



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 7 OF 2019

JANE CHEPKORIR BARUS.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF BARINGO.....1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF BARINGO.....2ND RESPONDENT

THE GOVERNOR, BARINGO COUNTY.....3RD RESPONDENT

THE BARINGO COUNTY, PUBLIC SERVICE BOARD.....4TH RESPONDENT

JUDGEMENT

1. The Petitioner filed an Amended Petition dated 6th August, 2019, on 29th November, 2019. She states that she was appointed as the County Chief Officer for Baringo County by a letter of appointment dated 3rd September, 2018 effective 1st July, 2018 to 1st July, 2022. That she conducted her duties attached to her office wholeheartedly as required of her office.

2. She avers that on 12th April, 2019 she learnt through the standard newspaper that there was a motion duped “*Baringo MCAs seeks to remove finance officer*” that had been tabled before the 1st Respondent with claims that she had abdicated her duties leading to massive ineffectiveness in her department such as; delay in payment of contractors, huge roll overs, corruption malpractices and undermining other departments, which motion was passed on 11th April, 2019 as evidenced in the standard newspaper except titled ‘ Baringo motion to fire finance officer passed’ of 13th April, 2019.

3. She states that she investigated the said allegation and affirmed that the motion was passed by the 2nd Respondent on 4th April, 2019 and that the 1st Respondent urged the 3rd respondent to move and or change her from the said department.

4. She states that she was not given an opportunity to answer to the allegations levelled against her neither was she accorded fair administrative action therefore they violated Article 47, 50(1) and 236 of the Constitution of Kenya. Further that the report and recommendations of the 1st Respondent passed by the 2nd Respondent without following due process is null and void as disciplinary action against her is not a preserve of the 1st and 2nd Respondent but a mandate for the 4th Respondent, therefore the 1st and 2nd Respondent overstepped their mandate contrary to Article 10 of the Constitution and section 59 of the County Government Act.

5. She states that the 3rd and 4th Respondents acted on recommendations made by the 1st and 2nd Respondent who lacked legal capacity to make the said recommendations as such the whole process of removing her from office was flawed.

6. She seeks the following prayers: -

1) A declaration that the actions of the 1st and 2nd Respondent in approving, tabling and passing the Notice of Motion seeking to remove the petitioner from office was ultra vires, the mandate of the 1st and 2nd Respondent and against the doctrine of separation of powers and is therefore unlawful on account of violation of and inconsistent with the provisions of Articles 10,41,47,50,232 and 236 of the Constitution of Kenya,2010 hence null and void ab initio.

2) A declaration that the rights of the Petitioner guaranteed and protected under Articles 27,28,41,47,50 and 236(a) and (b) of the Constitution have been violated by the 1st and the 2nd Respondents

3) An order of Certiorari be issued to bring into this Honourable Court for purposes of quashing forthwith and to quash the

recommendations of the 1st and 2nd Respondent seeking to have the 3rd and 4th Respondent to; move or replace the Petitioner from the department of Finance and Economic Planning with immediate effect and In conjunction with the 4th Respondent, institute disciplinary proceedings against the Petitioner as per the Hansard Report dated 11th April,2019 for being in contravention of Articles 10,41,47,50 of the Constitution of Kenya,2010.

4) A Permanent injunction restraining the 3rd and 4th Respondents in any manner whatsoever by themselves, their officers, staff agents, servants and/or any other persons acting under their instructions from taking any further action against the Petitioner on the basis of the recommendations of the Hansard Report dated 11th April,2019.

5) A declaration that the process employed by the 1st and 2nd Respondents including the making of recommendations and passing resolutions for the removal, reassigning and or replacement of the petitioner was prejudicial, unconstitutional and in gross violation of the Petitioners rights guaranteed under Articles 27, 28, 41, 47, 59, 232 and 236 of the Constitution.

6) A declaration that the decision of the 3rd and 4th Respondents to transfer the petitioner from department of Finance and Economic Planning to the Department of industrialization, Commerce, Enterprise and Cooperative development was not proper as they relied on the motion passed on Thursday 11th April, 2019 which decision was arrived at without following due process and denying the petitioner fair administrative action and hence the same is null and void.

7) General damages for violation of the Petitioner's constitutional rights.

8) Costs of this Petition and interests at courts rate be granted to the Petitioner.

9) Any other relief that the court deems fit.

7. The 3rd and 4th Respondents filed a Reply to the Amended petition dated 23rd January,2020 on 29th January, 2020 and affirmed that the office of the County Chief Officer is protected under Article 236 of the Constitution therefore are not to be removed arbitrary.

8. It was stated that the Chief officer is appointed by the Governor with approval of the County Assembly as provided for under Section 45(1) of the County Government Act. Further that the Governor is empowered under Section 45(5) of the County Government Act to re-assign duties to the chief officer. Additionally, that the discretionary powers vested upon the governor to re-assign duties are protected by the doctrine of executive privilege and that the reshuffling is normally carried out to ensure regional balance and gender equality, for improvement of performance and service delivery and for political reasons.

9. It was stated that the petitioner was moved to another department within the county as the chief officer in charge of industrialization, commerce, enterprise and co-operative development which re-assignment did not affect her terms of service, appointment, salary package, benefits and reporting lines as alleged therefore she was not removed or demoted as alleged. Further that the 3rd Respondent communicated the said reshuffle to the petitioner before the same was carried out.

10. It was contended that the decision to re-assign the petitioner different duties was made independently by the Governor and not with any influence by the 1st and 2nd Respondents as alleged, since the County Executive operates distinctively from the County Assembly as envisaged under Article 174, 175 and 185(3) of the Constitution and section 30 of the County Government Act.

11. The 3rd and 4th Respondent therefore urged this Court to dismiss the petition herein as it lack merit.

12. The 1st and 2nd Respondents herein did not enter Appearance nor file any responses to the petition herein.

13. The petition was disposed of by way of written submissions with the petitioner filling on 10th May, 2021 and the 3rd and 4th Respondents on 15th April, 2021.

Petitioner's submissions.

14. The Petitioner's Counsel submitted that the petitioner was removed from office without the Respondents satisfying the conditions for removal of a member of County Executive Committee provided for under section 40(1)(2) of the County Government Act or following the procedure of removal provided for under a section 40(3) of the County Government Act. He argued that the failure of the respondents to follow due procedure rendered the entire procedure mute. He relied on the case of **Moses Mwicigi & 14 other –v- Independent Electoral and Boundaries Commission. & 5 others [2016] eKLR** where the Judges of the Supreme Court held that;

“This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

15. Counsel submitted that the petitioner was not given a chance to defend herself or respond to the allegations leveled against her after the motion was debated by the 1st Respondent contrary to the provisions of section 40 (4) of the County Government Act and Article 47 of the Constitution. He buttressed his argument by citing the case of **County assembly of Kisumu and 2 others –v- Kisumu County Assembly**

service Board & 6 others[2015] eklr which Court of Appeal cited Lord Denning's Decision in Kanda v. Government of Malaya in which it held that;

“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

16. According to counsel, the manner in which the petitioner was removed from office without according her an opportunity to be heard violated Articles 10, 27, 28, 47, 50 and 236 of the constitution and contravened the doctrine of *Audi Alteram Partem*. Further that the petitioner was not given fair administrative action as envisioned under sections 10, 12 and 13 of the Employment Act. He argues that the 2nd Respondent failed to provide the petitioner with the report and recommendations by the 1st Respondent to enable her prepare and respond to the said allegation therefore violating due process as was held in **County assembly of Kisumu and 2 others –v- Kisumu County Assembly service Board & 6 others [2015] eklr** (Supra).

17. It was submitted that when the respondents published in the standard newspaper of its intentions to remove the petitioner from office, she received a lot of ridicule from her colleagues, family member and fellow Kenyans who viewed her as a corrupt, dishonest, untrustworthy and crooked individual as such she was defamed and sought for punitive and aggravated damages for the alleged harm as was held in **Standard Media –V- Kagia & Co Advocates; Johnson Evan Gicheru-v- Andrew Morton & Another[2015] eklr**. To further buttress this counsel relied on the case of **Joseph Njogu Kamunge –v- Charles Muruiki Gachari [2016] eklr**. Accordingly, the petitioner prayed for compensation of Kenya Shillings Two Million (Kshs. 2,000,000/-).

18. Counsel concluded by submitting that no reason was given to warrant the removal from office of the petitioner and that the removal was motivated by malice and politics therefore urged this Court to allow the Petition as prayed.

3rd and 4th Respondents' Submissions

19. The respondents on the other hand submitted that the 3rd Respondent herein acted within his mandate as provided for under Section 45 of the County Government Act to re-assign duties to the petitioner herein as such the 3rd respondent did not breach any law in reassigning the petitioner duties. Further that the reassigned duties only moved the petitioner to another department but did not in any way lower her salary or position. Counsel cited the case of Samuel **Okuro & 7 other- V- Kisumu County Public Service Board, the Government Kisumu County & another [2017] eklr** where Lady Justice Maureen Onyango with regard to re-assigning of duties to County Chief Officer held that;

“It is an office in the public service as expressly provided. The only powers of the Governor with respect to county chief officers is appointments and re-assignment, not termination. Only the County Public Service Board can terminate the services of county chief officers after following due process. Should the governor be unhappy with the performance of a county chief officer, the only action the governor can take is to request the County Public Service Board to take disciplinary action against the county chief officer. In fact such reporting should come from the CEC member to whom the chief officer is responsible as the governor does not have direct supervisory powers over county chief officers as provided in section 46 of the Act.”

20. He further cited the case of **Florence Khadenje O Khaguli –V- Governor Vihiga County H.E Wilbur Otichilo & Another [2017] eklr** which Court Held that;

“Section 45 of the County Governments Act does not give the Governor powers to remove the chief officers from office. It only gives the Governor powers to appoint and reassign. A Governor does not even directly supervise a county chief officer as this is done by the CECM who is the officer accountable to the Governor. If there was any intention to give the Governor powers to dismiss a county chief officer nothing would have prevented the legislature from expressly providing for the same as has been done in respect of all powers of removal from office in the Act. This can only be because this is an office in the public service and the procedure for removal is as already provided for all public officers under section 59 of the County Governments Act or as may be provided in the individual contract of the county chief officer.”

21. Accordingly, Counsel submitted that the 3rd Respondent acted independently and in accordance with the law under section 45(5) of the County Government Act in re-assigning the petitioner new duties in a different department without any influence from the 1st and 2nd Respondents. Further that there were no disciplinary proceedings against the petitioner as alleged to require any disciplinary hearing.

22. On the prayers sought by the petitioner, it was submitted that the 3rd Respondent acted within his mandate to reassign the petitioner duties which she is currently undertaking as the chief officer of industrialization, commerce, enterprise and cooperative development as such the Petition is without merit and the same ought to be struck out with costs.

23. I have examined the averments and submissions of the parties herein. The issues for this court's determination are as follows;

1. Whether there were valid reasons for the respondent to move a motion seeking removal or reassignment of the petitioner.
2. Whether due process was followed in pursuit of the motion for the removal or reassignment of the petitioner's duties.
3. Whether the petitioner's constitutional rights were breached.

4. Whether the petitioner is entitled to the remedies sought.

NO. 1 REASONS & NO. 2 (DUE PROCESS)

24. From the petitioner affidavits she was appointed as Chief Officer in the Department of Finance & Economic Planning in Baringo County Government vide a letter dated 3/9/2018 with effect from 1st July 2018 to 1st July 2022.

25. The petitioner deponed that on 12/4/2019, she learned through an excerpt from the Standard Newspaper that there had been tabled a Motion seeking her removal from office.

26. That the motion had been tabled before the 1st Respondent with claims that the petitioner had been acting contrary to the Provision of the County Government Act, the Public Finance Management Act and the Code of Conduct expected of Chief Officers and further that she had abdicated her duties leading to delay in payment of contractor huge roll overs and alleged malpractices.

27. She avers that she had never been served with any letter or document requiring her to answer to the said allegation.

28. On 13th April, 2019 through another excerpt on the Standard Newspaper she learnt that the 1st respondent had on Thursday 11th April 2019 passed the motion to have her sacked from office.

29. She avers that she decided to follow up on issue of these excerpt and captured the same and that no motion had been approved by the 2nd respondent on 4/4/2019. She also obtained a copy of the Hansard Report marked JJB5(a) & (b) and forwarding letter dated 12th April, 2019 and received by the 3rd respondent on 13th April, 2019 which confirmed her removal as CEC member.

30. Section 31 of the County Government Act No. 17 of 2012 states as follows;

31. **The governor—**

(a) may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;

(b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;

(c) may appoint an accounting officer for each department, entity or decentralized unit of the county government; and

(d) shall have such powers as may be necessary for the execution of the duties of the office of governor.

31. The law here envisages that the County Government may dismiss a CEC member but shall dismiss such CEC member if there is a resolution of the County Assembly as provided vide Section 40 of the County Government Act 2012.

32. Section 40 of the County Government Act 2012 on the other hand provides as follows;

40.(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

(2) A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).

(3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—

(a) the county assembly shall appoint a select committee comprising five of its members to Removal of member of executive committee. 790 No. 17 County Governments 2012 investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations—

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5) (b) is supported by a majority of the members of the county assembly—

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and Meetings of the county executive committee.

(b) the governor shall dismiss the county executive committee member.

33. The law here envisages that the Assembly may propose removal of a CEC member to the Governor on grounds as above.

34. It is however also a requirement of the law under Section 51(4) above that the CEC Member is entitled to some fair procedure to appear before a select committee to answer to the allegation levelled against her during the investigations.

35. The petitioner has submitted that she was never informed of the allegation levelled against her and neither was she given an opportunity to answer to the allegations against her.

36. The respondent on the other hand have submitted that the petitioner was reassigned other duties by the Governor as provided by the law.

37. Section 31(ba) of the County Government Act (Supra) envisages that the Governor can re-assign a CEC member other duties.

38. It is evident that the motion that was passed by the Assembly indicated that the Governor was to move or replace the petitioner. The CPSB was also urged to institute disciplinary proceedings against the said chief officer.

39. The resolution was forwarded to the Governor vide a letter dated 2nd April, 2019.

40. On 16/4/2019, this court issued orders staying the removal of the petitioner from office without due process. The orders for her being assigned other duties was not affected.

41. The 3rd respondent in my view chose to exercise his prerogative right and re-assigned the petitioner other duties.

42. In pursuing the re-assignment of a CEC from one docket to another, the law is however silent and the perception is that the Governor would not need to justify the re-assignment.

43. In the case of the petitioner, the re-assignment of the petitioner was not done by the Governor on his own motion. This was necessitated by the County Assembly in the process initiated for her removal. The process is however elaborate on what needs to be done as exemplified under Section 31 of the County Government Act (Supra).

44. The process however was not followed. There is no indication that there was a committee selected to investigate the petitioner. There is also no indication that the petitioner was given an opportunity to explain herself on the allegations levelled against her.

45. In this court's view, the respondent thus failed in according the petitioner a fair administrative action as envisaged under the law.

ISSUE NO. 3

46. Having found the respondent didn't accord the petitioner due process, it is also apparent that the provision of Article 47 of the Constitution were flouted.

47. Article 47 of the Constitution provides as follows;

Fair

administrative

action

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

48. Provision of Article 50 (1) of the Constitution were breached because the petitioner was condemned unheard. That being the position, I return the verdict that the constitutional rights of the petitioner were breached.

ISSUE NO. 4

49. Having found breach against the rights of the petitioner, I find for her and award her the following remedies;

1) A declaration that the rights of the petitioner as guaranteed and protected under Act 47 & 50 of the Constitution were violated by the 1st, 2nd & 3rd respondents.

2) An order of Certiorari be issued to bring into this Honourable Court for purposes of quashing forthwith and to quash the recommendations of the 1st and 2nd Respondent seeking to have the 3rd and 4th Respondent to; move or replace the Petitioner from the department of Finance and Economic Planning with immediate effect and In conjunction with the 4th Respondent, institute disciplinary proceedings against the Petitioner as per the Hansard Report dated 11th April, 2019 for being in contravention of Articles 10, 41, 47, 50 of the Constitution of Kenya, 2010.

3) A Permanent injunction restraining the 3rd and 4th Respondents in any manner whatsoever by themselves, their officers, staff agents, servants and/or any other persons acting under their instructions from taking any further action against the Petitioner on the basis of the recommendations of the Hansard Report dated 11th April, 2019.

4) A declaration that the process employed by the 1st and 2nd Respondents including the making of recommendations and passing resolutions for the removal, reassigning and or replacement of the petitioner was prejudicial, unconstitutional and in gross violation of the Petitioners rights guaranteed under Articles 27, 28, 41, 47, 59, 232 and 236 of the Constitution.

5) A declaration that the decision of the 3rd and 4th Respondents to transfer the petitioner from department of Finance and Economic Planning to the Department of industrialization, Commerce, Enterprise and Cooperative development was not proper as they relied on the motion passed on Thursday 11th April, 2019 which decision was arrived at without following due process and denying the petitioner fair administrative action and hence the same is null and void.

6) General damages for violation of the petitioner's constitutional rights amounting to kshs.1million.

7) Costs of the petition and interest on amount awarded be granted to the petitioner with effect from the date of the Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sitati holding brief for Peter Wanyama for 3rd & 4th respondents – present

Awuor holding brief for petitioner - present

Court Assistant - Wanyoike