



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 308 OF 2014**

**ERASTUS ONYANGO NYAMORI.....CLAIMANT**

v

**COUNTY GOVERNMENT OF MIGORI.....1<sup>st</sup> RESPONDENT**

**MIGORI GOVERNOR, ZACHARY**

**OKOTH OBADO.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Erastus Onyango Nyamori (the Claimant) was appointed as the County Executive Committee member for Public Works, Roads & Transport by the Governor, County Government of Migori around 29 May 2013.
2. On or around 1 October 2014, the Governor reorganised his Cabinet. The Claimant's name was missing from the new Cabinet.
3. On 13 November 2014, the Claimant sued County Government of Migori and the Governor, County Government of Migori (the Respondents) alleging unfair termination of employment.
4. Filed at the same time, was a Motion seeking interim relief.
5. In a Ruling delivered on 3 December 2014, the Court stayed the dismissal of the Claimant until the final determination of the Claim. The Respondents appealed.
6. The Court of Appeal stayed these proceedings on 21 January 2015 pending the hearing and determination of the Appeal by the Respondents.
7. On 23 January 2019, the Court of Appeal, upon the consent of the parties ordered that the Cause proceeds to hearing as one of the primary orders which had been sought by the Claimant, reinstatement, had been overtaken by time and therefore became moot.
8. The Respondents filed a Reply to the Memorandum of Claim on 6 March 2020 and a witness statement on 9 March 2020.
9. The Claimant's evidence was taken on 11 March 2020 while the Respondents case was taken on 17 November 2020.
10. The Claimant filed his submissions on 30 December 2020 (should have been filed and served on or before 11 December 2020). The Respondent's submissions were not on file by the agreed timeline of 3 February 2021.
11. In his submissions, the Claimant identified 2 Issues for determination:
  - (i) Whether the process followed in dismissing the Claimant/Applicant was procedural, fair and lawful.
  - (ii) Whether the Claimant/Applicant is entitled to payment of his unpaid salary, gratuity and general damages from 1 October 2014 to 7 May 2018.
12. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

13. It is not in dispute that the Claimant was removed from office through *reorganisation of county departments*.

14. The Respondents asserted that the removal was in tandem with section 31(a) of the County Governments Act. The provision empowers a Governor to remove a county executive committee member at any time if he considers it necessary and appropriate.

15. The section has been the subject of interpretation by the Court of Appeal.

**16. In *County Government of Garissa & Ar v Idriss Aden Mukhtar & 2 Ors* (2020) eKLR, the Court of Appeal after considering *Narok County Government & Ar v Richard Bwogo Birir & Ar* (2015) eKLR and *County Government of Nyeri & Ar vs Cecilia Wangechi Ndung'u* (2015) eKLR held**

In our view, the direction to take in this matter lies in an interpretation of section 31(a) of CGA in a way that conforms to the spirit and letter of the Constitution, as all laws must be interpreted and applied in accordance with this supreme law of the land. As already stated in this judgment, the people of Kenya, in their wisdom, adopted a Constitution that was anchored on the sovereignty of the people and supremacy of the Constitution. Under this Constitution, the Governor and members of the executive committee of a county government are state officers, that is, persons holding state office. Their power must be exercised in accordance with the Constitution. Indeed, it behoves such high ranking state officers to demonstrate commitment and fidelity to the Constitution.....

the current Constitution of Kenya has not specifically entrenched the pleasure doctrine. In our view, this omission is not by accident or inadvertence, but a deliberate omission because the pleasure doctrine is not compatible with the spirit and letter of the current Constitution. The doctrine is inimical to the national values of human rights, good governance, transparency and accountability, which are the hallmark of the delegated sovereign power and position of public trust. Therefore, the appointment of state officers must be insulated from political or any untoward interference. If Section 31(a) of the CGA was to be interpreted as giving the Governor unfettered discretion to dismiss a county executive member at any time, if he, the Governor, considers it appropriate or necessary to do so, the yardstick would be personal and without transparency or accountability and this would be contrary to the principles and values espoused in the Constitution.

.....

Nor do we agree that the section allows the Governor to dismiss members of the county executive without observing any procedures or assigning any reasons. Section 31(a) merely gives the Governor the discretion to dismiss a county executive member for a reason and process other than that stated in Section 40 of the CGA, subject to due process being followed.

17. The Respondents did not demonstrate through evidence that the Governor, as the appointing authority followed any due process before purporting to remove the Claimant through reorganisation of the County Government.

18. The Court has no hesitation in finding that the removal of the Claimant was tainted with procedural infirmities.

### **Compensation**

19. The Claimant had an expectation of serving for 5-years, but he served for only 15 months. His removal was devoid of any due process despite the protections assured public officers by both the Constitution and the applicable statutes.

20. In light of the foregoing, the Court is of the view that compensation equivalent to 12 months gross salary would be appropriate (the record suggests that the gross monthly salary was Kshs 300,000/-).

### **Breach of contract**

21. The Claimant contended that he was entitled to salaries up to 7 May 2018 (42 months) when his 5-year term of office would have lapsed. He computed the amount as Kshs 12,600,000/-.

22. The Claimant did not lay any evidential or legal foundation to the claim for the lost (prospective income), and the Court can do no better than endorse what was said by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2008) UGSC 21 that

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

### **Gratuity**

23. The Claimant sought gratuity amounting to Kshs 6,000,000/- at the rate of 1/3 of the gross salary for the 5-year term he was to serve.

24. In the view of the Court, the Claimant would only be entitled to *pro-rated* gratuity for the period served (15 months).

25. The Respondents should compute and pay the gratuity.

### **Conclusion and Orders**

26. The Court finds and declares that the removal of the Claimant from office was unfair.

27. The Claimant is awarded

(i) Compensation Kshs 3,600,000/-

(ii) Gratuity to be computed and paid by the Respondent.

28. The above sums to attract interest at court rates from today until full settlement.

29. The Claimant to have costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 17 February 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant Kirui & Co. Advocates

For Respondents Sagana, Biriq & Co. Advocates

Court Assistant Chrispo Aura