



REPUBLIC OF KENYA



KENYA LAW
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Murigu & another v Nairobi City County Government & 4 others (Petition E007 of 2021) [2022] KEELRC 1178 (KLR) (16 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E007 OF 2021**

MN NDUMA, J

MAY 16, 2022

**IN THE MATTER OF ARTICLES 3, 10, 19, 20, 22, 23, 27, 41, 47,
159, 162, AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 10,
27,**

41, 47, 232 AND 259(1) OF THE CONSTITUTION

AND

**IN THE MATTER OF SECTIONS 4, 7, 9 AND 11 OF THE FAIR
ADMINISTRATIVE**

ACTIONS ACT, ACT NO. 4 OF 2015

AND

**IN THE MATTER OF SECTION 6 OF THE NAIROBI CITY COUNTY
ALCOHOLIC**

DRINKS CONTROL AND LICENSING ACT

AND

**IN THE MATTER OF GAZETTE NOTICE NO. 86 DATED 12TH JANUARY, 2021
PUBLISHED ON 12TH JANUARY, 2021**

AND

**IN THE MATTER OF THE PURPORTED APPOINTMENT OF THE MEMBERS
OF NAIROBI SUB-COUNTY ALCOHOLIC DRINKS CONTROL AND LICENSING
COMMITTEES**



BETWEEN

ERIC KIOGORA MURIGU 1ST PETITIONER

STEPHEN MWANGI 2ND PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

**ACTING GOVERNOR, NAIROBI CITY COUNTY GOVERNMENT 2ND
RESPONDENT**

**NAIROBI COUNTY CHIEF OFFICER, COMMERCE AND
INDUSTRIALISATION 3RD RESPONDENT**

GOVERNMENT PRINTER 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The petitioner filed the suit on January 18, 2021 praying for order: -
 1. That the honourable court be pleased to declare the decision of the respondent of appointing the members of Nairobi City Sub-County Alcoholic Drinks and Licensing Committees illegal and improper against section 6 of the Nairobi City County Alcoholic Drinks Control Licensing Act, and unconstitutional contrary to article 2, 10, 27, 41, 43, 47, 233, and 259 of the Constitution.
 2. That the Honourable Court be pleased to issue an Order of Certiorari quashing the gazette notice no. 86 dated January 12, 2021 and published on January 12, 2021 the members of Nairobi City Sub-County Alcoholic Drinks and Licensing Committees.
 3. That the honourable court be pleased to issue an order of *Mandamus* directed at the 4th respondent to publish the names of the petitioners and the other members of Nairobi City Sub-County Alcoholic Drinks and Licensing Committees in keeping with the communique dated December 7, 2020.
 4. That the honourable court be pleased to grant the petitioners the cost of the petition.
 5. That the honourable court be pleased to make any further orders as it deems fit.
2. Interim orders initially granted in favour of the petitioners on February 1, 2021 were set aside on September 23, 2021 following conclusion of application dated January 18, 2021.
3. The petition is premised on grounds set out in part 13 of the Constitution, that petitioners brought the petition as a matter of public interest and were the Chairman and member of Dagoretti South and Langata Sub-County Alcoholic Drinks Control and Licensing Committee, and Licensing Committee, appointed as per Gazette Notice No. 12030 published on December 8, 2017 and whose tenure was extended on December 7, 2020 to December, 2023.



4. That the 4th respondent, despite receipt of the communication to extend the petitioners' and other members' tenure unlawfully neglected to publish the names of the petitioners and other members as duly appointed members.
5. That on January 6, 2021, the 3rd respondent purported to revoke the appointment of the petitioners and the other members of the aforesaid committee.
6. That on January 12, 2021, vide Gazette Notice No. 86 published on January 12, 2021, the 2nd respondent purportedly appointed the members of the Nairobi City Sub-County Alcoholic Drinks and Licensing Committee hence the suit.
7. The petitioners contend that the said appointments were made when the petitioners and other members were in office their tenure having been extended on December 7, 2020 and therefore, the purported appointments were made in excess and or without power contrary to section 6 of the Nairobi City Alcoholic Drinks Control and Licensing Act.
8. That the said appointment is therefore erroneous, illegal and wrongful and violates also section 4 of the *Fair Administrative Actions Act* No. 4 of 2015 and need to be remedied by an order of Certiorari quashing the said appointment.
9. That the conduct by the respondents amounts to unfair labour practice in violation of article 41(1) and (2) (b) of the *Constitution*.
10. That the petition be granted as prayed.
11. In response, the 1st, 2nd and 3rd respondents depose that there was never any appointment of the petitioners that was valid in law for the reasons that the petitioners' names were never gazetted. The purported appointment was therefore null and void and was incomplete.
12. That the respondents appointed the new members of the Nairobi City Sub-County Alcoholic Drinks Licensing Committee in accordance with the law as there were no members that had been appointed as the committee members.
13. That the 2nd respondent is mandated by section 6 of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 to appoint the members of the committee aforesaid.
14. That the petitioners have not proved any case against the respondents on a balance of probabilities. That no violations or threat to the rights of the petitioners under article 41 of the *Constitution* and/or under section 4 of Fair Administrative Action Act, 2015 have been disclosed in the petition nor have the petitioners established that they have been denied purported rights.
15. That the petition is completely devoid of merit and it be dismissed with costs.

Submissions

16. The petitioner filed submissions and cites section 33(2) (5) of the *County Government Act* which provides:-

“2 if a motion under sub-section (1) is supported by at least two thirds of all the members of the County Assembly-

(a)



(b) The Governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this Section.”

17. The petitioners submit therefore, the re-appointment done by the Executive Office of the Governor on the December 7, 2020 was valid and within the Legal realm of the Governor to execute the function as prescribed under section 6(3) (d) of the Nairobi City County Alcoholic Drinks Control and Licensing Act.

18. That section 6(3) (d) reads:-

“6(3) the Sub-County Committee shall consist of

(a)

(b)

(c)

(d) the residents of the sub-county, appointed by the Governor at least two of whom shall be of such gender as to ensure gender balance in the committee.”

19. The petitioners submit that the members of the committee were lawfully and constitutionally in office having been appointed by the Governor on December 7, 2020.

20. That the 4th and 5th respondents were by virtue of the appointment dated December 7, 2020 expected to extend the appointment by gazetting the extended period to December, 2023 effective December 8, 2020..

21. The 4th respondent upon receipt of the appointments on December 7, 2020, however refused/ neglected and/or ignored to publish the names of the petitioners as the members of the committee in the Kenya Gazette.

22. That the 4th respondent unlawfully gazetted other persons on January 12, 2021 in gazette notice No. 86 published in the special issue on January 12, 2021 in defiance of the lawful appointments by the Governor. That the subsequent appointment and gazettment was unlawful, null and void and the court is called upon to declare this subsequent appointment unlawful, and void ab initio as mandated under article 165(3) (d) of the Constitution.

23. That the 2nd respondent acted ultra vires his authority, that mandate having been lawfully discharged by the incumbent Governor.

24. The petitioners cite the case of Kenya National Examination Council v Republic; Ex parte – Geoffrey Kathenji Njoroge and others - Civil Appeal No. 266 of 1996 [1997] eKLR where it was stated as follows:-

“Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction.”

25. That the 2nd respondent acted in excess of jurisdiction by assuming being Acting Governor he had the power to revoke a decision of the substantive Governor made on December 7, 2020 and having been so communicated to the 4th respondent.



26. That in *Republic v The Attorney General and another ex parte James Alfred Kasoro* – Judicial Review Miscellaneous Application No. 44 of 2012, it was held:-

“an order for mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by law.” and as stated by the Court of Appeal in the case of *Geoffrey Gatbenji (supra)*

“The order must command no more than the party against whom the application is legally bound to perform. These principles mean that an order of mandamus compel performance of a public duty which is imposed on a person or body of persons by a statute where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

27. That the application be allowed.

28. The 2nd respondent filed submissions dated January 28, 2022 in which it challenges the jurisdiction of the Court under article 162(2) and section 12 of the *Employment and Labour Relation Court Act* and relies on the decision of Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank and 2 others* [2012] eKLR where it was held that jurisdiction flows from the *Constitution* on statute and cannot be extended by interpretation or craft. The respondents state that the present dispute does not constitute an employment and Labour dispute and therefore, the Court has no jurisdiction over it. That appointment of Board members is not a matter related to employment and Labour but is a Statutory/Constitutional mandate and any dispute arising from such appointment is to be resolved by the High Court.

29. The respondent cites the case of *Speaker of National Assembly v James Njenga Karume* [1992] eKLR where the Court held that where a specific procedure is prescribed by *the Constitution* or law, it must be followed.

30. That Section 9 of the *Fair Administrative Action Act*, provides:-

“Subject to subsection (2) a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*.”

31. The respondents challenge the contention that the petitioner’s term was extended upon expiry on December 7, 2020. That the names of the petitioners were not gazetted as alleged. That upon impeachment of the Governor, the Speaker of the County Assembly ascended to the office of the Governor. That as Acting Governor, being confronted with a Lacuna in the Nairobi City County Alcoholic Drinks Board, he appointed new members and gazetted them via gazette notice number 86 published on January 12, 2021. The appointments were made in public interest.

32. That the appointments were lawfully done in terms of section 6(3) of the Nairobi County Alcoholic Drinks Control and Licensing Act.

33. That the status quo is that the appointments of the new members was done and has taken effect and there is no evidence before court to show that the appointment was in excess of mandate granted to the acting Governor at the time of appointment. That the application has no merit and it be dismissed with costs.



34. That this court has jurisdiction over appointments of all public officers and the suit is properly before employment and labour relations court.
35. The court finds without hesitation that it has jurisdiction to hear and determine this dispute it being a matter related to employment and Labour.

Determination

36. In terms of sections 107, 108 and 109 of the *Evidence Act*, cap. 80 Laws of Kenya, he who alleges a fact must prove it on a balance of probabilities. The onus and/or burden of proof lies on him. The respondents assume evidential burden of rebuttal once the primary burden of proof has been proved.
37. In the present case, the petitioners whose term had expired as members of the Nairobi City County Alcoholic Drinks Board without producing a legal instrument to that effect, allege that the impeached Governor had extended their term with effect from 7th December, 2020. The petitioners allege without any substantive proof that Communication dated 7th December, 2020 was forwarded to the Government printers to gazette the said appointments but the Government Printer declined to publish the names of the petitioners.
38. The 2nd respondent has on the other had adduced a gazette no. 86 presented in the special issue on January 12, 2021, showing that persons other than the petitioners had lawfully been appointed as members of the Nairobi County, Sub-County Alcoholic Drinks and Licensing Committee.
39. The petitioners have failed to produce any substantive evidence to show that as at the time the erstwhile Governor was impeached, he had appointed and lawfully caused the appointments of the petitioner's as members of the Licensing Committee for a further period effective December 8, 2020 as alleged by the petitioners or at all.
40. There is a presumption of legality of a legal instrument duly adduced before court unless compelling evidence is adduced to have the court invalidate the document. The petitioners have failed to discharge that onus to the satisfaction of the court.
41. The court is therefore satisfied that the persons appointed to the Nairobi, City Sub-County Alcoholic Drinks and Licensing Committee by the 2nd respondent were lawfully and properly appointed and they held the office lawfully as at the time of filing this suit.
42. Accordingly, the petition lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 16TH DAY OF MAY, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances:-

Ndegwa & Ndegwa Advocates for the Petitioner

Miller & Company Advocates for 1st respondent

Kago Mburu & Associates Advocates for 2nd respondent

Odukenya for 4th and 5th respondent

Ekale: Court Assistant

