



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**PETITION NO. E001 OF 2021**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS PURSUANT TO ARTICLES 2,3,6, 10, 19, 20, 21, 22, 23, 47, 48, 159, 162, 179(7) 182(2) (3b) OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF SECTIONS 30 (D), SECTION 35(3) OF THE COUNTY GOVERNMENT ACT.**

**DOUGLAS OSEKO BOSIRE.....1<sup>ST</sup> PETITIONER/ APPLICANT**

**JOHN MOENGA OMANWA.....2<sup>ND</sup> PETITIONER/ APPLICANT**

**BENARD OSUMO MANG'AA.....3<sup>RD</sup> PETITIONER/ APPLICANT**

**PETER MUGA OMWANZA.....4<sup>TH</sup> PETITIONER/ APPLICANT**

**ZABLON OERO ONCHIRI.....5<sup>TH</sup> PETITIONER/ APPLICANT**

**-VERSUS-**

**H.E AMOS KIMWOMI NYARIBO**

**JOHN MOENGA OMANWA.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NYAMIRA.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY, NYAMIRA COUNTY...3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**GLADYS MOMANYI.....5<sup>TH</sup> RESPONDENT**

**MS EMILY MORAA ONGAGA.....6<sup>TH</sup> RESPONDENT**

**THOMAS NYARIKI.....7<sup>TH</sup> RESPONDENT**

**JONES OMWENGA.....8<sup>TH</sup> RESPONDENT**

**SAMUEL MAIKO.....9<sup>TH</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect of Two Applications; Notice of Motion dated 13<sup>th</sup> January, 2021 filed by the Petitioners and the Notice of Motion dated 20<sup>th</sup> January 2021 filed by the Respondents herein.

2. The Petitioners filed their application dated 13<sup>th</sup> January, 2021 through the firm of Wamuyu Munga & Company Advocates relying on Article 22, 23, 162 of the Constitution of Kenya 2010, Rules 4, 13, 19 and 23 of the constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules of 2013 and all other enabling provisions and sought the following orders;

**a. That the application and the petition filed herewith be certified as urgent and apt for hearing on a priority basis and ex-parte in the first instance.**

**b. That, pending hearing and determination of the Application/ Petition this Honourable Court be and is hereby pleased to issue conservatory Orders staying the communiqué by the 1<sup>st</sup> Respondent in the press statement released on the 6<sup>th</sup> January, 2021 purporting to forward the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents among the names for approval as well as the Notice inviting the candidates and the public on approval hearings slated for the 21<sup>st</sup> January, 2021.**

**c. That pending hearing and determination of the Application/ Petition, this Honourable Court be pleased to issue a conservatory Order in the form of an injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from interfering with the service contracts of the petitioner/ Applicants.**

**d. That pending hearing and determination of the Application/ Petition, this Honourable Court is pleased to issue a conservatory order against the 3<sup>rd</sup> Respondent from conducting approval hearing; vetting of the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents.**

**e. That pending hearing and determination of the Application/ Petition the Honourable Court be and is hereby pleased to issue a conservatory order restraining the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents from presenting themselves for vetting before the 3<sup>rd</sup> Respondent; accepting, taking up offices and /or assuming office as County Executive Committee members for departments of Health services; economic planning and lands, housing, physical and Urban development department respectively.**

**f. Any other Orders this Honourable Court may deem fit in the interest of justice**

**g. Costs be in cause.**

3. The Application is supported by the grounds set out therein and in the Supporting Affidavits of Douglas Oseko Bosire, John Moenga Omanwa, Benard Osumo Mang'aa, Peter Muga Omwanza and Zablon Oero Onchiri the Petitioners herein.

4. The Petitioners aver that they were collectively appointed as County Executive Committee members on the 14<sup>th</sup> April 2020 by way of respective written contracts signed by the immediate former Governor, Nyamira County H.E John Obiero Nyagarama (Deceased) to the Department of Health Science; Transport, Road and public works; Public Service Management; Finance, ICT and Economic Planning and Land, Housing, Physical planning and Urban Development respectively.

5. The Petitioners deposed that the said contract of service were entered into after successful vetting and appointment to their respective County Executive Committee member departments pursuant to the public appointment (Parliamentary approvals) Act that involved both the County public and legislature.

6. That the said contracts emanated from the Office of the County Governor, Nyamira County and were copied to the deputy Governor, the Speaker, the County secretary and the head of the County public service as well as the Chairman, County public service Board expressly stating that the petitioners were to serve on full time basis till 31<sup>st</sup> August 2022.

7. The Former Governor died on 18<sup>th</sup> December 2020 paving way for his deputy, the 1<sup>st</sup> Respondent herein, to assume office which he did and on 6<sup>th</sup> January 2021. Subsequently, the 1<sup>st</sup> Respondent released to the press a list of nominees for the County Executive Committee members containing names of alleged nominees forwarded for vetting and approval which press released the Petitioner contends that they were not aware of.

8. Subsequently, the Clerk of the 3<sup>rd</sup> Respondent advertised on Daily nation of 8<sup>th</sup> January, 2021 a Notice to candidates and the public on the matter of consideration and approval hearing of nominees to the County Executive Committee Departments. These actions according to the petitioners rendered them jobless.

9. The Petitioners aver that, the 1<sup>st</sup> Respondent herein assumed office under Article 182(2) and 3(b) which according to the petitioners is for the remainder of the term left by the former Governor and which in essence is not attributable to the said sitting Governor.

10. The Petitioner allege that there was no such Vacancy in the office of the County Governor of Nyamira to necessitate and or warrant the purported attempt to unlawfully remove persons holding CECs offices.

11. According to the Petitioners, the import of Article 179(2)(b) and section 35(1)(2) and (3) which the impugned press statement was premised was to take operation upon creation of a vacancy in the office of the Deputy Governor which they contends that there was none.

12. They therefore state that their terms of contract of service were not terminated neither have they been availed with written communication terminating their services as espoused under Article 47 of the Constitution and Fair Administrative Actions Act. The Petitioners thus sought for this Honourable Court Urgent intervention.

13. The Respondents filed their Replying Affidavit sworn by the 1<sup>st</sup> Respondent herein, H.E Amos Kimwomi Nyaribo, the current Governor of Nyamira County, on 26<sup>th</sup> January, 2021.

14. The Respondents are urging this Court to review, set aside the Orders granted on 18<sup>th</sup> January, 2021 on grounds that by virtue of Article 179(7) of the Constitution of Kenya the Petitioners have ceased to hold office by operation of law and thus the seat they allege to be holding are in fact vacant.

15. They contend that that once the Former Governor passed on, a vacancy arose at the said office as such the CECs cease automatically to hold office and the said position ought to be advertised afresh which the County was in the process of filling the said positions.

16. They thus deposed that the Application by the Petitioners is frivolous, vexatious and is fraught with misrepresentation which ought to be dismissed by this Court.

17. Hardly a week later, the Respondents filed an application Notice of Motion under certificate of Urgency dated 20<sup>th</sup> January 2021 through the firm of Ligunya Sande and Associates seeking the following Orders;

**a. That the application be certified as urgent and heard ex parte in the first instance.**

**b. That the Honourable Court be pleased to exercise its inherent jurisdiction to review and discharge or set aside its ex parte orders of 18<sup>th</sup> January, 2021.**

**c. That the cost of this application be provided for.**

18. Application is supported by the grounds enumerated therein and the supporting affidavit of His Excellency Governor Amos Kimwomi Nyaribo, the Governor Nyamira County, sworn on 20<sup>th</sup> January 2021 on his behalf and on authority of the 2<sup>nd</sup> to 9<sup>th</sup> Respondent. He annexed a letter of Authority as annexure AKN-1.

19. The gist of the Respondent Application is that the Petitioners misapprehended the law more specifically article 179(7) of the Constitution, which states that all the county executive committee members appointed by the governor under Article 179(2)(b) shall cease to hold office once a vacancy arise in the Office of the Governor.

20. They aver that its undisputed fact that the Respondents were appointed as CECs on 14<sup>th</sup> April 2020 by the former Governor and that their letters of Appointment and acceptance thereof became obsolete on the demise of the former Governor.

21. The Respondents contends that when the former Governor, John Obiero Nyagarama, died on 18<sup>th</sup> December, 2020 his office became vacant as stipulated under Article 182(1) of the Constitution.

22. The 1<sup>st</sup> Respondent herein assumed office on 29<sup>th</sup> December, 2020 as stipulated under Article 182(2) and (3) of the Constitution and contends that the persons appointed by the former Governor cease to hold office. Subsequently, the 1<sup>st</sup> Respondent nominated the 5<sup>th</sup> to 9<sup>th</sup> Respondent herein together with others to be subjected to vetting by the 3<sup>rd</sup> Respondent on 21<sup>st</sup> January, 2021.

23. Finally, The Respondents urged this Court to dismiss the Petitioners Application of 13<sup>th</sup> January, 2021 and allow their application of 20<sup>th</sup> January 2021 and in effect discharge the impugned orders of 18<sup>th</sup> January, 2021.

24. The Applications were conversed by way of written submissions, with the Petitioners filing their submissions dated 8<sup>th</sup> February, 2021 and the Respondents filed their submissions on 9<sup>th</sup> February, 2021.

### **Petitioners Submissions**

25. The Petitioners submitted that Article 23 of the Constitution empower this Court to grant any appropriate relief including conservatory Orders for the purposes of enforcing protection of fundamental rights and freedoms and cited the case of **EWA & 2 Others –versus- Director of Immigration and Registration of persons & Another (2018) eKLR.**

26. The Petitioners submitted that the nature of conservatory Orders sought herein are of preservatory nature which if not confirmed by this Court may render their Petition nugatory and they will suffer prejudice. On this they cited the supreme Court case **Gatirau Peter Munya – versus- Dickson Mwenda Kithinji(2014) eKLR** and **Center for Rights Education and Awareness(CREAW) –VERSUS- Attorney General(2011) eKLR**

27. It is the Petitioners submissions that there was no vacancy in the office of the Governor as contemplated under Article 179(7) of the constitution to necessitate the purported attempt to remove CECs from office. Further that since the 1<sup>st</sup> Respondent herein assumed office under Article 182(2) and (3b) of the Constitution for the remainder of term of the former Governor as such the Petitioner submitted that the said remainder of the term is not and ought not to be attributed to the new Governor.

28. The Petitioners submitted that the main contention in their petition, which they argue has high chances of success, is on the issue of their violated rights to fair administrative Action and right to fair hearing prior to release of the Notice of 6<sup>th</sup> January 2021 appointing their replacement rendering them jobless contrary to Article 27, 47 and 48 of the Constitution.

29. The Petitioners urged this Court to take judicial notice of shortage of funds to Counties to service the current payrolls and argue that the said County will lose more funds in case the Court at a later stage makes an order of damages and thus pray that this Court confirms the conservatory Orders to prevent any adverse effects and proceed with speed to hear and determine the Petition.

30. Finally, the Petitioner argued that they continued holding the said CECs position discharging all their duties as required in their respective Dockets even after the demise of the former Governor and that there is no vacancy and or Vacuum created as alleged by the Respondent save for the vacancy of the office of the Deputy Governor.

31. The Petitioners beseeched this Court to allow their Application herein and issue the conservatory Orders sought.

### **Respondents Submissions**

32. The Respondents submitted that upon the death of the former Governor on 18<sup>th</sup> December, 2020, the office of the County Governor of Nyamira became vacant as provided for under Article 182(1)(a) of the Constitution. Subsequently, the offices held by the Petitioners as appointed under Article 179(1) herein became vacant as the petitioners ceased to hold office as envisioned under Article 179(7) of the Constitution.

33. The Respondents submitted that the Petitioners applications herein is bad in law as the petitioners are seen to be asking this Court to legalize their resistance to adhere to Article 179(7) .

34. It is the Respondents submissions that the County Executive Committee members is appointed by the County Governor and therefore perform their duties at the pleasure of the County Governor , the relied on the case of **County Government of Nyeri & another -versus- Cecilia Wangechi Ndungu(2015) eklr.** Which Court held that section 31(a) of the County Government Act, the Governor has powers to dismiss a member of the County Executive Committee at any time that is at his pleasure and that the said powers to be exercise reasonably and not arbitrary or capriciously. Further that CECs member is a right hand man for the Governor and in the event that the Governor loses confidence in the said member then he would be fired to allow smooth running of the County Government business for the benefit of the citizens.

35. The Respondents submitted that the Governor did not exercise the above powers but that the petitioners ceased to hold office by operation of law.

36. The Respondents relied on the case of **Benard Ngeno & another –versus- County Asembly of Bomet and another(2019) eklr** where Justice M. Mbaru Held that ” the Appointment of County Executive Committee members is a political process and Court of law cannot compel the appointing authority to appoint a particular individual and proceeded to grant review of her Orders .

37. The Respondents further submitted that Article 3 of the constitution behooves all state organs and bodies of Government to uphold the constitution and called upon this Court to uphold the law that the County Governor has no authority to give CECs contracts of service that outlive the said Governor. And cited the case of **Jacob Kyule & 3 others –versus- County Government of Machakos (2018) eklr.**

38. The Respondents submitted that this Court has inherent powers to vacate and or vary its own orders in cases where there would otherwise be an irreparable injustice which powers should be exercised in exceptional circumstances. On this he relied on **Jacob Kyule** case quoted above and the case of **Bloggers Association of Kenya(BAKE) –Versus- Attorney General & 5 others(2018) eklr**

39. The Respondents submitted that allowing the Orders issued by this Court on 18<sup>th</sup> January 2021 to stand would amount to irremediable injustice on the constituents of the 2<sup>nd</sup> Respondent as the operations of the County would be paralyzed and general public stopped from accessing services until this petition is heard and determined.

40. Finally, the Respondents submitted that Under Article 162(2) (a) of the Constitution, this Court is bestowed with exclusive jurisdiction to only deal with issues of employment and labour relations. Therefore, for one to claim relief in this Court one has to prove that there is an employer- employee relationship which the Respondents submitted that there is none. Consequently the respondent submitted that by dint of section 4(1) of the employment and Labour Relations Act this Court lacks Jurisdiction to hear and determine this Application and Petition thereon.

41. I have examined the averments of the parties herein. The interim applicants all seek interim reliefs pending the hearing and determination of the petition herein. The main issue for this court to determine is whether in each application the applicants have established a prima facie case with likelihood of success to warrant issuance of the orders being sought

42. In determining whether there is a prima facie case to dispose of the Petitioners and Respondents applications, this court notes that the main contention by the Petitioners is that they were legally appointed and that the 1<sup>st</sup> Respondents cannot purport to sack them, The Respondents on their part have submitted that the 1<sup>st</sup> Respondent didn't sack the petitioners but that their term of office expired by operation of the law. The Respondents relied on the provisions of Article 179(7) of the Constitution which states as follows:-

“If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2) (b) cease to hold office.”

43. My understanding of this Article is that the appointment and term of office the CEC Members is premised upon the life of the Governor. It is also stated in the facts which have been agreed upon by both parties that indeed the former governor passed on and the 1st Respondent herein assumed office as the new governor, That being the position it implies that before the current governor assumed office, there was a vacancy in that office. That therefore also means that the operation of Art 179(7) of the Constitution came into operation warranting the Applicants to cease occupying the office of CECs.

44. This, in my view, is the simple issue I have to determine in this application and which I find that on the face of it, the applicants application has no merit and therefore cannot stand. I therefore find that the interim orders already in force cannot stand, I vacate the said orders and order that the applicants proceed with the main petition if they so wish.

45. Costs of this application will be in the cause

**Ruling delivered virtually this 18<sup>th</sup> Day of February, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mrs. Ligunya for Respondent appearing together with John Anyoka, Ismael Nyaribo & Edward Ominde - present

Mr. Omayio for Petitioner - present