



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. E002 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

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE

FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(1), (2) &(3), 28, 41(1), 47(1) and 50(1) OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF: RULES 4,10,11,13 and 20 OF THE CONSTITUTION

OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

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

AND

IN THE MATTER OF: ACTIONS ACT: SECTION 45 OF THE FAIR ADMINISTRATIVE

AND

IN THE MATTER OF: SECTIONS 45 OF EMPLOYMENT ACT

BETWEEN

JOB ONG' OMBE GESEMBE.....PETITITONER

VERSUS

H.E AMOS KIMWOMI NYARIBO

THE GOVERNOR NYAMIRA COUNTY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA.....2ND RESPONDENT

NYAMIRA COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

RULING

1. This Ruling is in respect of the petitioners Application dated 27th January, 2021 filed through the firm of Mwae & Associates & Company 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 of culture, heritage and Art advisor in the office of the Governor Nyamira County.
- e) A reinstatement Order does issue reinstating the petitioner to the position of Culture, Heritage and Art advisor in the office of the Governor Nyamira County.
- 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, Job Ong'ombe Gesembe, sworn on 27th January, 2021.

3. The Petitioner aver that at all material times relevant to this suit, he was the Culture Heritage and Art Advisor of the Governor Nyamira County pursuant to his appointment on 1st May, 2020 by way of a written contract duly signed by the former Governor John Obiero Nyagarama(deceased) and annexed a letter of appointment marked as **JOG-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 Chairman and chief Officer, County public service Board expressly stating that the petitioner was to serve in the aforementioned position on full time basis till 31st August 2022.

5. The Former Governor of the 2nd Respondent, died on 18th December 2020 paving way for his deputy, the 1st Respondent herein, to assume office on 6th January 2021 for the remainder period of about One Year Seven Months.

6. The Petitioner avers that, the 1st 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 1st Respondent herein.

7. The Petitioner alleges that on 12th 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 1st February, 2021. On this he annexed the letter of termination marked as annexure **JOG-2**.

8. According to the Petitioner, the notice of 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.

11. The 1st Respondent entered Appearance by filling a Memorandum of Appearance dated 8th February, 2021 while the 3rd Respondent filed its memorandum of appearance on 10th February, 2021. Subsequently, the 1st Respondent filed a Replying Affidavit sworn by Amos Kimwomi Nyaribo, the 1st Respondent herein, on 15th February, 2021.

12. The 1st 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 12th January, 2021.

13. The 1st 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 18th December, 2020 as such he alleges that the petitioner ceased to hold office on the demise of the former governor.

14. The 1st Respondent states that he has been wrongly enjoined in this petition as he is not the appointing authority and or the person that

issued the Petitioner with the letter of termination.

15. Nevertheless, the 1st 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 advisor. 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.

16. The 1st Respondent contends that the advisors position such as the Petitioner's herein were created by the then Governor which terminated and or ceased to exist upon demise of the governor on 18th December, 2020 and that such a position does not have security of tenure as alleged by the petitioner.

17. The 1st Respondent further states that the letter of termination dated 12th 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 does not invalidate the fact that the petitioner's position ceased by operation of law upon the death of the former Governor.

18. The 1st Respondent avers that the petitioner's prayers in the application, are couched in a way that is seen to be asking this Court to compel the sitting Governor to inherit his predecessor's personal appointees which according to the Respondent is not practical and misconceived.

19. The 1st 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 baseless and incompetent.

20. On 3rd March, 2021, the 1st Respondent filed a Notice of Appointment and grounds of opposition to the Applicants application of 27th January, 2021 on the following grounds;

- a) That the petitioner had not demonstrated in any manner whatsoever how the Respondents have violated or have threatened to violate his constitutional rights under the constitution.
- b) The petitioner has not cited with particularity any constitutional provisions that have been violated by the Respondents.
- c) The petitioner's interpretation of the constitution is misleading, misconceived and self-serving as he has the opportunity to raise any constitutional issue in normal claimant not a petition.
- d) That the petition is hapless, presumptive and an abuse of court process and should be dismissed with costs as the petitioner has not established any cause of action against the 1st respondent.

21. On 9th February, 2021, this Court directed that this application be canvassed by way of written submission but both parties have not filed any submissions.

22. I have considered the averments of the parties herein despite this court directing the parties to file their submissions; none has been filed within the timelines granted.

23. I note that the applicant was appointed as an advisor to the late Governor. That position in my view was premised on the life of the said Governor.

24. In the circumstances I find the applicant has not established a prima facie case with any chances of success.

25. I find the application without merit and I dismiss it accordingly.

Ruling delivered virtually this **16TH** day of **MARCH, 2021**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kathumo holding brief Mr. Omayio & Mwae for the petitioner – present

Respondents - absent