



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E021 OF 2021

**IN THE MATTER OF ARTICLES 22, 23(1) & (3), 35, 41, 47 AND 162(2)(a) AND 236 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF SECTION 7 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES,
2016**

AND

IN THE MATTER OF SECTION 45 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTIONS 3, 4 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTION 76(2) OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF

SECTION 10 OF THE COUNTY ASSEMBLIES' POWERS

AND

PRIVILEGES ACT, NO. 6 OF 2017

BETWEEN

ELIZABETH ALILA OCHAYE.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MIGORI.....1st RESPONDENT

GOVERNOR MIGORI COUNTY2nd RESPONDENT

JUDGMENT

1. Elizabeth Alila Ochaye (the Petitioner) was nominated and appointed as a County Executive Committee member for Trade, Tourism and Co-Operatives by the Governor, County of Migori (the Governor).

2. In 2019, the Governor moved the Petitioner to the Ministry of Environment, Natural Resources and Disaster Management.
3. On or around 31 December 2020, the Governor restructured his government by merging some of the executive functions. The gazette notice did not disclose the fate of the Petitioner as far as portfolio was concerned.
4. The Petitioner was not paid her February 2021 salary on time and on 10 March 2021, she sought for explanations from the County Secretary.
5. On 5 March 2021, the Governor issued a show-cause to the Petitioner. The notice outlined some 3 allegations against the Petitioner. The Petitioner was given 30 days to respond to the allegations and was informed of the formation of Disciplinary Committee.
6. At the same time, the Governor notified the Petitioner that she had been reassigned to a Department without Portfolio.
7. The next day, the Petitioner's medical cover was removed on the instructions of the Chief Officer, Public Service.
8. The chair of the Special Disciplinary Committee wrote to the Petitioner on 25 March 2021, inviting her to appear before the Committee on 9 April 2021 for a hearing.
9. The Petitioner was served with a Summons to Appear and charge sheet on 30 March 2021.
10. On 7 April 2021 (two days before the scheduled hearing), the Petitioner moved the Court under a certificate of urgency seeking a myriad of interdicts. The Court issued an order of *status quo* to be maintained.
11. The County Secretary filed a replying affidavit on 27 April 2021.
12. The Petitioner did not appear before the Disciplinary Committee and on 13 April 2021, the Governor issued a letter terminating her appointment.
13. On 12 May 2021, the Petitioner moved the Court seeking to cite the Governor for contempt and the Governor filed a replying affidavit to the Motion on 24 May 2021.
14. The Court dismissed the contempt application on 1 July 2021.
15. On same day, the Petitioner secured leave to file an Amended Petition and it was filed on 19 July 2021.
16. In the Amended Petition, the Petitioner was challenging the fairness of termination of her appointment as a County Executive Committee member on 13 April 2021.
17. The County Secretary of the County Government of Migori filed a replying affidavit in response to the Amended Petition on 6 September 2021.
18. The Petitioner filed her submissions on 22 December 2021 while the County Government filed its submissions on 18 February 2022.
19. The main Issue for adjudication is whether the termination of the Petitioner's appointment was unfair, and if so, appropriate remedies.

Unfairness Due process

20. On or around 5 March 2021, the Governor, County of Migori (the Governor) reassigned the Petitioner.
21. The reason given for the reassignment was that the Petitioner had breached the principle of collective responsibility (such as making disparaging remarks against the county government).
22. The Petitioner asserted that the Governor had already planned to dismiss her in December 2020 and that the disciplinary process was a choreographed process to regularise the decision.
23. The Petitioner also asserted that she was not given sufficient particulars of the charges she was facing and that there was a violation of the County Assembly Powers and Privileges Act, 2007 as some of the allegations related to remarks made before the County Assembly.
24. In the same vein, the Petitioner contended that the charges had been preferred by the Governor thus being the complainant and that the Governor had also appointed members of the Disciplinary Committee contrary to the rules of natural justice.
25. The Petitioner submitted that she had not been afforded a fair hearing and that the decision contravened her rights to fair labour practices, fair administrative justice and due process as contemplated by Article 236 of the Constitution.
26. The County Government in defending the Governor's decision stated that the Petitioner had previously been reassigned in 2015, 2017 and 2019 and that the restructuring of the county executive was within the legal powers of the Governor as prescribed by section 30(a) & (e)

of the County Governments Act.

27. According to the County Government, there was no constructive dismissal of the Petitioner in December 2020 and that her remuneration for January and February 2021 were paid on time while the March 2021 though delayed was paid.

28. On the process leading to the termination of the Petitioner's appointment, it was contended that a show-cause was issued, and she was requested to respond and that further a Disciplinary Committee was established, it invited the Petitioner to attend and make further representations, but she declined after which her appointment was terminated on 13 April 2021.

29. According to the County Government, the Governor was exercising the power given to him by section 31(a) of the County Governments Act when terminating the Petitioner's appointment.

30. The Governor notified the Petitioner of contemplated disciplinary action through a letter dated 5 March 2021.

31. The grounds given were insubordination, gross misconduct, and violation of the law. The particulars were making disparaging remarks against the county government before the County Assembly in 2018, supporting an initiative to have the Governor impeached and making wild allegations against the Governor in social places in November 2020.

32. On 25 March 2021, the Special Disciplinary Committee invited the Petitioner to appear before it on 9 April 2021, and it attached a copy of a charge sheet setting out the charges and particulars.

33. The Petitioner moved the Court on 7 April 2021 and secured *status quo* orders and thus she did not attend the oral hearing.

34. At the time the Petitioner obtained the *status quo* order, the disciplinary process had already commenced and since a *status quo* order maintains the situation as it is, it is apparent the Petitioner misinterpreted the meaning of the order and thus failed to appear to make representations.

35. In the circumstances, the Court finds that the Petitioner's rights to procedural fairness, fair administrative action, fair hearing, and due process were not violated.

Valid and fair reasons

36. The Court of Appeal in *County Government of Nyeri & Ar v Cecilia Wangechi Ndungu* (2015) eKLR reiterated the need for valid and compelling reasons before a Governor dismisses a county executive committee member.

37. In near similar language, the Court of Appeal in *County Government of Garissa & Ar v Idriss Aden Mukhta & 2 Ors* held that section 31(a) of the County Governments Act had no place for the pleasure doctrine and that in dismissing a county executive committee member, the Governor should assign reasons.

38. The County Government did not disclose to the Petitioner and/or the Court the nature of disparaging remarks the Petitioner made before the County Assembly in 2018. It is also telling that the said remarks only became the subject of action in 2021.

39. The County Government and Governor did not equally outline the particulars of disloyalty shown by the Petitioner in August to October 2020, or the details of the meetings such as venues, dates, and participants where the Petitioner participated in crafting a deal to remove the Governor from office.

40. Lastly, the County Government and the Governor did not disclose the nature of the unprintable words uttered by the Petitioner to malign the Governor before right thinking members of society.

41. The allegations against the Petitioner were alleged to have arisen within public space. It was not suggested that the Governor himself was present at those events or occasions.

42. The Respondents did not produce any corroborating evidence from those who may have heard or seen the Petitioner.

43. The Court finds that the termination of the Petitioner's appointment was devoid of valid or compelling reasons.

Conclusion

44. From the foregoing, the Court finds and declares that the termination of the Petitioner's appointment on 13 April 2021 was unfair.

Orders

45. Due the nature of interpersonal relationship, trust and confidence expected between a Governor and his county executive committee members, the Court declines to quash the termination of appointment and/or order reinstatement.

46. In lieu, the Court awards the Petitioner of Kshs 3,000,000/- as damages.

47. Petitioner to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF MARCH 2022.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR APPLICANT AMUGA & CO. ADVOCATES

FOR 1ST RESPONDENT OWINO & MCDOWELL ADVOCATES

FOR 2ND RESPONDENT PROF TOM OJIENDA & ASSOCIATES

COURT ASSISTANT

CHRISPO AURA