kirinyaga Joint Committee on Gender, culture, children and social services and Transport, Roads and Public Works of 22nd June, 2018 which is within the knowledge of the Claimant.*

iii) *The reasons for dismissing the claimant from office are apparent from the show cause letter dated 30th July, 2018 as read together with the termination letter dated 7th August, 2018.*

iv) *The suspension of the Claimant was done in absolute good faith and for reason of good administration to enable the Respondents conduct their own investigations without hindrance or interference.*

vi. *The Respondents were under no legal obligation to afford the Claimant a hearing before the suspending him from office.*

vii. *The dismissal of the claimant from office was in accordance with Section 31 (a) of the County Government Act, which does not require the 2nd Respondent to give the claimant a hearing before dismissing him from office.*

This matter came for on 10th June, 2021 whereby the parties testified in favour of their respective cases.

The issues for determination therefore are;

1. Whether the termination of employment of the claimant was wrongful, unfair and unlawful?
2. Whether the Claimant is entitled to the relief sought?
3. Who bears the costs of the suit?

The 1st issue for determination is whether the termination of employment of the claimant was wrongful, unfair and unlawful. The Claimant in his written submissions dated 25th June, 2021 fomented a case of unlawful termination of employment.

The Claimant sought to rely in authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where it was held as follows;

*"...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employee in effecting the termination."*

This was in addition to various authorities in a support of a case for unfair termination of employment.

The Respondent in opposition to the claim submits that the claimant was appointed by the 2nd Respondent by a letter dated 12th October, 2017 pursuant to Article 179 (2) (b) of the constitution and Section 30 (2) (d) of the County Government Act, 2012. His term of office was

to the office of the 2nd Respondent.

It is their further submission that the claimant was a political appointee having been directly appointed by the 2nd respondent with the approval of the County Assembly of Kirinyaga. He was therefore not a normal employee of the County Public Service Board. On this, she sought to rely on the authority of **ELRC Cause No.103 of 2014 Tom Luusa Munyasa & Another vs Governor Makuani County & Another (2014) eKLR** where the court held thus;

*“This court is of the view that the Members of the Executive at both National and County levels are political appointees, whose assumption of, tenure, and removal from office, hinges on the political mandate granted to the appointing Authorities by the people. The President and the Governor have the prerogative in dismissing their Members of the Executive whenever they deem it appropriate or necessary to do so.”*

To cement this, the Respondent further sought to rely on the authority of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu (2015) eKLR** where the Court of Appeal held as follows;

*“Firstly, by dint of Article 179(1) of the Constitution and Section 34 of the County Governments Act the executive authority of a County is vested in the County Executive Committee. The County Executive Committee comprises of the Governor, Deputy Governor, members of the County Executive Committee who are appointed by the Governor. The members of the County Executive Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities (see Article 179 (6) of the Constitution and Section 39 of the County Governments Act.) A County Executive Committee member is the Governor’s right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member. Where such confidence is lost the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.”*

The Respondent further submits on the 2nd Respondent’s authority under Section 31 of the County Government Act which comes out as follows;

*31. Powers of the Governor*

*The Governor*

- a) May, despite section 40, dismiss a county executive committee member at any time, if the Governor considers it appropriate or necessary to do so;*
- b) Shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;*

It is also the Respondents case and submission that the claimant was afforded an opportunity to ventilate his case but failed to substantially do so and therefore termination of his employment.

This matter tilts in favour of the Respondent’s case. This overwhelms that of the claimant. This is purely on grounds of the appointment and the legal aspect of dealing with it. The Claimant served on the good will of the 2nd respondent.

Again, the Claimant’s case is countered on the ground that he was afforded an open opportunity to present, ventilate and mitigate his case but failed to satisfactorily do so. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

The Respondents’ case is very ably demonstrated in evidence. They have displayed documentary evidence of the goings on leading to the termination of employment of the claimant. This is also supported by the testimonies of her witnesses.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

The last issue for determination is one on costs. I would order that each party bears their costs of their claim.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

**DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

Appearances

1. Ms.Manengene instructed by Manengene & Partners Advocates for the Claimant.
2. Mr. Nyamondi instructed by V.A. Nyamondi & Company Advocates for the Respondents.