



**REPUBLIC OF KENYA**

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

**AT KERICHO**

**PETITION NO. E003 OF 2021**

**IN THE MATTER OF ARTICLES 1,2,3(1),10,19,20,21, 22 27(1)(2) & (3), 28, 41(1), 47(1) & (2), 48, 50(1) 165(3)(B) & 258 (1), OF  
THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OR ALLEGED CONTRAVENTION OF FUNNDAMFNTAL RIGHTS AND FREFDOMS UNDER ARTICIES  
27(1,(2) & (3), 28,41(1), 47(1) and 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: RULES 4,10,11,13, AND 20 OF THE CONSTITUTION of KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREFDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE  
AND PROCEDURE RULES 2013.**

**AND**

**IN THE MATTER OF: SECTIONS 31 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012, LAWS OF KENYA.  
AND**

**IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF: SECTIONS 45 OF EMPLOYMENT ACT**

**BETWEEN**

**JOSEPH AMWOMA.....PETITIONER**

**AND**

**H.E AMOS KIMWOMI NYARIBO,**

**THE GOVERNOR NYAMIRA COUNTY.....1<sup>ST</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF**

**NYAMIRA.....2<sup>ND</sup> RESPONDENT**

**NYAMIRA COUNTY PUBLIC SERVICE**

**BOARD..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF NYAMIRA.....INTERESTED PARTY**

**RULING**

1. This Ruling is in respect of an Application; Notice of Motion dated 27<sup>th</sup> January, 2021 filed by the Petitioner through the firm of Mwae & Associates Advocates seeking for the following orders;

- a) **That the instant application be certified as urgent and services of the same be dispensed with in the first instance.**
- b) **That, pending hearing and determination of the instant Application, the Honourable Court be pleased to temporarily suspend and or stay implementation of the contents of the purported dismissal letter dated 12/ 1/ 2021 issued by the respondent to the petitioner.**
- c) **That pending the hearing the determination of this Petition, the Honourable Court be pleased to permanently suspend and or stay implementation of the contents of the purported dismissal letter dated 12/1/2021 issued by the Respondent to the petitioner.**
- d) **That pending hearing and determination of this Petition, a conservatory order do issue stopping the respondent from filling the position the chief of staff in the office of the Governor.**
- e) **A reinstatement Order do issue reinstating the petitioner to the position of the chief of staff in the office of the Governor.**
- f) **Costs of this Application and interest thereon be provided for.**
- g) **Any other and further reliefs that this Honourable Court may deem fit and just to grant in the circumstances.**

2. The Application is supported by the grounds set out therein and in the Supporting Affidavit of the petitioner, **JOSEPH AMWOMI**, sworn on 27<sup>th</sup> January, 2021.

3. The Petitioner aver that at all material times relevant to this suit, he was the chief of staff in the office of the Governor pursuant to his appointment on 1<sup>st</sup> November, 2019 by way of a written contract duly signed by the former Governor John Obiero Nyagarama(deceased) and annexed a letter of offer of appointment marked as **JA-1**.

4. The Petitioner deposed that the said contract of service emanated from the Office of the County Governor, Nyamira County and was copied to the, Governor, the County secretary and the head of the County public service as well as the chief Officer, public service B management expressly stating that the petitioner was to serve in the aforementioned position on full time basis till the lapse of Three (3) years.

5. He avers that when the former Governor died on 18<sup>th</sup> December 2020, it paved way for his then deputy, the 1<sup>st</sup> Respondent herein, to automatically assume office on 6<sup>th</sup> January 2021 for the remainder period of about One (1) Year Seven (7) Months.

6. It is stated 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 current sitting Governor, the 1<sup>st</sup> Respondent herein.

7. The Petitioner alleges that on 12<sup>th</sup> January, 2021, the Respondents, without any color of legal right and or justification, wrote a letter to him indicating that his services to the Governor of Nyamira County shall be terminated with effect from 1<sup>st</sup> February, 2021. On this he annexed the letter of termination marked as annexure **JA-2**.

8. According to the Petitioners, intended dismissal is substantively and procedurally unfair as it does not either meet the constitutional safe guards of Article 47 nor the statutory requirements of sections 4 of the fair administrative Action Act or section 45 of the Employment Act.

9. The petitioner contends that his dismissal was arbitrary, capricious, whimsical and unilateral therefore sought for an immediate intervention of this Court to stop the Respondents from effecting the said letter of termination since they have flouted the express provisions of Article 47 of the constitution, Section 31 of the County Government Act no 17 of 2012, section 4 of the Fair Administrative Action Act and section 45 of the Employment Act.

10. The petitioner states that he has a prima facie case with overwhelming chances of success at trial, and avers that if the said interim orders are not granted he will suffer irreparable harm incapable of being compensated by damages and the petition will be rendered nugatory. Further that the balance of convenience tilts in his favour.

11. The 1<sup>st</sup> Respondent entered Appearance by filling a Memorandum of Appearance dated 8<sup>th</sup> February, 2021 and a Replying Affidavit sworn by Amos Kimwomi Nyaribo, the 1<sup>st</sup> Respondent herein, on 15<sup>th</sup> February, 2021.

12. The 1<sup>st</sup> Respondent is urging this Court to unveil the mischief in the petitioner Application which according to the Respondent is couched in constitutional petition when he ought to have filed an industrial claim as this suit is based on the termination letter of 12<sup>th</sup> January, 2021.

13. The 1<sup>st</sup> Respondent avers that the position of the petitioner herein was pegged upon the office of the former Governor, John Obiero Nyagarama (Deceased) who died on 18<sup>th</sup> December, 2020 as such the petitioner ceased to hold office on the demise of the former governor.

14. The 1<sup>st</sup> Respondent avers that the termination of the petitioner was lawful and procedural in accordance with laid rules and laws that govern appointment of a Governor's Chief of Staff. Additionally, the petitioner was appointed by the Governor and not the County Government of Nyamira as such was to serve under the pleasure of the then Governor.

15. The 1<sup>st</sup> Respondent contends that the chief of staff position such as the Petitioners herein were created by the then Governor which terminated and or ceased to exist upon demise of the governor on 18<sup>th</sup> December, 2020 and that such a position does not have security of tenure as alleged by the petitioner.

16. The 1<sup>st</sup> Respondent further states that the letter of termination dated 12<sup>th</sup> January, 2021 ought not to have been served upon the Petitioner and indicated that the same was a courtesy letter drawn by the County public service Board which if done without does not invalidate the fact that the petitioner's position ceased by operation of law upon the death of the former Governor.

17. The 1<sup>st</sup> Respondent avers that the petitioner's prayers are couched in a way that is seen to be seeking this Honourable court to impose the chief of staff upon the governor in effect unilaterally appointing the petitioner when this court does not have such power to appoint the petitioner.

18. The 1<sup>st</sup> Respondent avers that he has not breached any constitutional provision and the law as alleged by the Petitioner and this application and the main Petition ought to be dismissed by this Court for being a total abuse of the Court process.

19. On 3<sup>rd</sup> March, 2021, the petitioner filed a further affidavit sworn on 2<sup>nd</sup> March, 2021 in reply to the respondent replying affidavit and stated as follows;

a) That the petitioner contract of service of 31<sup>st</sup> October 2019 was worded in specific terms that the petitioner would serve in the office of the governor for a period of Three (3) years up to the lapse of the governor's term. consequently, he avers that his term of service would have come to an end on 31<sup>st</sup> October, 2022.

b) The petitioner avers that the office that he occupied as a chief of staff is not a creation of the constitution but that it is a public office that cannot be rendered vacant by the death of the former governor but that due procedure needed to be following in terminating his service.

c) He further stated that when he was appointed as the chief of staff he served both the office of the governor and the deputy governor (the current governor) in equal measure therefore his appointment was not pegged on the governor but for the benefit of the people of Nyamira County.

d) He therefore urged this court to declare the process of declaring his seat vacant as unlawful and allow the application as prayed

20. This application proceeded for hearing by way of written submissions with the petitioner filing his submission on 9<sup>th</sup> March, 2021.

#### **Petitioner's submissions.**

21. The petitioner submitted that this Court is empowered under Article 23 of the constitution to grant **any appropriate relief** including conservatory orders and cited the case of **EWA & 2 others –versus- Director of Immigration and registration of persons & another [2018] eKLR** where the court held that;

**“As for the appropriate reliefs, this Court is empowered by Article 23 (3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition "appropriate relief" is the one given by the South African Constitutional Court in Minister of Health & Others vs Treatment Action Campaign & Others[6]thus:-**

**"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."**

22. Its further submitted that the test for grant of conservatory orders in the nature sought by the petitioner is set out in the case of **Gatirau peter munya –versus- Dickson Mwenda kithinji [2014] eKLR** where the supreme court held that;

**“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 values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”**

23. Counsel submitted that they have established a prima facie case that warrants the issuance of conservatory orders sought. He relied on

the case of **Gatirau peter munya –versus- Dickson Mwenda kithinji [2014] eklr** (supra) and submitted that the petitioner firstly, need to satisfy the court that the case is arguable and not frivolous, secondly, that unless conservatory orders are granted the petition if successful would be rendered nugatory and thirdly, that it is in the public interest to issue the conservatory orders.

24. It is submitted that an arguable case is one that elicits cognizable constitutional controversies. He therefore submitted that article 47 states that every person has a right to administrative action while Article 50 provides for right to fair hearing. he argued that the termination of the petitioner’s employment upon the death of the former governor before the lapse of the three years indicated in his service contract, was unlawful as the respondents did not follow the legal procedure required of an employer in hearing the petitioner before termination.

25. On whether the petition before court is one that is arguable, its submitted that the right to fair administrative action, fair hearing, fair labour practices and protection from unfair termination of the employee will be violated and that these issues constitutes an arguable case.

26. On whether the petition will be rendered nugatory if the conservatory orders are not confirmed, it was submitted that if the petitioner succeeds in the main petition there will be untidy situation were the newly appointed person will be ordered to vacate office occasioning the county huge financial losses in paying damages.

27. Finally, counsel argued that it is in public interest to issue conservatory orders and allow the petitioner continue discharging his role to the county to avoid any disruption of service to 2<sup>nd</sup> Respondent.

28. I have examined the averments of the parties and submissions filed herein. The applicant petitioner has averred that he was wrongfully terminated and sought protection of this court to reinstate him by declaring the dismissal letter of 12/1/2021 null and void.

29. He also sought orders stopping the 1<sup>st</sup> respondent from filling the position of Chief of staff in the office of the Governor. When the applicant appeared before this court exparte on 2/2/2021, no interim orders were granted.

30. In seeking orders herein the applicant submitted that he has an arguable petition which is not frivolous and that his right to a fair administrative action, fair hearing, fair labour practices and protection from unfair termination of an employee has been flouted.

31. From the pleadings herein, the applicant was appointed Chief of Staff by the 2<sup>nd</sup> respondents late Governor vide a letter dated 31<sup>st</sup> October, 2019. This appointment was made after a decision by the late Governor.

32. The appointment was therefore made by the Governor himself and not by the County Public Service Board.

33. On this account, the appointment was predicated on the life of the Governor who is now deceased. It is therefore a tall order for the applicant to insist on being chief of staff of the current Governor while the appointment was personal to the late Governor.

34. On whether the termination was unfair, this can be handled in the main petition. In the circumstances, I find the application by the applicant has no merit and I dismiss it.

35. Costs in the petition.

Ruling delivered virtually this 25<sup>th</sup> day of **March, 2021**.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kathurina holding brief Omayio & Mwae for the Petitioner – present

Respondents - absent