



REPUBLIC OF KENYA



KENYA LAW
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**Karugu v Nyeri County Government (Cause E045 of 2021)
[2022] KEELRC 3841 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3841 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E045 OF 2021
MA ONYANGO, J
AUGUST 5, 2022**

BETWEEN

CAROLINE WANJIRU KARUGU CLAIMANT

AND

NYERI COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. This Claim was filed by Hon Dr Caroline Wanjiru Karugu, Deputy Governor, Nyeri County, on September 3, 2021. The claim is against the Nyeri County Government as established under Article 176 of the *Constitution* of Kenya and governed by the *County Government Act* No 17 of 2012.
2. At the time this claim was filed, Nyeri County Resident Judge of the Employment and Labour Relations Court was not sitting and as such, at the behest of the Claimant and with no contest by the Respondents, the file was sent to Nairobi Employment and Labour Relations Court for hearing and determination in view of the urgency.
3. This claim was initially brought against the Nyeri County Secretary and the Nyeri County Governor as the persons/office holders responsible for the Claimant's grievances as the 1st and 2nd Respondents respectively. The Claimant amended her Statement of Claim to join the Nyeri County Assembly, the Speaker Nyeri County Assembly, the Clerk, Nyeri County Assembly and the Nyeri County Government as the 3rd, 4th, 5th and 6th Respondents respectively.
4. Pursuant to a ruling by Nzioki Wa Makau J dated November 11, 2021 and subsequent proceedings, all other Respondents were released leaving the Nyeri County Government as the sole Respondent.
5. In the Amended Statement of Claim dated September 2, 2021 and amended on October 6, 2021, the Claimant prays for the following reliefs: -



- i. A declaration do issues, that the 2nd Respondent in purporting to direct and order the 1st Respondent to withhold and/or stop the remittance of the Claimant's salary, car allowance, house allowance, security and emoluments as the Nyeri County Deputy Governor constitutes a breach of the Claimant's Constitutional rights under Articles 27(4), 28, 29(d), 41, 47(1) & 50 of the Constitution of Kenya.
- ii. A declaration do issue, that by his purported closure and blockade of access to the Claimant's office of Nyeri County Deputy Governor, and the 2nd Respondent's directives on the withdrawal of the Claimant's support staff thereto as such Nyeri County Deputy Governor the 2nd Respondent has no lawful power to so act, absent due process and the said act to the extent it hampers the Claimant from discharging her duties and responsibilities as the Nyeri Deputy County is wholly unconstitutional, illegal, null and void and constitutes a violation of the County Government Act.
- iii. A declaration do issue, that on account of the absence of the Claimant as the Nyeri Deputy County Governor in all Nyeri County Government Cabinet meetings convened and held since April 2019 and pursuant to Article 179(2)(a) of the Constitution of Kenya incorporating the Claimant as part of the Executive Committee of Nyeri County Government, together with the H E Governor and the Executive Committee Members stipulated under Article 179(2)(b) of the Constitution of Kenya, no, valid, lawful or binding legal decisions have been made by the Nyeri County Executive Committee's decisions are null and void and of no effect.
- iv. A declaration do issue, that by the Respondent's withholding and/or stopping the remittance of the Claimant's salary, allowances, and ancillary dies due to her since November 2018 (as the case may be) to date while the Claimant remains as the Nyeri Deputy County Governor, constitutes an unfair, unlawful, and wrongful act indignifying of the Claimant in violation of Article 28 of the Constitution of Kenya.
- v. An Order of injunction and prohibition do issue as against the 1st and 2nd Respondent, restraining them by themselves and/or any person under their behest from blocking the Claimant from accessing her office at the offices of Nyeri County Deputy Governor, withdrawing any support staff thereto, or otherwise interfering with, or curtailing the efficient execution of the Claimant's duties, tasks, and her delivery of services as the Nyeri Deputy Governor.
- vi. An Order directing the 1st Respondent to forthwith, and not later than 24 hours of the making of this Order to release to the Claimant all of the Claimant's accrued salary arrears of Kshs 685,250/= per month, all accrued allowances, all accrued ancillary benefits and dues, from November 2018 (as the case may be), to date.
- vii. Special damages in the sum of Ksh 442,107/= incurred by the Claimant as her own resources to fuel the official Nyeri County Government Car assigned to her on account of the Respondent's stoppage of remittance of withholding the Claimant's fuel allowance to the Claimant's office since June 2019 to date.
- viii. Special Damages for security incurred by the Claimant in the sum of Kshs 15,000/= per month since November 2018 to date, in consequence of the Respondent's default to avail her personal security.
- ix. General damages be awarded to the Claimant to the unlawful withholding of the Claimant's accrued salary, allowances, benefits and ancillary remittances.



- x. Costs of the suit be awarded to the Claimant.
 - xi. Interest on sums awarded herein levied at 27% p.a. until payment in full.
 - xii. Any other relief amenable in the circumstances.
6. It is the Claimant's case that the conduct of the Respondent through its Governor and officials have effectively suspended and/or constructively terminated her as the Nyeri Deputy Governor.
 7. That she was sworn in on May 4, 2018 to her role as the Deputy Governor, Nyeri County by operation of Article 179(4) of the Constitution of Kenya. As such she is the Deputy Chief Executive Officer of Nyeri County.
 8. The Claimant as the Deputy Governor, Nyeri County, is a member of the Executive Committee of the Nyeri County Government together with the Governor, Nyeri County and other members pursuant to Article 179(2)(a) and Article 179(2)(b) of the Constitution of Kenya.
 9. The Claimant avers that she has been denied access to her official office since November 2019 and by various irrational acts unfairly directed to her, she has been deliberately side-lined from effectively executing her role.
 10. The Claimant avers that the said acts include the Respondent declining to invite her to County Executive Meetings, being "kept in the dark" on County policy and mandates issued by the Nyeri County Executive Committee. She avers that her personal assistant's contract was not renewed as a form of frustrating her and the remainder of the staff were either reassigned or indisposed thus crippling her office.
 11. The Claimant further avers that the Respondent stopped allocating allowances due to her including phone, entertainment allowance and house allowance which were last issued to her in November 2018. Fuel allowance was also stopped in June 2019 and subsequently her salary was stopped altogether.
 12. It is the Claimant's averment that the discharge of duties and mandates of the office of Deputy Governor, Nyeri County is dependent on the facilitation the Respondent affords. That her terms and conditions of service are regulated by the Constitution of Kenya, the County Government Act, principles of fair administrative action and rules of natural justice.
 13. The Respondent filed a Statement of Response dated 6 December 2021 wherein it challenges the jurisdiction of this Court to determining the Claimant's alleged grievances. It is the Respondent averment that this Court does not have the jurisdiction to entertain the suit as there is no employer-employee relationship.
 14. The Respondent avers that the Claimant stopped working for the Nyeri County Government as at August 2019 without any explanation. That the Respondent continued remitting the Claimant's salary until June 2021 when it was discovered during routine staff returns at the end of the 2020-2021 financial year that the Claimant could not be accounted for since she had not been reporting to work and as such had constructively resigned.
 15. That the Claim by the Claimant that she had not been receiving her pay since November 2019 is sensational, false/a lie meant to mislead the Court. The Respondent referred to annexure CK-1 being evidence of payment of salary for the month of April 2021.
 16. The Respondent avers that the Claimant chooses and picks when to visit her office for political convenience. That she has been entertaining political entourages in her office when convenient and it is therefore untrue that the Claimant has been hindered from accessing her office.



17. The Respondent avers further that the Claimant has refused to attend executive committee meetings as communicated to her during the assumption of office.
18. With regards to the Claimant's staff, the Respondent avers that the Claimant's personal assistant's contract lapsed by effluxion of time whereafter she appointed a personal assistant who she unprocedurally terminated. That within the year May 2018 to May 2019 she terminated five junior staff members without adherence to the *Employment Act*.
19. The Respondent avers that with respect to fuel allowance, that the same is allocated equitably to all county government vehicles to operate within Nyeri County with an allowance for routine work outside the County. That the Claimant lives in Nairobi and has made exorbitant claims for fuel presupposing that she ought to be transported daily to and from Nairobi to Nyeri and back. That the allocation would cripple the entire County Government fleet including ambulances and fire engines.
20. It is the Respondent's averment that while the Claimant was not a resident of Nyeri County, she had undertaken that she would relocate for ease of execution of her mandate including deputizing the Governor in his absence. That the Claimant's continued refusal to relocate and reside in Nyeri has made it completely difficult for her to supervise the administration and delivery of services in the County to the detriment of the people of Nyeri.
21. The Respondent avers that the Claimant is not authorized to take a government vehicle to a private garage that has not been pre-qualified to service or repair government vehicles as any payment would be in breach of the *Public Procurement and Assets Disposals Act*.
22. That as regards security personnel, the Respondent avers that it continues to retain and pay allowances for one security personnel for the office of the Deputy Governor similar to such allocations for other Deputy Governors across the country. There is no justification for her to have more than the one personnel to be catered for by the Respondent.
23. The Respondent avers that the Claimant has attended only 22 of over 90 County Executive Meetings and that pursuant to the County Government Act, failure of a County Executive Member to attend 3 consecutive County Executive Meetings without any reasonable excuse or written authority is ground for removal of a County Executive Member.
24. It is the Respondent's averment that when an employee absconds work, then the employer's obligation to pay at the end of the month does not arise. That the Respondent cannot just remit the remuneration to the Claimant as long as there is no tangible service or work rendered.
25. The suit was heard on December 16, 2021 where the Claimant testified on her behalf and the Respondent called the County Secretary of the Respondent – Benjamin Gachichio as its witness.

Claimant's Evidence

26. The Claimant, giving evidence as PW-1 adopted the averments of her Amended Statement of Claim and her Affidavit sworn on September 2, 2021. She produced the annexures therein as "Exhibit CK1-CK6" accordingly.
27. It was the Claimant's testimony that upon the passing of the former Governor of Nyeri and the taking up of the position by the current Governor who was the then Deputy Governor, the current Governor asked her to assist him in serving the people of Nyeri County. That at the time the Governor approached her, she was in the field of Academia and Banking.



28. She testified that she has not been paid her salary since June 2021 and all her allowances had been stopped in May 2019. That she has not been housed nor has house allowance been paid even as she continues to do community work.
29. CW1 testified that she was invited to a few meetings but was indisposed which she communicated to the CEC. She was however excommunicated.
30. During cross examination she testified that she was not physically barred from the office and confirmed that she had been in the office the previous week.

Respondent's Evidence

31. RW1 adopted his Witness Statement dated December 6, 2021 together with the documents annexed thereto as "Exhibits 1 to 14".
32. RW1 testified that the Respondent is not aware of any meetings attended or reports tendered by the Claimant since she disappeared from the office.
33. It was RW1's testimony that as far as he was concerned there was no Deputy Governor as the Claimant had completely absented herself from the office for about three years. He testified that the Respondent did not communicate to the Claimant when it decided to stop paying her salary.
34. RW1 testified that the work ticket produced by the Claimant is supposed to be signed by either the Chief of Staff or Transport Officer or any other Service Officer and not the Deputy Governor or the Governor. That it was improper for the Claimant to sign the work ticket.
35. It was RW1's testimony that the trips taken by the Claimant have nothing to do with Nyeri County and that there is a Fuel Allowance Policy for the County. He testified that the County policy provides for the issuance of a fuel card to the Governor and Deputy Governor for their normal office running activities. If either was to go out of town, they were to take an imprest for fuel.
36. RW1 testified that the procedure as relates to housing of the Speaker, Deputy Governor and Governor was that they were to have official residences constructed. He testified that he was aware that there was a tender to construct the said houses but that they had not been constructed. In the meantime, the said Executive Members were required to identify a house that they would live in and the same would be valued and paid for by the County. He testified that the policy capped the amount but he was not aware of the figure.
37. He testified that the Claimant's staff members who left resigned or were terminated by the Claimant and that neither he nor the Respondent blocked her return to the office.
38. Following the conclusion of the hearing, the parties agreed to convene a meeting between the Claimant and the Governor, Nyeri County to explore a possible resolution of the dispute. It is unfortunate that a consensus was not reached.
39. The parties filed their respective written submissions pursuant to this Court's directions of January 7, 2022.

Analysis and Determination

40. Despite the extensive submissions on the matter by the parties, the issue for this Court's determination is whether Claimant is entitled to the reliefs sought.



41. Before I proceed, I note that while my learned brother Nzioki Wa Makau J conclusively dealt with the issue of jurisdiction in the ruling delivered on November 11, 2021, both parties submitted on the issue.
42. The Respondent as the Objector interpreted the finding of the learned Judge that the jurisdiction of the Court was hinged on the determination of the threatened impeachment of the Claimant. That as a disciplinary action, the same would constitute a human resource function that would enable this Court be seized of the matter.
43. Prior to that finding at paragraph 15 of the Ruling, the Learned Judge observed as follows persuaded by the holding of Ongaya J in *Mike Sonko Mbuvi Gideon Kioko v Clerk, Nairobi City County Assembly & 4 Others*:
- “The Claimant is not an elected official as a Deputy Governor rides on the ticket for the candidate of the Governor. In the case of the Claimant, she was picked for the position of the Governor of Nyeri. She is therefore employed in the words of Ongaya J. by the people of Nyeri to act as their Deputy Governor her selection by the Governor notwithstanding. The Claimant is therefore before the correct Court in my view.
44. The issue on jurisdiction was thus determined and I shall say nothing further on the same.
45. The parties before me have divergent positions on almost every single claim and allegation made by the other party. It is however not in dispute that the Claimant to date remains the Deputy Governor of Nyeri County sworn in as such on 4th May 2018.
46. She has not been removed or impeached as a holder of a constitutional office that would be pursuant to the provisions of Article 181 of the *Constitution*. While the Respondent has made several claims of non-performance and absconding of duty by the Claimant, nothing has been brought before this Court to show there was any kind of disciplinary hearing or process. That the Respondent alludes to a process of removal of a non-performing County Executive Committee Member under Section 40 of the *County Government Act* but it is not clear why this was not initiated if the Respondent was keen on indicting the Claimant on her performance.
47. Article 41 and 47 of the *Constitution* are abundantly clear on the right to fair administrative actions and fair labour practices. An employer cannot one day decide to stop salaries and allowances without due process whose particulars are enumerated under Section 4 and 6 of the *Fair Administrative Actions Act*.
48. Indeed Section 4 of the Fair Administrative Act provides as follows:
4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision —
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;



- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
4. The administrator shall accord the person against whom administrative action is taken an opportunity to—
- a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;
 - c. cross-examine persons who give adverse evidence against him; and
 - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the *Constitution*, the administrator may act in accordance with that different procedure.
49. Section 6 on the other hand sets out as follows:
6. Request for reasons for administrative action
- 1. Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.
 - 2. The information referred to in subsection (1), may include—
 - a. the reasons for which the action was taken; and
 - b. any relevant documents relating to the matter.
 - 3. The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.
 - 4. Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.
 - 5. An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.



50. That said, it is the finding of this Court that the withholding of the Claimant's salary and allowances by the Respondent was unlawful. I now proceed to consider the Claimants claims under the respective prayers: -

i. Nullity of Decisions of Nyeri County Government Executive Committee

51. From my reading of Section 41 of the County Government Act, there is no provision or requirement of the attendance of a Deputy Governor for meetings to be held and resolutions passed. The quorum of a County Executive Meeting constitutes half of the members being present. A resolution may pass by a majority of the members present.

52. The claim thus fails.

ii. Salary and Salary Arrears

53. I have already found that the Respondent's withholding of the Claimant's salary was unfair and consequently award the Claimant her full salary from June 2021 to date being kes 8,076,250 (621,250 x 13). I however decline to make any orders as to allowances in the absence of proof as the Claimant failed to supply any documents to show her entitlement.

iii. Special Damages - Fuel Allowance and Security

54. The claim for Special Damages for fuel already paid for and security meet a similar fate as there has been nothing presented to this Court by the Claimant to establish her entitlement.

iv. General Damages

55. The Claimant has not made a case for general damages either in her pleadings or in submissions and I decline to grant the same.

56. For the avoidance of doubt, the final orders of this Court are as follows: -

- i. A declaration be and is hereby issued that the withholding of the Claimant's salary by the Respondent was unlawful.
- ii. An order be and is hereby issued directing the Respondent to pay the Claimant her full salary and arrears to date being Kshs 8,076,250/= with interest at Court rates from the date of judgment until payment in full.
- iii. The Respondent shall pay the Claimant's costs.

56. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF AUGUST 2022

MAUREEN ONYANGO

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the { Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

