



REPUBLIC OF KENYA



KENYA LAW
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Kamanda & 36 others v County Government of Nyamira & 5 others (Petition E005 of 2022) [2022] KEELRC 12848 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12848 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E005 OF 2022**

S RADIDO, J

OCTOBER 12, 2022

(ORIGINALLY, KERICHO ELRC PETITION NO. E006 OF 2022)

**IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20,
21, 22, 23, 162(2)(A), 258 AND 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT
OF THE RIGHTS AND FREEDOMS IN ARTICLES 25, 27, 28, 33,
35, 41, 47, 48, AND 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT
OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT
OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007

BETWEEN

**DUKE KAMANDA 1ST PETITIONER
VIOLET NYABOKE NYABUTI 2ND PETITIONER
SHADRACK MOGONA ONDIEKI 3RD PETITIONER
DAVID OMANGA CHWEYA 4TH PETITIONER
ELIZABETH NYANCHAMA MARANGWA 5TH PETITIONER
VICKLINE BONARERI ONDIEKI 6TH PETITIONER**



MAXWELL GISORE OUKO	7 TH PETITIONER
LINET NYABIAGE OKERI	8 TH PETITIONER
MILLYYVONNE PENINAH NYACHIEO	9 TH PETITIONER
SOPHIA KWAMBOKA NYANGWENCHA	10 TH PETITIONER
BRIAN NYAGERIGA	11 TH PETITIONER
JANET KEMUNTO BUNDI	12 TH PETITIONER
LINET MORAA MOKUA	13 TH PETITIONER
EZINAH BISASE ACHOKI	14 TH PETITIONER
PATRICK M. ACHOKI	15 TH PETITIONER
NANCY KERUBO ONDORO	16 TH PETITIONER
CARREN KWAMBOKA MOMANYI	17 TH PETITIONER
DORIS KEMUNTO ONYANCHA	18 TH PETITIONER
RICHARD ONDIEKI ATUNGA	19 TH PETITIONER
BRIAN MONARI GWARO	20 TH PETITIONER
ESTHER KWAMBOKA MOMANYI	21 ST PETITIONER
JANE KWAMBOKA MOSE	22 ND PETITIONER
KELVIN NYANGAU KIMANGA	23 RD PETITIONER
ISAIAH NYAKUNDI GETONGO	24 TH PETITIONER
MERCYLINE MORAA ONKEO	25 TH PETITIONER
RHODA BWARI ONDIGI	26 TH PETITIONER
EVERLYNE KEMUNA OSERO	27 TH PETITIONER
RICHARD MAGARE SAGWE	28 TH PETITIONER
GLADYS BANGE NYOKWOYO	29 TH PETITIONER
KELVIN MOMANYI MAASI	30 TH PETITIONER
LABAN MOTAROKI OSUMO	31 ST PETITIONER
KENNETH OIRERE NYANGERI	32 ND PETITIONER
CHARLES OGINO SAGWE	33 RD PETITIONER
LILIAN SAGWE	34 TH PETITIONER
ALICE NYANGAU	35 TH PETITIONER
JOSPHAT OSINDE	36 TH PETITIONER
RUTH BOSIBORI MAKORI	37 TH PETITIONER

AND



COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT
GOVERNOR NYAMIRA COUNTY 2ND RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER, PUBLIC SERVICE
MANAGEMENT 3RD RESPONDENT
COUNTY SECRETARY, COUNTY GOVERNMENT OF NYAMIRA 4TH
RESPONDENT
CHAIRPERSON, NYAMIRA COUNTY PUBLIC SERVICE BOARD 5TH
RESPONDENT
SECRETARY, NYAMIRA COUNTY PUBLIC SERVICE BOARD 6TH
RESPONDENT

JUDGMENT

1. On or around March 1, 2019, the Governor, County Government of Nyamira, issued a Memo to the County Executive Committee member, Public Service Management, to suspend and remove from the payroll employees said to have been illegally employed from June 2018 pending investigations.
2. The decision was followed by a staff audit/headcount, which was to be completed by April 10, 2019. As a result of the audit, about 874 employees were removed from the payroll
3. Through a petition lodged with the court sitting in Kericho on May 13, 2022, the petitioners challenged the decision, and the remedies sought were:
 - (a) A declaration that the removal of the petitioners who are support staff and enforcement officers by the respondents is irregular, unprocedural, and was in breach of article 47 of the *Constitution of Kenya*.
 - (b) A declaration that the actions of the respondents in this cause violated the constitutional rights of the 634 employees under articles 27, 35(1)(b) and (2), 36(1), 47, 50(1) and (2) of the *Constitution of Kenya* and *Employment Act, 2007* and declare the same as illegal and illegitimate.
 - (c) A declaration that to the extent that the decision reached by the respondents is discriminatory, malicious, baseless, and malevolent and is a violation of article 35(1)(b), 47, and 50(1) of the *Constitution*, therefore null and void ab initio.
 - (d) An order against the respondents to retract the decision to remove the employees from the payroll within 14 days.
 - (e) An order of judicial removal of certiorari be issued to remove into the honourable court for quashing the decision of the respondents to remove county employees from the payroll and as conveyed by a letter issued by the respondents and without due regard to the provisions of the *County Governments Act*, No 17 of 2012, *Employment Act, 2007* and article 10 of the *Constitution, 2010*.
 - (f) An order declaring that the said decision of the respondents prompting to remove petitioners/ county employees from the payroll was illegal and irregular and the same be brought into the court and be quashed pursuant to an order of certiorari.



- (g) A permanent injunction restraining the respondents either by themselves, agents, servants and/or employees from removing the petitioners from the payroll of the County Government of Nyamira and/or stopping any payments to and/or in favour of the said employees, either on account of remuneration, allowances and/or salaries whatsoever and/or howsoever.
 - (h) An order for payment of salaries in arrears from the month of May 2019 and remittance of statutory arrears to NSSF and NHIF.
 - (i) A declaration that the petitioners be compensated the amount of money that the court deems sufficient and/or appropriate by the respondents for the violation of the petitioner's rights and fundamental freedoms under articles 27, 28, 41, 47, and 55 of the Constitution.
 - (j) The honourable court do order that costs of this petition be borne by the respondents.
 - (k) Such other orders as this honourable court shall deem fit and just to grant in the circumstances.
4. When the motion and petition were placed before the court on may 24, 2022, it declined territorial jurisdiction and transferred the petition to this court.
 5. The parties appeared before this court on June 7, 2022, and the court gave directions on the filing and exchanging of responses to the petition, further affidavit, and submissions with judgment reserved for October 23, 2022.
 6. The respondents filed a response and replying affidavit sworn by the 5th respondent on June 30, 2022. They filed a list of documents on July 14, 2022.
 7. The petitioners filed their submissions on August 2, 2022, and the respondents on August 31, 2022.
 8. In their submissions, the petitioners raised 3 Issues:
 - i. Whether the petitioners herein were employees of the County Government of Nyamira?
 - ii. Whether the interdiction of the petitioners was lawful?
 - iii. Whether the petitioners are entitled to the reliefs sought?
 9. The respondents, on their part, identified the Issues in dispute as:
 - i. Whether the respondents acted within the law?
 - ii. Whether the petitioners are entitled to the prayers sought?
 10. The court has given due consideration to the petition, affidavits, and submissions and not only finds that it has no jurisdiction, but the cause of action, though disguised as a constitutional petition, alleges breach of contract, which can be remedied under statutory and the common law and is thus time-barred.

Jurisdiction

11. The violations or breaches alleged by the petitioners emanated from a decision by the respondents to remove them from office or payroll.
12. By dint of article 234(2)(i) of the Constitution as read with section 77(2)(a) and (e) of the County Governments Act and sections 85,86 and 87(2) of the Public Service Commission Act, the petitioners should have at the first instance approached the Public Service Commission.
13. Section 77(2)(a) and (e) of the County Governments Act provides:



- (2) The commission shall entertain appeals on any decision relating to the employment of a person in a county government, including a decision in respect of—
- (a) recruitment, selection, appointment and qualifications attached to any office;
 - (e) retirement and other removal from service ;
13. The petitioners were challenging their removal from the payroll.
14. The aforesaid legal provisions have anchored what is called the exhaustion principle within the disputation arena within the county public service.
15. The exhaustion principle within the context of the county public service was the subject of examination by the Court of Appeal in *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR, where it was held:
- There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance..... Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is, in our view, without basis because section 77 has placed no fetter to the jurisdiction of the Public Service Commission.
16. The decision is binding on this court, and the court would therefore decline first-instance jurisdiction.

Limitation

17. The court also notes that the Petition was not precise in terms of facts and issues in disputation. It was drafted in general terms and what is apparent is that the petitioners were complaining about decisions taken on March 1, 2019.
18. A reading of the petition does not disclose any constitutional or other cause of action which could not be determined based on statutory employment and common law.
19. It is probable the petitioners were avoiding challenges on the ground of time-bar (section 90 of the *Employment Act, 2007*) as urged by the Respondents.
20. There was no explanation why it had taken the Petitioners over 3 years to move the court.

Conclusion and orders

21. In light of the foregoing, the court has no hesitation in dismissing the petition with costs to the respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 12TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances



For Petitioners Ochoki & Co. Advocates

For Respondents R. Nyambane, Advocate, County Law Office

Court Assistant Chrispo Aura

