



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

PETITION NO. 3 OF 2021

IN THE MATTER OF ENFORCEMENT OF THE CONSTITUTION AND BILL OF RIGHTS

UNDER ARTICLES 2, 3, 10, 22, 23, 27, 47, 50 AND 55 (b) (c) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF PART VII AND PART VIII OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

IN THE MATTER OF THE RULES OF NATURAL JUSTICE

IN THE MATTER OF THE HIGH COURT (ORGANIZATION AND ADMINISTRATION) ACT

IN THE MATTER OF LEGITIMATE EXPECTATION

- BETWEEN -

MR. SHEKUE KAHALE KOMBO.....PETITIONER

- VERSUS -

THE GOVERNOR LAMU COUNTY.....ST RESPONDENT

THE COUNTY SECRETARY LAMU COUNTY.....ND RESPONDENT

THE COUNTY GOVERNMENT OF LAMU.....^{3RD} RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

RULING

The petitioner has filed an application on 02.06.2021 by way of a notice of motion through Katsoleh & Company Advocates. The application is under Article 23, 154 and 165(3) of the Constitution of Kenya 2010 and what is stated as “Matiang’i Rule 2013” and which the Court presumes to be the commonly known Mutunga Rules. The petitioner prays for orders:

a) (spent)

b) The conservatory interim order be issued restraining the respondent from implementing the termination and appointing another person for the post of Economic Advisor pending hearing and determination of the application.

a) The conservatory interim order be issued restraining the respondent from implementing the termination and appointing another person for the post of Economic Advisor pending hearing and determination of the application and petition.

b) Costs be in the cause.

The application does not state the grounds and supporting affidavit it is based on. However, there is annexed on the application the supporting affidavit of the petitioner sworn on 19.05.2021. He states and urges as follows:’

a) He was appointed the Economic Advisor, County Government of Lamu, per letter dated 08.04.2019 signed by the 1st respondent. It was for a term of three years or for the 1st respondent's term of service whichever comes first. The three years were lapsing on or about 08.04.2022 and the 1st respondent's tenure has so far not yet lapsed.

b) By a letter dated 15.03.2021 the 1st respondent terminated the petitioner's employment with immediate effect and the letter stated that the claimant would be paid one-month salary in lieu of notice subject to formal clearance. The reason for termination was stated thus, **"Its however noted that you have been engaging in early campaigns for one of the parliamentary seats in Lamu County. This leaves you vulnerable to accusations of conflict of interest and makes your continued occupation of the office of advisor untenable."**

c) The petitioner says that the implementation of the termination should be stayed to the extent that the vacancy should be preserved on account that he was not given a chance to be heard, the termination is not in the best interests of the people of Lamu County, and the abrupt termination came despite his servicing of a loan from Gulf Bank.

The respondents have opposed the application by filing the replying affidavit of John Mburu, the Lamu County Secretary sworn on 16.06.2021 and filed through Kilonzo & Aziz Company Advocates. It is stated and urged as follows:

a) It is true that the petitioner was appointed as pleaded for him. He was part of the 1st respondent's personal staff appointed as Economic Advisor.

b) The terms and conditions in the letter of appointment dated 08.04.2019 bind the petitioner. The petitioner has breached the terms of the employment by engaging in early campaigns. The exhibits show the petitioner engaging in political campaigns.

c) The petitioner has not denied the reasons for termination.

The parties filed their respective submissions. The Court has considered all the material on record and makes findings as follows:

1) It is submitted for the respondents that the 1st respondent was entitled to dismiss the petitioner in exercise of the Governor's powers to dismiss per section 31(a) of the County Governments Act. The Court finds that the section does not apply to the petitioner who did not hold an office as county executive committee member and to which the section applied. The Court finds that the petitioner may have held office as Economic Advisor and part of staff within the Governor's office but that did not graduate him to a county executive member as envisaged in section 31 of the Act and the submission is found unjustified.

2) The Court finds that in absence of any other material before the Court, the position held by the petitioner clearly fell within the establishment of the County public service and was under the statutory powers and functions of the county public service board per the County Governments Act. To the extent that the board was not involved in the termination of the petitioner, the Court finds that the termination appears to have proceeded unfairly and in breach of the applicable provisions of the County Governments Act vesting in the Board human resource functions over the county public officers such as the petitioner and including the powers of appointment, disciplinary control and others as stipulated in the Act.

3) Despite the procedural defects in the manner the petitioner was terminated, the petitioner has not denied and attacked the reason for the termination in any material respect. As submitted for the respondents, the petitioner must be deemed to admit the reason for the termination. The Court finds that to the extent that the reason for the termination is valid and genuine on the face of the pleadings, the petitioner has failed to establish a *prima facie* case that would justify the grant of the interim conservatory order as prayed for. To say it in other words, even if the vacancy is preserved on interim basis, per the material before the Court, the claimant is apparently culpable of the reason for termination and the Court should not act in vanity to preserve a vacancy which in the face of that culpability, the petitioner would not at the end of it all or at any rate be eligible to be reinstated therein. The trite rule was that the Court will not grant orders in vanity and the rule truly applies in the instant circumstance. While making that finding, the Court considers that as submitted for the respondent, any established procedural irregularity in the termination process would readily be remedied with a pecuniary award as may be found just after the full hearing of the petition. The application is therefore found not meritorious.

4) The Court has considered the parties' respective margins of success and the respective weight of their positions in the case and each will bear own costs of the application in any event.

In conclusion the application is hereby dismissed with orders that each party will bear own costs of the application in any event.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16TH JULY, 2021.

BYRAM ONGAYA

JUDGE