



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 1 OF 2021**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 27, 28, 40, 41,  
47, 48, 50, 165, 258, 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION ACT**

**AND**

**IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION REGULATIONS**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**JACKSON NGOVI.....1<sup>ST</sup> PETITIONER**

**FRANCIS MUTUKU.....2<sup>ND</sup> PETITIONER**

**BERNARD MUSAU.....3<sup>RD</sup> PETITIONER**

**BENSLEY MATHUKU.....4<sup>TH</sup> PETITIONER**

**TIMOTHY MANENO.....5<sup>TH</sup> PETITIONER**

**SHARACK MWAU.....6<sup>TH</sup> PETITIONER**

**GIDEON MWANGO.....7<sup>TH</sup> PETITIONER**

**VERSUS**

**COUNTY ASSEMBLY OF MAKUENI.....RESPONDENT**

**JUDGMENT**

## **Parties**

1. The Petitioners are former Members of the County Assembly of Makueni having been duly elected as such during the general elections of 4<sup>th</sup> March 2013.
2. The Respondent is the legislative arm of the County Government of Makueni established under Article 176(1) of the Constitution responsible for making laws necessary for effective performance of the functions and exercise of powers of the county government.

## **Facts**

3. The Petitioners have instituted this suit seeking to secure their rights and freedoms and to compel the Respondent to apply the law in the disbursement of their terminal benefits and gratuities owed to them. They served a five year term from the aforesaid election date which ended on the subsequent general election held on 8<sup>th</sup> August 2017 wherein none of them was re-elected.
4. During their active terms the Petitioners applied for car loans and mortgage facilities at subsidized interest rates and for loan periods prescribed by the Salaries and Remuneration Commission. On the advice on the Commission, the Respondent enacted legislation adopting the Commission's recommendations and requiring that car loans be repaid at the end of the 5 year term; and mortgages within a 20 year period.
5. At the end of their terms, since none of the Petitioners were re-elected their gratuity set by the Commission accrued. However, they assert that the Respondent has without any lawful authority withheld and failed to remit the same. In addition to unpaid gratuity, there are outstanding arrears owed to the Petitioners being payment of sitting allowance arrears of Kshs.10,679,500 which amount was included in the supplementary budget estimates for the financial year 2017/2018. Consequently, the Petitioners have defaulted on their car loan and mortgage repayments having lost their sources of income as well as being denied their aforementioned entitlements. Further, the Respondent has threatened to alter the interest on mortgage rates to commercial rates due to the said default whilst failing to acknowledge their debt to the Petitioners. They aver that the Respondent's actions are contrary to the provisions of the Constitution, the Fair Administrative Action Act and the principles of fairness and justice upheld by the laws of Kenya hence it is imperative that this Court intervenes to safeguard the said rights.
6. The Petitioners seek the following orders:
  - i. A declaratory order that the actions of the Respondents in withholding the gratuity and arrears of the Petitioners undermines their rights as enshrined in Articles 41(1) and 47 of the Constitution.
  - ii. An order that the Respondent hereby remit all sums due to the Petitioners as gratuity in line with the recommendations of the Salaries and Remuneration Commission on Remuneration and Benefits of State Officers.
  - iii. An order that the Respondent hereby remits all sums due to the Petitioners in sitting allowance arrears
  - iv. An order that the actions of the Respondent in attempting to revert the interest rates on mortgage facilities is unfair, unreasonable, unlawful and therefore null and void.
  - v. An order prohibiting the Respondent from reverting the interest rates on mortgages taken out by the Petitioners to market rates as opposed to the rate of 3% per annum.
  - vi. Costs of the petition
  - vii. Such other or further relief as this court may deem just to grant.

7. This petition is brought under the provisions of Articles 10, 22 as read with 258, 27, 28, 40, 41, 47, 230 and 259 of the Constitution. It is also founded on Section 4 of the Fair Administrative Action Act and Sections 11 and 21 of the Salaries and Remuneration Commission Act.

## **Response to the petition**

8. The Respondent filed a replying affidavit sworn by Edward Libendi, the County Clerk of Makueni County Assembly. He deposes that the Petitioners entered into a contractual agreement with the Respondent for acquisition of mortgage facilities pursuant to the provisions and guidelines issued by the Salaries and Remuneration Commission vide a circular dated 17<sup>th</sup> December 2014. It was a term of the contract that the Petitioners would repay the same in monthly instalments until full and final settlement of all outstanding balances. The Petitioners failed to remit the instalments as agreed rendering the account non-performing which prompted the deponent to write them a demand letter dated 11<sup>th</sup> December 2017 requesting settlement of the outstanding amounts.
9. It is pleaded further that in the circular issued by the Commission, the interest rate was set at 3% but there was a rider that it would revert to commercial rates in the event of default of more than 3 monthly instalments. It stated that where a state or public officer leaves the public service for whatever reason other than disciplinary grounds, the terms of the loan remain in force and does not change for the life of the loan unless in cases of default where it reverts to commercial terms. Therefore, reversion is solely due to the Petitioners' default in loan repayments.
10. The deponent asserts that legitimate expectation can only be given effect if it is consistent with the law. A contracting party who fails to

perform his part of the contract cannot obtain an injunction to restrain a consequence of the breach being executed by the other party. He continues that there is a charge registered in respect of each mortgage and that the contractual terms and conditions which the parties ought to abide by are contained therein with no other terms outside those documents. That the Petitioners' equity of redemption was extinguished by operation of the law hence this suit is overtaken by irreversible events being that they were perpetually in arrears since August 2017.

11. The deponent states that this court cannot vary, improve or re-make a contract for the parties. Granting the Petitioner's prayers would amount to a variation of contractual terms as contained in the Commission's circular as well as the charge documents. It is deposed that the Petitioners have come to court with unclean hands. Their contract terms are clear, bear no ambiguity and the Petitioners appended their signatures thereto signifying their acceptance of the same. He concludes that in any event, it is within the law to withhold as lien any benefits that may be due to the Petitioners as security or set it off against the defaulted amount.

## **Hearing**

12. The petition was heard on 20<sup>th</sup> November 2019. After giving a brief synopsis of the petition learned counsel for the Petitioners Miss Leah Hezekiah submitted that some of the Petitioners have been paid save for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners. The Respondent withheld their dues as lien for loans taken. She maintained that the loan was subject to a separate agreement where securities were offered. However, the Respondent proceeded to withhold the Petitioners' gratuity and allowances purporting to use them as security yet the loans were not pegged on the same.

13. The Petitioners asserted that the Respondent's conduct was a violation of the constitution and that their dues must be paid. Their rights to equal benefits of the law as well as the Fair Administrative Action under the Act had been infringed upon. They sought orders as prayed in the petition.

14. The Respondent's case was condensed into four questions:

- i. Who are the Petitioners
- ii. Who is the Respondent
- iii. What do the Petitioners want
- iv. Why can't the Petitioners' prayers be granted

15. Counsel for the Respondent submitted that at the time of institution of the suit the Petitioners were state officers in public service as envisaged under Article 260 of the Constitution as Members of the County Assembly of Makueni. Presently, they do not fit that description. The Respondent on the other hand is a County Government established under Article 173 of the Constitution. He continued that the petition seeks five prayers that all turn on gratuities and allowances. They also seek to cap interest rates on their mortgages at 3% as opposed to commercial rates.

16. The Respondent contends that in the circumstances the applicable law is the Pensions Act which provides for the granting and regulation of pensions, gratuities and allowances of public officers in respect of services rendered by them to the republic of Kenya. Section 6 of the Act stipulates that pension and gratuity is payable upon retirement. Since the Petitioners no longer serve as MCAs their gratuity fell due. However, section 13 of the Act provides that pension, gratuity and other allowances shall not be assignable or transferable except for purposes of satisfying (a) a debt due to the Government; or (b) an order of any court for the payment of periodical sums of money towards the maintenance of the wife, or former wife, or minor child, of the officer to whom the pension, gratuity or other allowance has been granted. In this case the Petitioners are in debt with the government as they were offered mortgages of different sums from the County Assembly.

17. Counsel for the Respondent averred that even though the loans were secured by securities which can be lawfully repossessed, the Petitioners are in arrears and have therefore approached the court with unclean hands. That they have acknowledged their debt and agreed to have their gratuities deducted in settlement thereof. Moreover, the named 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners have been adamant that their dues not be used to settle their loans. The gratuity payable to the 1<sup>st</sup> and 2<sup>nd</sup> is Kshs.1,336,947.21 each while the 3<sup>rd</sup> Petitioner's is 1,886,886.87 yet their loan arrears amount to Kshs.343,277.72, 1,317,723.88 and 1,437,516.96. Counsel observed that the Petitioners appear to have stopped paying their loans.

18. It is the Respondent's case that the law allows it to withhold the amounts due since the Petitioners are defaulters. It should therefore be allowed to hold the monies due as lien and pay any balance remaining. The Petitioners however want the money to be given to them after which they repay with no evidence that they will do so. It is submitted that Section 16 of the Government Proceedings Act bars any court from issuing injunctions against government agencies. The Petitioners want to compel the Respondent to pay up the monies hence prayer (a) cannot succeed.

19. On the matter of interest rates the Respondent avers that there was a circular from the Salaries and Remuneration Commission stating that interest rates will revert to commercial rates. The Petitioners entered into a contracts with the government which were clear on loan terms. Interest was contractual hence the court change such terms which are binding. The Respondent urged the court to dismiss the petition with costs.

## **Analysis and Determination**

20. I have considered the pleadings and submissions of the parties. It is common ground that the Petitioner were elected a Members of the Makueni County Assembly during the general elections held on 4<sup>th</sup> March 2013 and that the terms lapsed on following the general elections

held on 8<sup>th</sup> August 2017 as none of them was re-elected.

21. It is further common that at the expiry of their terms, the Petitioners were entitled to gratuity. None of the parties however provided to Court the particulars of the amounts payable to each of the Petitioners as gratuity.

22. It is further common ground that each of the Petitioner was a beneficiary of the Respondent's mortgage facility approved by Salaries and Remuneration Commission under Circular Reference No. SRC/ADM/CIR/1/13 Vol. III (128) dated 17<sup>th</sup> December 2014 whose commencement date was 1<sup>st</sup> January 2015. (Refer to annexure SN2 of petition).

23. Under the circular, the duration of the mortgage scheme was 20 years at an interest rate of 3% per annum on a reducing balance

24. The circular further provides that where a state officer or a public officer leave public service employment for whatever reason other than disciplinary grounds, the terms of the loan remain in force and does not change for the life of the loan "*unless in cases of default in which case it reverts to commercial terms.*"

25. The Public Finance Management (Makueni County State and Public Officer Car Loan and Mortgage Fund) Regulations, 2016 further provided as herein under—

### **3. Establishment of the Fund**

- 1. There is established Makueni County State and Public Officers Car Loan and Mortgage Fund.**
- 2. The Fund shall be a revolving fund.**
- 3. The Fund shall cater for both the county executive and county assembly state and public officers who are either on permanent employment or on contract for a period of three years or more.**

### **4. Object and Purpose of the Fun**

**The object and purpose of the Fund is to provide load scheme for the purpose of advancement to state officers and public offices funds for purchasing of a car or the purchase, development, renovation or repair of residential property by members of the Scheme.**

### **5. Sources of the Fund**

**The Fund shall consist of—**

- a. any amounts that may from time to time be appropriated by the County Assembly;**
- b. all sums of money earned by or arising from the fixed deposits made in respect of the fund; and**
- c. all other sums of money that may in any manner become payable to or vested in the fund including gifts, grants and donations.**

### **8. Operation of the Fund**

- 1. A member of the Scheme who wishes to apply for a loan or a mortgage from the fund shall present to the officer administering the fund an application in the prescribed form.**
- 2. The officer administering the fund shall forward the application to the committee and the committee shall satisfy itself of the applicant's status and capacity to pay.**
- 3. If the committee approves the application, the applicant shall enter into an agreement in such terms as the committee may prescribe.**
- 4. The car loans and mortgages shall be disbursed by financial institution identified by the county government and contracted for that purpose.**

### **19. Maximum Mortgage Disbursement**

**1. The maximum mortgage to any officer is subject to the provisions of the Salaries and Remuneration Commission on Mortgage for State Officers and Public Officers.**

### **20. Maximum Repayment Period**

**A mortgage granted under these Regulations shall be fully repaid for state officers by end of term of the County Government**

and for public officers in a period of 20 years.

## 21. Supplementary terms

1. The interest chargeable on a mortgage is three per centum per annum on a monthly reducing balance.

## 22. Lien

1. The financial institution or the county entity shall have a charge registered on the property financed through a mortgage and shall be entitled to have its name entered in all documents of title for such property.

## 2. The borrower shall -

a. not mortgage, charge, surrender the lease or sell or agree to sell or part with possession of the charged property or any part thereof without the prior written consent of the financial institution or the county entity;

b. meet and pay all rates, rents, insurances and any other outgoings in respect of the property and send the proof of such payments to the committee; and

c. provide a transfer deed duly signed by the borrower and a letter authorizing the County Government to sell the property in case of default in payment.

## 3. During the loan repayment period –

a. the borrower shall maintain the property in a satisfactory state of repair; and

b. all legal documentation and disbursement of funds shall be supervised by the financial institution.

## 24. Default

The financial institution or appointed debt collector may call in a mortgage and in default sell the charged property by public auction or private treaty where the borrower is in breach of the terms under the loan agreement or the covenant contained in the charge or the mortgage instrument.

26. The issues for determination according to the petition are whether the Respondent has violated the constitutional rights of the Petitioners and whether they are entitled to the orders sought.

27. Articles 41 and 47 of the Constitution which the Petitioner's allege to have been violated by the Respondent provide for labour relations and fair administrative action. The Petitioner have not demonstrated how the Respondent violated their rights under either Article 41 or 47 of the Constitution. As was held by the Court in the case of **Anarita Kirimi and Mumo Matemu**, constitutional violations must be pleaded with a reasonable degree of precision. It was not enough to cite provisions of the Constitution without clarity on how those provisions have been violated.

28. Although the Petitioners seek payment of gratuity, they have not adduced any evidence to prove that they are entitled to gratuity. They have also not specified how much each of them is entitled to and how that figure is arrived at. The least the Petitioners should have done is produce or make reference to the terms of service or to the instrument that provides for the same. They have further not adduced any evidence to prove that they are owed arrears of sitting allowances as no particulars thereof have been adduced.

29. On the contrary, the Petitioners have admitted that they have defaulted in the repayment on their monthly instalments of the mortgages. The terms of the mortgage scheme are clear, that they must repay the advanced in sum monthly instalments for their respective life of the mortgages.

30. From the foregoing I find that the Petitioners have not proved any violation of their constitutional rights under Article 41 or Article 47 or any other provision of the Constitution.

## Remedies

31. The Petitioners sought a declaration that the withholding of their gratuity and arrears undermine their rights under Article 41(1) and 47 of the Constitution. I have already found above that the Petitioners have not demonstrated that they are owed any gratuity or arrears of sitting allowances. Further, that they have not proved any violation of Articles 41(1) and 47 of the Constitution. Prayers (a), (b) and (c) of the petition therefore fail.

32. The Petitioners further pray for an order that the Respondent's threat to revert to commercial interest rate is unreasonable.

33. In the Makeni County State and Public Officers Car Loan and Mortgages Fund Regulations, 2016, there is no provision for interest rates to be revised to commercial rates. The application forms for the mortgage signed by the Petitioners also do not contain any such condition.

34. I therefore agree with the Petitioners that there is no basis for the Respondent to review the interest rates on the mortgages from 3% per annum to commercial rate. The Respondent is thus restrained from reviewing interest rates on the mortgages and to retain the interest rates at 3% per annum for the life of the mortgages.

35. Other than the prayer on retaining interest rates at 3%, the petition herein is dismissed. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2021**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

**MAUREEN ONYANGO**

**JUDGE**