



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 28 OF 2020

IN THE MATTER OF THE COUNTY GOVERNMENT ACT AND

OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF: ARTICLES 1, 3, 6, 10, 19, 21,22,23,27,28,32,35,41,43,45,47,65,165,176,

179,180,183,185(3), 195, 230(5) 232, 235,236,258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION AND/OR APPREHENDED

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

MARITA MMOJI AGUFANA..... PETITIONER

VERSUS

H.E. DR. WILBER OTTICHILO..... 1ST RESPONDENT

THE COUNTY ASSEMBLY OF VIHIGA..... 2ND RESPONDENT

THE COUNTY GOVERNMENT OF VIHIGA..... 3RD RESPONDENT

RULING

1. Application dated 29th July, 2020 was not certified urgent. The Applicant prays for an Order in the following terms: -

1. Spent
2. Spent
3. Spent
4. Spent

5. That pending the hearing and determination of this Petition this Honourable Court be pleased to grant Conservatory Orders restraining the 1st and 3rd Respondents from forwarding the names or any other name or individual to replace the petitioner herein.

2. Orders 6, 7, and 8 are incidental and would flow from grant of Order 5 above.

3. The application is premised on grounds 1 to 11 set out on the face of the application whose gravamen is that: -

That there is in existence impeachment proceedings against the petitioner as the County Executive Committee Member for youth, Sports, Gender, culture and social services but the said impeachment proceedings have been overtaken by events since the Petitioner/applicant has a different docket of County Executive Committee for Water and Environment.

4. That on 30/6/2020 Section 31 of the County Governments Act was amended by replacing the word “*shall*” with “*may*” so that Section 31(a) now reads that the Governor “*may dismiss a County executive committee member.*” and that a Governor- “(ba) *may re-assign a County Executive Committee Member.*”

5. That pursuant to Article 47 of the Constitution

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

6. That this Constitutional provision moderate the action of the Governor in terms of the amended Section 31 of the County Governments Act, in that the Governor may adhere to the dictates of fair administrative action as provided under Article 47 of the Constitution.

8. The amendment also removed section 40(1) of the County Governments Act, requiring the Governor to dismiss County Executive Committee members upon impeachment.

7. That the 1st respondent has illegally terminated the services of the Applicant.

8. That the petition raises substantial constitutional and legal issues, requiring the substratum of the dispute at hand to be protected.

9. That the application be granted with costs.

10. The 1st and 3rd respondents filed replying affidavit sworn to by Idah Alyne Khaiga, the Principal Legal officer of the 3rd Respondent stating that the application is misconceived, scandalous, vexatious, frivolous, defective and an abuse of the Court’s process.

11. That the contents in the supporting affidavit of the applicant are false, oppressive, irrelevant and inadmissible in that Section 40 of the County Government Act, 2012, gives the County Assembly the power to remove a County Executive Committee member.

12. That the procedure under Section 40 of the Act, was followed to the letter in the removal of the Petitioner/Applicant.

13. That Section 40(6) mandates the respondent to abide by the decision of impeachment of a County Executive Committee by the County Assembly.

14. That the petitioner was found to be unfit to serve and was lawfully removed from office.

15. That injunctive orders given in Petition No. 53 of 2018 in which temporary injunction was granted to stop removal of the petitioner/applicant from the position of County Executive Committee, Youth, Gender Sports, culture and social services were vacated on 25/6/2020 and the impeachment process was proceeded on.

16. That the Petitioner/Applicant lodged an appeal against the above ruling being Civil Appeal No. 71 of 2020 which appeal is still pending at the Court of Appeal.

17. The issue raised in this Petition and application are *subjudice* in petition No. 53 of 2018 and in the pending Appeal No. 71 of 2020.

18. That the Orders sought by the Petitioner have in any event been overtaken by events since the Petitioner was removed from office on 2/7/2020 and a letter to that effect is attached to the replying affidavit.

19. That the applicant has not satisfied the requirements for grant of a Conservatory order.

20. That the application be dismissed with costs.

Determination

21. The applicant did not file a supplementary and/ or further affidavit to join issue with the respondent on matters of fact raised in the replying affidavit and in particular on serious allegations that the issues in dispute in this suit are the subject of Employment & Labour Relations Court Petition No. 53 of 2018 and Civil Appeal No. 71 of 2020 pending at the Court of Appeal.

22. Be that as it may, the real issue for determination is whether the applicant has satisfied the requirement for grant of conservatory orders in Public domain as per the dictates of the Supreme Court in **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR** as follows: -

“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 values and the proportionate magnitude and priority levels attributable to the relevant causes.”

23. This Court is not satisfied at this interlocutory stage that the petitioner/applicant has demonstrated inherent merit in her case especially bearing in mind, she has already been removed from office following an impeachment process under section 40 of the County Governments’ Act and has been replaced by another.

24. The relative priority in this matter is to allow ordered functioning of the County Government and the suit to proceed on its merits. In the event the Court in the end finds that the Constitutional rights of the petitioner and the law was breached in the process of her impeachment and removal, the petitioner has sufficient alternative remedies available to her including but not limited to an award of damages.

25. Therefore, the proportionate magnitude in this matter dictates that no conservatory order is granted at this stage of the hearing.

26. The application is therefore dismissed with costs in the cause.

Dated and delivered at Nairobi this 11th day of March, 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 15th 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

Mr. Mwamu Advocates for the Petitioner/Applicant

Mr. Lakewa, Francis, Legal Officer County Government of Vihiga

Chrispo: Court clerk