



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 33 OF 2020**

**DR. DALMAS OYUGI.....CLAIMANT**

**VERSUS**

**THE SPEAKER, MIGORI COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**THE CLERK, MIGORI COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**MIGORI COUNTY PUBLIC SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY SECRETARY,**

**MIGORI COUNTY GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant vide the Notice of Motion application dated 17/5/2018 prays for an Order that: -

“Pending the hearing and determination of the Claim herein, this Court does issue a temporary Order of Injunction restraining and prohibiting the 3<sup>rd</sup> and 4<sup>th</sup> respondents from implementing the recommendations of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by suspending and/or terminating the services of the claimant as the Chief Officer, health services or from declaring the office of the Chief Officer, health services vacant, advertising, employing, replacement of labour or employee in the same position currently held by the claimant to perform the same or similar work as the claimant.

2. The application is premised on grounds 1 to 5 set out on the face of the Notice of Motion the gravamen of which is that on 14/5/2020 the 1<sup>st</sup> and 2<sup>nd</sup> respondents recommended termination of the services of the claimant without justifiable cause.

3. That the recommendation is unlawful and unfair.

4. The application is buttressed by a supporting affidavit of the claimant who deposes *inter alia* that he is a Chief Officer Migori County having been so appointed by the 3<sup>rd</sup> respondent.

5. That the recommendation by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was abruptly made on 14/5/2020 without giving the claimant a chance to be heard and that the decision is without justification. That he holds the Ministry of Health and Medical Services docket and has not been found guilty of any misconduct.

6. The respondents filed a replying affidavit sworn to by the Executive Officer to the Migori County Assembly on 15/6/2020 and he deposes *inter alia* that the office of Auditor General carried out audit and submitted a report on the financial statements of Migori County Executive, for the period ending 30<sup>th</sup> June, 2017.

7. That pursuant to the Audit Report the Migori County Assembly's County Public Investment and Accounts Committee sitting in its supervisory role made recommendations based on the Audit report that the claimant do step aside to pave way for executive/ administrative action by the Governor through the County Government Public Service Board.

8. That the claimant was the accounting officer of the Ministry of health. That pursuant to the recommendations, the claimant/applicant is yet to appear before the Public Service Board for disciplinary action hence the claim and the application is premature and devoid of merit. That the application be dismissed.

9. The parties have filed their respective submissions and the issue for determination is whether the Claimant/Applicant has satisfied the criteria for grant of a conservatory Order in Public domain set out by the Supreme Court in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 others – Applications No. 5 of 2014 [2014] eKLR** where the Supreme Court made the following binding guideline on exercise of judicial discretion in granting conservatory Orders related to public institutions.

a. “[86] “**Conservatory Orders**” bear a more decided Public –law connotation: for these are Orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the Court in the public interest. Conservatory Orders, therefore, are not unlike interlocutory injunctions linked to such private-party issues as “**the prospects of irreparable harm**” occurring during the pendency of a case; or “**high probability of success**” in the supplicant’s case for Orders of stay. Conservatory Orders, consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional value, and the proportionate magnitudes and priority levels attributable to the relevant cause.”

10. In the present case the claimant/applicant awaits a constitutional and public disciplinary process to determine his conduct of financial affairs in the Ministry of Health of the Migori County being the Accounting Officer. He has been asked to step aside awaiting that process.

11. The applicant now invites the Court to pre-empt that process and second guess the role of the County Public Service Board, an Independent body vested with authority to conduct the disciplinary process, giving the applicant a fair hearing and make recommendations to the County Governor on whether the claimant/applicant should continue serving in the office of Chief Officer, Health or he should be removed for misconduct.

12. Public interest dictates that the Court does not intervene to pre-empt that process sanctioned by law. The application lacks inherent merit and has been brought prematurely by the claimant/applicant.

Accordingly, the application is dismissed with costs in the cause.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of February, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

**H. Obach & Co. Advocates for the Claimant/Applicant**

**Cheboi Ouma & Associates Advocates for the respondents**

**Chrispo: Court clerk.**