



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

PETITION NO. 2 OF 2020

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 41, 47 AND 236 OF THE CONSTITUTION 2010.

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.

AND

IN THE MATTER OF SECTION 40 OF THE COUNTY GOVERNMENT ACT NO.17 OF 2012.

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF DECISION TO REMOVE THE COUNTY EXECUTIVE COMMITTEE MEMBER-LANDS,

HOUSING AND PHYSICAL PLANNING OF THE COUNTY GOVERNMENT OF KERICHO

AS COMMUNICATED IN THE LETTER DATED 1TH JANUARY, 2017,

BETWEEN

ARCH. NICHOLAS NGENO.....PETITIONER

VERSUS

THE GOVERNOR KERICHO COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY GOVERNMENT OF KERICHO.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner filed his Amended Petition dated 22nd January, 2021 on even date and stated that he was appointed by the 1st Respondent pursuant to Article 179(2) of the Constitution of Kenya 2010, to the position of County executive member in charge of land, housing and Physical planning by a letter dated 24th June, 2013 with the job commencing on 7th June, 2013 and automatically became a state officer under Article 260 of the Constitution.

2. He stated that his duties are as provided for under Article 183 of the Constitution and his remuneration was started at Kshs. 225,000/- with SRC increased salary for selected arms of county government that saw his salary rise to Kshs.350,000/-

3. He states that his appointment was gazzeted by Notice number 9084 of 5th July, 2013 in Volume number CXV-No.99. he avers that he

continued discharging his duties as required of his office diligently until 12th October, 2016 when he was arrested and charged in criminal case number 5 of 201 **Republic –VS- Nicholas Ngeno and 4 others** for offenses of abuse of office contrary to section 46 as read with section 48(1) of the Anti-corruption and economic crimes Act, failure to comply with the law applicable procedure and guidelines relating to management of public funds and incurring expenses contrary to section 45(2)(b) as read with section 48(1)(a) of the anti-corruption and economic crime Act and conspiracy to commit an offence of corruption contrary to section 45(a)(3) as read with section 48 (1) of the Anti-corruption and economic crime Act which charges did not arise in the course of the petitioner's engagement with the respondent but out of a previous employment by the defunct municipal council of Eldoret.

4. He states that the Respondent orally informed him to step aside till his name was cleared from the charges against him. However on 16th January, 2017 while the said criminal case was ongoing he was removed from office by the 1st Respondent on claims of being absent from office for over one year which absence has affected service delivery in his docket.

5. The petitioner states that the Respondents action of removing him from office infringed on his constitutional rights Under Articles 10, 41, 47 and 236 of the Constitution 2010 and sought the following reliefs;

1. That a declaration do issue that the petitioner rights under Article 10, 41, 47 and 236 of the Constitution of Kenya 2010 were breached by the Respondent and the decision by the Respondents as communicated in the letter dated 16th January, 2017 removing the petitioner from the position of County Executive Member-lands, housing and physical planning of the County Government of Kericho is null and void for failure to comply with section 40 of the County Government Act no. 17 of 2012.

2. That an order of certiorari do issue forthwith removing into this Honourable Court and quash the decision of the respondent as communicated in the letter dated 16th January, 2017 removing the petitioner from the position of a County Executive Committee member-lands housing and physical planning of the county government of Kericho.

3. That an order of Mandamus do issue to compel the respondents to reinstate him to the position of member of the county executive committee-lands, housing and physical planning of the county government of Kericho forthwith.

4. That the Petitioner prays for an award of compensation by way of damages as follows;-

a. Three months in lieu of Notice@ Kshs.350,000- Kshs.1,050,000/-

b. 12 months' salary as compensation @Kshs.350,000/- Kshs. 4,200,000/-

c. Loss of car loan scheme benefits based on the salaries and remuneration commission remuneration and benefits for county executive member (CEC's) car and mortgage scheme dated 30th September, 2014 - Kshs. 2,000,000.

d. Loss of mortgage loan scheme benefits based on the salaries and remuneration commission remuneration and benefits for county executive member(CEC's) car and mortgage scheme dated 30th September, 2012 - Kshs. 3,000,000/-.

e. 5 years leave allowance @ Kshs. 10,000 based on the salaries and remuneration commission- Annual leave allowance for state officer serving at the county government dated 19th November, 2014 – Kshs. 50,000/-.

f. Monthly commuter allowance of Kshs 20,000 for the remaining months from January, 2017 to July, 2018 based on the salaries and remuneration commission –provision of transport for county executive committee dated 20th August, 2013- Kshs 340,000/-

g. Service gratuity at the rate of 31% of the annual basic salary for the remaining 17 months thus for 2 years of Kshs. 1,302,000/- based on constitution of Kenya remuneration and Benefits of state officer serving in the county government Kenya gazette notice number 2888 of 2013 – Kshs. 2,604,000/-.

h. Lost opportunity to earn remuneration for the full term from January, 2017 to July, 2018 @ Kshs 350,000 being 17 months- Kshs. 5,950,000/-

i. General damages for breach of fair labour practices, fair administrative action and Article 236 of the Constitution of Kenya 2010- Kshs- . 10,000,000/-.

5. That the Respondent be ordered to compute all terminal dues which the petitioner is entitled to and make full payment forthwith in tandem with the public service commission-county public service human resource manual 2013 being in addition to the forgoing.

6. That the costs and interests be awarded to the petitioner to be sourced by the Respondents.

6. The Respondent opposed this petition and filed a replying Affidavit sworn by **H.E Paul Kiprono Chepkwony**, the Governor Kericho County and the 1st Respondent herein on the 25th February, 2021 and filed in this Court on the 2nd March, 2021 on the following grounds;

a. That the petitioner was indeed appointed to serve in the docket of lands, housing and Physical planning in Kericho County Government by a letter dated 24th June, 2013.

b. He states that on 23rd November, 2015 the Petitioner wrote a letter to him requesting to step aside to pave way for investigations that were carried out by EACC on a project the petitioner had participated in while at the employ of the defunct municipal council of Eldoret.

c. Accordingly, he states that he instructed one Joel Bett the county secretary to act in place of the petitioner in the interim.

d. That on 27th June, 2016, he wrote a letter to EACC asking for the status report of the Petitioner investigation, and on 12th October, 2016 the petitioner was arrested and charged for abuse of office following corruption allegation leveled against him.

e. He states that prior to the petitioner's arrest, the petitioner had been away from office since 23rd November, 2015 which absence affected service delivery to the people of Kericho County and greatly affected his discharge of duties attached to his docket.

f. That on 21st October, 2016, EACC responded to his letter on the status of investigation and informed him that the petitioner had been charged with corruption related offenses and advised him to suspend the Petitioner on half pay which he did and suspended the Petitioner with effect from the date of his charge.

g. That following the suspension, the petitioner's office remained vacant till 16th January, 2017 when he terminated the service of the petitioner in accordance with section 31(a) of the County government Act for being absent from office for over one year and section 40(1)(d) and (f) of the County government Act for failing to attend Three (3) consecutive county executive committee meetings and clearly outlining the reasons for termination in the said letter as absence from office for over one year and the corruption allegation leveled against him.

h. The respondent contends that the petitioner is not entitled to the prayers sought in his petition having served 90 % of his tenure and voluntarily stepped aside in 2015 and was later terminated in January, 2017 leaving only 6 months before the August General Election that automatically terminated the service of the CEC's by operation of law.

i. He stated Further that by the time the charges were withdrawn by EACC in December, 2017 there was a new county Government in Office as such the petitioner was not entitled to be reinstated the position being political and pegged to the sitting governor of the time.

j. The Respondent contends that the CEC's office is not an office under the public service therefore the County public service Human Resource manual is not applicable to the Petitioner as alleged.

k. He thus urged this Court to dismiss the petition as lacking merit.

7. The petition herein was disposed of by way of written submissions with the petitioner filing his submissions on the 19th May, 20210 and the Respondents on even date.

Petitioner's Submissions

8. The petitioner submitted that the respondents breached his rights protected under Articles 10, 41, 47 and 236 of the Constitution of Kenya 2010 when the respondent failed to comply with the mandatory provision of section 4 of the fair administrative Actions Act and failed to subject the petitioner to fair administrative action as envisaged under Article 41 and 47 of the Constitution. He relied on the case of **County Government of Garissa and another –v- Idris Aden Mukhtar and 2 other [2020] eKLR**.

9. The Petitioner argues that the Respondent breached the provision of Section 40 of the County government Act that requires that a CEC's member shall be subjected to hearing by a select committee by the county Assembly before their removal and Buttressed this argument by citing the case of **County government of Nyeri and another –v- Cecilia Wangeci Ndugu [2015] eKLR**.

10. It was submitted further that the petitioner is protected under Article 236 of the Constitution against arbitral removal from office without following due process. He relied on the case of **Narok County Government –v- Richard Bwogo Birir and another [2015] eKLR**.

11. The petitioner maintains that the respondents failed to comply with Clause D.31 of the Public Service Commission- County public service Human Resource manual, 2013 which provides for interdiction awaiting outcome of criminal proceedings with ½ pay. Further that the respondent sourced advice from the EACC who advised the respondent to suspend the petitioner at half pay till the criminal proceedings are heard and determined as long as the same does not take more than 24 months. Accordingly, the Petitioner argues that he was dismissed from employment before the 24 months therefore the respondents acted illegally and contrary to section 62(1) of the Anti-corruption and economic crimes Act.

12. The petitioner therefore urged this Court to allow the petition as prayed and grant him the reliefs sought.

Respondents Submissions.

13. The respondents submitted that the 1st Respondent is empowered under section 31(a) of the County Government Act to dismiss a CEC

member, at any time and considering the fact that the petitioner has not been in office since 23rd of November, 2015 to 16th January, 2017 his office remained without a head which made most operations to come to a standstill, therefore it was only prudent for the Governor to dismiss him. He argued further that section 40(1) (d) & (f) of the County Government Act, now repealed was operational during the dismissal of the petitioner, clothed the governor with power to dismiss any CEC who failed to attend three consecutive Meeting of the County Executive Committee. Also that public interest demanded that the position of the said CEC be filled for the purposes of ensuring service are delivered to the people of Kericho County.

14. He cited the case of **Walter Ogal Anuro –v- Teachers Service Commission [2013] eKLR** and submitted that the dismissal of the petitioner from his employment was fair and just in the circumstances.

15. He submitted further that the 1st Respondent communicated the reasons for the dismissal to the Petitioner by the letter dated 16th January, 2017 being corruption allegation and charges preferred against him and the absence from office for over one year, which petitioner choose not to respond to. He argued that the reason given are sufficient and valid to warrant dismissal of a CEC member from employment, therefore the Respondent acted within the provisions of Article 47 of the Constitution and County Government Act.

16. On whether the Petitioner is entitled to the prayers sought, it was submitted that the petitioner is not entitled to the prayers sought since a CEC serves for a maximum period of 5 years if his services are not terminated before the terms expires by operation of law. He argued that the petitioner was employed in 2013 and served till January, 2017 leaving a remainder of 6 months before the general election was conducted in 2018. Also that the petitioner had voluntarily stepped aside in 2015 as such is not entitled to any back wages. He submitted further that the damages sought for alleged 17 months are based on misconception.

17. On the issue of car loan and mortgage loan, the respondents urged this Court to take judicial notice that no CEC benefited from the said facility between the year 2013 and 2017.

18. It is the respondent case that by the time the charges against the Petitioner were withdrawn in December 2017, election had already be carried out and a new County government was constituted under section 30(2)(e) of the County Government Act, as such the prayer for reinstatement cannot issue.

19. On whether the petitioner had legitimate expectation, the Respondent submitted that the doctrine cannot apply in this case because the criminal case was concluded in December, 2017 long after a new county government had been constituted therefore the Petitioner could not have had expectation to be reinstated to a position that had lapsed by operation of law. He cited the supreme Court case of **Communication Commission of Kenya & 5 others –v- Royal media Services & 5 others Petition number 14, 14A, 14B & 14C OF 2014**.

20. On whether the petitioner has met the threshold for the grant of Order of certiorari and Mandamus, it was submitted that the said Orders are discretionary and the Petitioner has not satisfied the conditioned pre-requisite to granting the said orders and reinforced his argument by citing the case of Republic-v- **the principle secretary, Ministry of internal security and another Ex-parte Schon Noorani & Another [2018] eKLR**.

21. The respondents submitted in conclusion that the petitioner's services were terminated by law and that the Orders sought are not capable of being implemented and urged this Court to dismiss the Petition with costs.

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

1. **Whether there were valid reasons to terminate the petitioner.**
2. **Whether due process was followed before the termination of the petitioner.**
3. **Whether the petitioner's rights under the constitution were flouted.**
4. **Whether the petitioner is entitled to the prayers sought.**

ISSUE NO. 1 Reason for termination and NO.2 Due process

23. The petitioner was appointed as a CEC member in charge of Lands, Housing and Physical Planning vide a letter dated 24th June 2013 and the commencement date being 7th June, 2013.

24. The petitioner was however removed as CEC Member vide a letter dated 10th January, 2017 which stated as follows;-

“Following the corruption allegations and the preferring of charges against you before the Anti-Corruption Court in Eldoret on 12th October, 2016 and your absence from office for over one year over the same, it has become imperative for me to relieve you of your duties. The said action will enable the department to run smoothly. Your absence since 23rd November, 2015 has adversely affected the delivery of services to the public for which your appointment was to serve.

You are hereby relieved of your duties with immediate effect pursuant to Section 40(1)(d) and (f) of the County Government Act, 2012 as the County Executive Committee member. The County Secretary will oversee your handing over.”

25. It is therefore apparent that the county Governor terminated services of the petitioner under Section 40 (1) (d) & (f) of the County

Government Act.

26. Under section 40 of the County Government Act, the Governor may remove a member of the County Executive Committee from office for any of the following grounds;

“40. Removal of member of executive committee

(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 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

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

27. In case of the petitioner, he was charged with the offence of abuse of office but the charges were later withdrawn by the state on 1/12/2017 because the EACC was not properly constituted at the time he was charged.

28. The charges were actually withdrawn on a technicality as the EACC was not properly constituted and not because the petitioner had not been found culpable.

29. That notwithstanding, the petitioner was entitled to a fair internal disciplinary process before being terminated. This is due to the fact that criminal process is different and parallel to the internal disciplinary process which the petitioner was not subjected to. The process envisaged is that provided for under Section 40 of County Government Act.

30. In Narok County Government & Another VS Richard Bwogo Birir & Another (2015) Eklr JJA Waki, Nabuye & Kiage observed as follows;

“40. There is no argument that a member of the executive Committee is a State Officer, Article 260 of the Constitution so defines them and also defines a “Public officer” to include any state officer, while Article 236 embodies the protection of public officers through adherence to due process of law in the removal, demotion on disciplinary action. Such due process includes fair

administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, one where a person is given written reasons for intended action that is likely to adversely affect them (Article 47).....”

31. A similar holding was held by the court in County Government of Nyeri & Another VS Cecilia Wangeci Ndungu (2015) EKLR in which JJA Visram, Koome & Odek observed as follows;

“18. From the language adopted by the legislature in enacting sections 40 & 31(a), we discern two methods through which a member of a County Executive Committee can be dismissed.”

Firstly, under Section 40, a Governor can dismiss a County Executive Committee member on any of the afore mentioned grounds following a resolution by the County Assembly for such dismissal. In that case, the dismissal is initiated by the County Assembly.

Secondly, under Section 31 (a), a Governor can dismiss a County Executive member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second rule that appears to rest an element of discretion on the part of the Governor and which is the subject of interpretation in this appeal.

19. The respondent was dismissed from office by a letter dated 24th June, 2014 from the 2nd appellant pursuant to Section 40 (1) of the County Government Act. Subsequently by a letter of date, the 2nd appellant corrected the earlier letter by indicating that the respondents dismissal was pursuant to Section 31 (a) of the County Government Act.

It is not lost to us that the amendment was due to the fact that the 2nd appellant could only dismiss the respondent on his own motion under Section 31 (a) and not Section 40 (1) as herein above observed.”

32. In the case of the petitioner herein, he was dismissed by the Governor ostensibly pursuant to Section 40 (1) (d) & (f) of the County Government Act.

33. Section 40 (1) (d) & (f) envisages that the Governor may remove a member of CEC for failure to attend the 3 consecutive meetings of the CEC and also for gross violation of the constitution or any other law.

34. Under the said act, the procedure to be adopted before the removal is set out under Section 40 (2), (3), (4), (5) & (6) (Supra).

35. There is no evidence that indeed the County Assembly resolved to dismiss the petitioner and passed this resolution to the Governor to execute. The governor therefore acted on his own motion to terminate the appointment of the petitioner is breach of the law and without giving the petitioner an opportunity to defend himself.

36. Section 41 of the Employment Act also states as follows;

“41. Notification and hearing before termination on grounds of misconduct

(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make.”

37. Section 45 (2) of the Employment Act states as follows;

“45. Unfair termination

(1)

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for his termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

38. The petitioner having been terminated as explained above it is my finding that it was in breach of the law and also in breach of the constitution.

39. Article 47 which states as follows;

“47. 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.”

40. In case of the petitioner, it is apparent that he was not subjected to a fair administrative process.

41. It is only a proper disciplinary hearing that would have determined if there were proper reasons to enable the respondent terminate the services of the petitioner.

42. I therefore return a finding that it was not established that the petitioner was terminated due to valid reasons. It is also established that due process was not followed before the petitioner was terminated.

ISSUE NO. 3: Breach of the Constitution

43. Following a finding of breach of law, I also find that the petitioner’s rights under the constitution were also breached and in particular breach of Article 41 & 47 of the constitution on right to Fair Labour Practices and breach of the right to a fair hearing and fair administrative action.

ISSUE NO. 4. Remedies

44. Having found there was breach, I find that the petitioner is entitled to compensation as follows;

1. 1 month salary in lieu of notice = 350,000/=

2. 12 months salary as compensation for the unfair and unjustified termination = 12 x 350,000 = 4,200,000/= This is pegged on the fact that the period before expiry of his contract was just below 2 years and this compensates him.

3. Gratuity at 31% of the annual basic salary for the remainder of the contract period = 17 months

= 350,000 x 17 x 0.31

= 1,844,500/=

4. General damages equivalent to 2 Million KShs. For breach of the petitioners rights under the constitution.

TOTAL = 8,394,500/=

Less statutory deductions

5. The respondent will pay costs of this suit plus interest at court rates with effect of the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mrs. Murungi for Respondent – present

Kwoba holding brief for Wambua Kigamwa for petitioner –

Present

Court Assistant - Fred