



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 37 OF 2020

IN THE MATTER OF: ILLEGAL, UNFAIR, IRREGULAR AND ARBITRARY DISMISSAL AND

IN THE MATTER OF: ARTICLES 10, 22, 23, 47, 179 AND 183 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

BETWEEN

PAULINE KAHIGA WAITITU.....'.....PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

MIKE MBUVI SONKO KIOKO.....2ND RESPONDENT

JUDGMENT

1. The Petitioner filed the Petition dated 4th March, 2020 contending that termination of her employment as a County Executive Committee Member (CECM) by the 2nd Respondent, was unfair and was undertaken in a vacuum as her contractual term had not expired. The petition seeks the following prayers:

- a. A declaration that the Petitioner has been illegally, unfairly, irregularly and arbitrarily dismissed as the County Executive Committee Member of Finance and Economic Planning by the Respondents.
- b. THAT the Honourable Court be pleased to issue a REINSTATEMENT ORDER to the Respondents to re-install the Petitioner as the County Executive Committee Member for Finance and Economic Planning into the payroll of the 1st Respondent until the expiry of her contract of employment with all the benefits.
- c. An order of PROHIBITION restraining the Respondents themselves, their agents, employees or servants or any other person or body corporate acting under the instruction of the Respondents from barring the Petitioner from re-entering her office, performing the duties of her office, withholding her salary until the expiry of her contract of employment.
- d. THAT alternatively the Respondents be compelled to pay damages and accrued salary and benefits as and against the number of years in service remaining up to and including February 2020 together with all benefits and the same to be paid in lump sum.
- e. THAT the Honourable Court be please to declare the reorganization of Nairobi City County Government Finance Committee by the 2nd Respondent illegal, null and void.
- f. Any such further and or other relief as the Honourable Court may deem fit and expedient to grant in the circumstances.

2. The Petition is supported by the affidavit of the Petitioner sworn on 4.3.2020 in which she reiterated the averments in the Petition and annexed a bundle of documentary evidence.

3. The 1st Respondent opposed the Petition through the Replying Affidavit sworn on 16.3.2020 by Mr. Justus Kathenge, the 1st Respondent's acting County Secretary. However, the 2nd Respondent entered appearance but did not file a response to the Petition.

4. The Petition was disposed of by way of written submissions.

Petitioner's Case

5. The Petitioner contended that on 22.3.2019, the 2nd Respondent appointed her as she was appointed as CECM for Devolution, Public Service and Sub-County Administration Sector in the 1st Respondent. She contended that in accordance with Gazette Notice No. 89 dated 7.7.2017 and Article 179 (2) (b) of the Constitution as read with section 30 (2) (d) of the County Government Act, her appointment as a CECM was on a 3 year contract basis.

6. In her own view, she was professional, honest and exercised fair play in the course of her service as the CECM Devolution, Public Service and Sub-County Administration Sector and eventually CECM for Finance and Economic Planning. She averred that she worked diligently until the 2nd Respondent terminated her by a letter dated 3.2.2020 before she completed her contract

7. It is her case that section 31 (a) of the County Governments Act, under which her employment was terminated, had already been declared unconstitutional. Further, she contended that the 2nd Respondent can only exercise authority conferred to him under the said section when it is appropriate and necessary, meaning that the 2nd Respondent is obligated to provide reasons before dismissing her. She contended that the 2nd Respondent did not cite any reason for her purported termination of her contract and she was not afforded an opportunity to be heard on any complaint.

8. She averred that the 2nd Respondent is currently facing criminal charges under the Anti-Corruption and Ethics Crimes Act; that his bail terms are such that he was barred from office and as such the 1st Respondent was reorganized while the 2nd Respondent was suspended from performing his functions of the office of the governor. Consequently, according to her, going by the orders issued by the Superior Court, the 2nd Respondent did not have the mandate to interfere with her employment or duties or remove her from the payroll until the time he was cleared by the Court.

1st Respondent's case

9. The 1st Respondent averred that through a notice dated 30.1.2020, the 2nd Respondent effected changes in portfolio, the office holders and structure of the 1st Respondent and declined to confirm the appointment of the Petitioner as CECM Finance and Economic Planning. Instead, he appointed Hon. Allan Igambi to the position and gazetted him on 31.1.2020 as the substantive CECM Finance and Economic Planning.

10. It contended that the 2nd Respondent in exercise of his powers under section 31 (a) of the County Governments Act informed the Petitioner, vide the letter dated 3.2.2020, of her termination as a CECM with effect from 30.1.2020. Subsequently, the 2nd Respondent on 5.2.2020 informed the Principal Secretary for National Treasury, Controller of Budgets and the Governor of Central Bank to facilitate the changes and accord the new CECM the requisite support.

11. The 1st respondent further averred that the Government Printer that through a letter dated 7.2.2020 addressed to the Attorney General, expressed his concerns about gazettelement of the substantive CECM owing to the pending cases being **JR No. 23 of 2020 and Nairobi ACC No. 32 of 2019** in which the 2nd Respondent was barred from accessing his office. However, the Solicitor General responded on 21.2.2020 advising that the 2nd Respondent was still the Governor thus he was entitled to exercise his powers and functions under the law

12. Accordingly, the 1st respondent averred that the allegation that the 2nd Respondent lacked capacity to reorganize his government because of the ongoing criminal case is misplaced and unfounded.

13. It further contended that CECMs are appointed pursuant to Article 179 (2) (b) of the Constitution and they serve at the pleasure of the County Governor subject to their performance, and the law does not obligate the Governor to give reasons to the CECMs or subject them to disciplinary processes before dismissal. It contended that the Petitioner's dismissal was necessary because as a signatory to the county accounts, she had used her office to pilfer public funds for personal use and engaged in a paying spree of to herself, her family and close friends who did not deliver any service to the 1st Respondent.

14. Finally, it contended that the said conduct by the Petitioner amounted to abuse of her office, gross misconduct and violation of the constitutional principles of prudent use of public resources and the Public Finance Management Act.

Petitioner's submissions

15. The Petitioner submitted that the Respondents' actions have occasioned great prejudice and are an infringement of her fundamental rights and freedoms under Articles 27, 41, 47, 21, 28 and 50 of the Constitution. She further submitted that the decision to arbitrarily terminate her appointment is contrary to Articles 10 and 232 of the Constitution on national principles and values.

16. She argued that the 2nd Respondent acted contrary to the provisions of Article 73 of the Constitution by exercising his power in a manner that is inconsistent with the purpose of the Constitution. She relied on **Umuro Roba Godana v County Government of Marsabit & ano [2017] eKLR** where the court held that in the absence of due process by the governor to establish the reasons for dismissal prior to dismissing the Executive Committee Member under section 31 (a) of the County Governments Act, rendered the termination unfair because the CECM was denied an opportunity to know the reasons and defend himself.

17. She submitted that the Court considers public service is governed by constitutional and statutory provisions whose purpose is to protect

the good delivery of services and rights. In support of this submission, she relied on the finding of the Court of Appeal in **Richard Bwongo Birir v Narok County Government and 2 others [2014] eKLR**.

18. She further argued that the pleasure doctrine has no place in Kenya and it was not stated in her appointment letter. She relied on the Court of Appeal decision in **County Government of Nyeri & ano v Cecilia Wangechi Ndung'u [2014] eKLR** that section 31 (a) of the County Governments Act provides places an obligation on a governor to exercise his power to dismiss a CECM only when necessary and with reasonableness.

19. She argued that the Constitution does not provide for a case where a public or state officer would be punished or removed from office without following the due process of the law. In her own view, the termination of her employment contract was unlawful because she was neither given a valid reason nor an opportunity to present her case contrary to Articles 22, 28, 47 and 50 of the Constitution and section 4 of the Fair Administrative Action Act. Further, she contended that the Governor did not do any investigations before taking action against her.

20. She submitted that the termination letter cited the reason for the termination as 'reorganization of the 1st Respondent'. According to her, the said reason was not valid and the reorganization was an afterthought because the 2nd Respondent could not restructure or remove a CECM due to court orders barring him from office.

21. She submitted that the office of CECM is created under Article 179 of the Constitution and that she had a legitimate expectation that she would serve the entire term. According to her, the termination was also contrary to Section 42 of the County Governments Act which provides that CECM holds office until the conclusion of the term of the current parliament which is run until the next general elections.

22. She argued that her termination was an act of intimidation of possible witness in the Governor's **anti-corruption case no. 32 of 2019** in which he is the 1st accused.

23. She submitted that she has made out a case to warrant grant of the orders sought and urged the court to be guided by the principle that there can be no violation of rights or breach of law without remedy. For emphasis she relied on **Republic v Independent Electoral and Boundaries Commission (IEBC) v Ex-parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR**.

24. She relied on **John Gakuo & ano v county Government of Nairobi & 3 others [2018] eKLR** where the Court of Appeal substituted an award of Kshs. 904,448 for Kshs. 1, 500,000 as damages for breach of the appellants right to fair administrative action. She further relied on **Kenya Human Rights Commission & ano v Non-Governmental Organisations Co-ordination Board & ano [2018] eKLR** and **Raiply Woods (K) Ltd & ano v Baringo County & 3 others [2017] eKLR** to urged the Court to grant an award of damages for the violation of her fundamental rights and freedoms..

1st Respondent's submissions

25. The 1st Respondent cited Article 179 (1) of the Constitution and submitted that the 2nd Respondent was impeached and therefore ceased being a governor on 17.12.2020. It further submitted that all the CECMs appointed by the 2nd Respondent ceased being CECMs on the same day upon operation of the law unless retained by the subsequent governor. Consequently, it submitted that the remedy for reinstatement is unavailable.

26. Further, it contended that, since the Petitioner was merely acting as the CECM Finance and Economic Planning, she cannot be reinstated to a position she never held. It relied on **Hellen Chepkirui Rono v County Government of Kericho & 2 others [2018] eKLR** where the Court found that the Petitioner was in an acting capacity as CECM and that the timeline for such appointments under section 42 (2) of the County Governments Act would not by automation of the law award the Petitioner a place in the CECM of the County.

27. It submitted that the Petitioner is a state officer and reinstatement under section 49 of the Employment Act is not available to her because the Act is not applicable to state officers. It cited **County Government of Nyeri & ano v Cecilia Wangechi Ndung'u [2015] eKLR** where the Court held that a member of a County Executive Committee is not subject to the provisions of the Employment Act.

28. It argued that it neither appointed nor fired the Petitioner but the 2nd Respondent who is no longer its head. It submitted that it cannot take responsibility for the 2nd Respondent's actions, who also cannot be liable to pay damages in his personal capacity since his decision was made in his capacity as the governor.

29. It relied on section 31 (a) of the County Governments Act to submitted that the law does not obligate a governor to give reasons to a CECM or subject such a member to a disciplinary process. In this regard, it cited the Court of Appeal's decision in **County Government of Nyeri Case [Supra]**. It reiterated that the Petitioner's dismissal was for public interest as contemplated under section 31 (a) of the County Government Act. Finally, urged the court to dismiss the petition with costs contending that it lacks merits, is overtaken by events and is against public interest.

Petitioner's rejoinder

30. The Petitioner argued that on 24.9.2019 she was appointed as Ag. CECM for Finance and Economic Planning while still holding her substantive post as CECM for Agriculture, Livestock Development and Fisheries which she never relinquished upon the reorganization of he government. She clarified that she remained in her substantive position until the termination on 3.2.2020 and the subsequent degazettment on 6.3.2020.

31. She submitted that the 1st Respondent contended that she was terminated for gross misconduct while the termination letter cited the

reason as a reorganization of the 1st Respondent.

32. She submitted that in **Jamin Shtsukane Muliru v Governor Wycliff Ambetsa Oparanya & ano [2016] eKLR** the Court found that the petitioner's dismissal was without valid reason and without compliance with basic principles of natural justice.

33. She argued that her fixed gross monthly salary was Kshs. 259,875.000 together with benefits and urged this Court to award her damages for unlawful dismissal, her salary for February 2020, salary for the period of 32 months from the date of her termination to the expiry of her term, one month salary in lieu of notice, gratuity for the 3¹/₂ years at the rate of 31% of the basic pay totaling to Kshs. 12,219, 323.

34. She further urged that the court awards her general damages plus interest on all monetary awards at court rate from the date of judgment till payment in full and costs of the Petition. She cited **County Government of Garissa & ano v Idriss Aden Mukhtar & 2 others [2020] eKLR** where the Court of Appeal upheld the decision of the High Court in granting an award of Kshs. 15, 736,562.50 as benefits.

Issues for determination

35. After careful consideration of the pleadings, affidavits and submissions, it is clear that the petitioner was appointed CECM for Agriculture, Livestock Development and Fisheries by the 2nd respondent on.22.3.2019 for a term of 3 years and served until the premature termination vide the letter dated 3.2.2020. It is also a fact that by the letter dated 24.9.2019, the petitioner was given additional duty of acting CECM for Finance and Economic Planning. The issues for determination revolve around the fairness in the removal of the petitioner from the office of CECM and the remedies available to her if any.

36. The parties did not file agreed issues for determination and therefore I have framed the same as follows:

a. Whether due process was followed in terminating the Petitioner's appointment.

b. Whether the Petitioner is entitled to the reliefs sought.

Whether due process was followed in terminating the Petitioner

37. The Petitioner contended that due process was not followed before her removal from office as CECM because the 2nd Respondent never cited any valid reasons for her termination and never accorded her any hearing. She averred that the 2nd Respondent misinterpreted section 31 (a) of the County Governments Act because he could not terminate her services without adhering to section 40 of the County Government Act and the Fair Administrative Action Act. She contended that the 2nd Respondent could not dismiss her at will and submitted that the pleasure doctrine was not stated in her appointment letter.

38. The 1st Respondent submitted that section 31 (a) of the County Governments Act does not obligate a Governor to give reasons or subject a member to a disciplinary process before termination. It further averred that a CECM serves at the pleasure of the county governor.

39. The termination letter dated 3.2.2020 stated that her appointment as CECM had been terminated pursuant to section 31 (a) of the County Government Act. The section provides:

“The governor—

(a) may dismiss a county executive committee member;

(b)”

40. Section 31 (a) of the County Governments Act is unambiguous and allows the governor to dismiss a CECM. However, dismissal of CECM under this section and the applicability of the pleasure doctrine was addressed by the Court of Appeal in **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** where it held that:

“We are of the considered view that the Section 31 (a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously...

Secondly, Section 31 (a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising this power...”[Emphasis Added]

41. As stated above, the 2nd Respondent had the discretion to dismiss the Petitioner, however he had an obligation to act reasonably in exercising his power, and only for the public good.

42. The Petitioner's termination was as a result of the reorganization of the 1st Respondent. She averred that her termination was neither appropriate nor necessary. A reorganization is a prerogative of an appointing authority. Article 179 (2) (a) and (6) of the Constitution provide that a governor is to appoint the county executive committee and the CECMs are accountable to him for the performance of their duties.

Section 30 (2) (e) of the County Governments Act provides that a governor is to constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county.

43. By virtue of the governor's duties and functions, it was not arbitrary *per se* for the 2nd Respondent to change the structure of his county executive committee leading to the termination of the petitioner's appointment both as acting CECM Finance and the substantive CECM Devolution in order to achieve effective implementation of the county's policies. However as appreciated by the judicial precedents above, when it comes to termination of a substantive appointment of a CECM under section 31 of the County governments Act, the Governor is bound to act reasonably by carrying out some genuine investigations on the concerned matters and then inform the CECM the actual reason for the termination.

44. In this case, the termination letter cited the reason as reorganization, although the 1st respondent alleged that the actual reason for the termination was abuse of her office, gross misconduct and violation of the constitutional principles of prudent use of public resources and the Public Finance Management Act, as the signatory of its bank accounts. The alleged misconduct is however not verified by any documentary evidence and as such the court relies on the termination letter to find that the reason cited by the Governor for dismissing the petitioner was reorganization of government.

45. The petitioner's contract was terminated prematurely just because the Governor wanted to reorganize his government. The Court of Appeal in **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** further held that:

“Further, Section 31 (a) of the County Governments Act does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he can only dismiss if he considers it appropriate or necessary. Appropriateness or necessity is not arbitrariness or whimsical. Appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power exercised under Section 31(a) of the County Governments Act is reasonable or not.” [Emphasis added]

46. In this case the Governor did not cite any reason or reasons for exercising his discretion under Section 31(a) of the Act to the detriment of the petitioner. It follows that the termination of the petitioner's appointment as substantive CECM for Devolution, Public Service and Sub-County Administration was not necessary or appropriate but arbitrary, unreasonable, whimsical and capricious. Consequently, I find and hold that the termination violated the petitioner's right to fair administrative action as envisaged under Article 47 of the Constitution because there was no justifiable reason.

47. Article 47 of the constitution provides for the fundamental right to fair administrative action as follows:

“(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.”

48. The Petitioner averred that the 2nd Respondent had no mandate to dismiss her because the Court had suspended him from performing his functions as a governor. However, that issue is not material now because I have already made a finding of fact that the termination was not in accordance with the law. I am also not entirely in disagreement with the advice by the Solicitor General to the Government Printer that the said Court order did not bar the 2nd Respondent from exercising his substantive function as a governor.

Whether the Petitioner is entitled to the reliefs

49. The petitioner prayed for a declaration that she has been illegally, unfairly, irregularly and arbitrarily dismissed as the County Executive Committee Member of Finance and Economic Planning by the Respondents. However, she was holding that position in acting capacity and as such she lost the position fairly after a substantive CECM was appointed. Consequently, she is not entitled to the declaration sought.

50. In addition, the petitioner is not entitled to a reinstatement to the position of CECM Finance and Economic Planning with full benefits until the end of her contract term because she was never confirmed to that position before the termination of her appointment as CECM. In any event it is not in dispute that there is no vacancy in that office since another person was appointed as the substantive holder of that office. Also the court takes judicial notice that the Governor has since been impeached and the CEC dissolved.

51. I further decline to grant an order of PROHIBITION restraining the Respondents themselves, their agents, employees or servants or any other person or body corporate acting under the instruction of the Respondents from barring the Petitioner from re-entering her office, performing the duties of her office, withholding her salary until the expiry of her contract of employment. The prayer is not clear whether she wants to return to the office of CECM Finance or CECM Devolution. I have already held that the position of CECM Finance is substantively filled and the Governor has also been impeached. Since she has not sought reinstatement to the position CECM Devolution, which was her substantive position, I decline to grant the prohibitory order sought.

52. The petitioner sought an alternative prayer that the Respondents be compelled to pay damages and accrued salary and benefits as against the number of years in service remaining up to and including February 2020 together with all benefits and the same to be paid in lump sum. She did not show any basis for that alternative prayer for anticipatory salary and benefits. However, there is no dispute that the petitioner's contract was unfairly and unreasonably terminated and as such this court has jurisdiction to award damages to be paid by the 1st respondent because the 2nd respondent was acting on behalf County Government.

53. In **John Gakuo & Ano v County Government of Nairobi & 3 Others [2018] eKLR** the Court of Appeal substituted an award of Kshs.

904,448 for Kshs, 1, 500,000 as damages for breach of the appellants right to fair administrative action. Again in **Ol Pajeta Ranching Limited v David Wanjau Muhoro [2017] e KLR** the Court of Appeal awarded Kshs. 7,500,000 to the employee as damages for racial discrimination in the payment of salary.

54. Having considered the foregoing binding precedents, and the fact that the petitioner was engaged on 3 years' contract and she had a legitimate expectation to continue working until the end of her contract term, I award Kshs 3,000,000 as damages for violation of her constitutional right to fair administrative action.

55. Finally the Petitioner prayed for declaration that the reorganization of Nairobi City County Government Finance Committee by the 2nd Respondent is illegal, null and void. It is not clear why this prayer was sought. However if the reason is because the Governor was barred by the court from accessing office, I think I have already given my opinion on that issue herein above.

56. The Petitioner is awarded costs plus interest at Court rate from the date hereof.

DATED, AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2021

ONESMUS MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE