



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. E001 OF 2021

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS PURSUANT TO ARTICLES 2,3,6, 10, 19, 20, 21, 22, 23, 47, 48, 159, 162, 179(7) 182(2) (3b) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF SECTIONS 30 (D), SECTION 35(3) OF THE COUNTY GOVERNMENT ACT.

DOUGLAS OSEKO BOSIRE.....1ST PETITIONER

JOHN MOENGA OMANWA.....2ND PETITIONER

BENARD OSUMO MANG'AA.....3RD PETITIONER

PETER MUGA OMWANZA.....4TH PETITIONER

ZABLON OERO ONCHIRI5TH PETITIONER

-VERSUS-

H.E AMOS KIMWOMI NYARIBO

JOHN MOENGA OMANWA.....1ST RESPONDENT

THE GOVERNMENT OF NYAMIRA.....2ND RESPONDENT

THE COUNTY ASSEMBLY, NYAMIRA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

GLADYS MOMANYI.....5TH RESPONDENT

MS EMILY MORAA ONGAGA.....6TH RESPONDENT

THOMAS NYARIKI.....7TH RESPONDENT

JONES OMWENGA.....8TH RESPONDENT

SAMUEL MAIKO.....9TH RESPONDENT

RULING

1. This Ruling is in respect of the 1st Respondents application dated 21st April, 2021, brought pursuant to Order 2 Rule 15(a), Order 51 of the Civil Procedure Rules and other enabling provisions seeking the following Orders; -

1) That the Honourable Court be pleased to dismiss the Petitioners Claim/ Petition as it discloses no reasonable cause of action.

2) That the costs of the suit and the application be borne by the petitioner.

2. The application is supported by the grounds on the face of the application and the supporting affidavit deposed upon on 12th April, 2021 by, **H.E Amos Kimwomi Nyaribo**, the Governor Nyamira County, on the following grounds.

a) That the petitioner herein filed this petition sometimes on 13th January, 2021 seeking interalia to restrain the Respondents from filling in the positions of CECS they held in the county government before their dismissal and in the alternative they be compensated for the alleged unfair dismissal.

b) That the Petition herein was informed by the presumption that there existed employer-employee relationship between the Respondents and the Petitioners who had been employed as CECs by the late former Nyamira Governor, John Obiero Nyagarama.

c) That by an application dated 13th January, 2021 the petitioner sought for interim restraining Orders against the Respondents from ejecting them from office and filling the position until the said application was heard and determined.

d) That the application was heard and the Ruling delivered on 18th February, 2021 dismissing the said application for lacking merit and holding that the position of the Petitioner lapsed by operation of law pursuant to Article 179(7) of the Constitution of Kenya since their employment was pegged on the life of the former governor.

e) That in absence of a valid and existing contract, and employment relationship between the Respondents and the Petitioners, the petitioners suit as filed lacks merit and no cause of action can be established therefore the suit must fall.

3. The Petitioners vehemently opposed the said application and filed a replying affidavit on 29th April, deposed upon by the 1st Petitioner, Douglas Oseko Bosire based on the following grounds;-

a) That the application herein as filed is fatally defective having been brought under the Civil Procedure Rules when the Applicable rules are the Constitution of Kenya (protection of rights and fundamental rules) practice and procedure Rules 2013.

b) That under Article 23 of the Constitution, the Court should not normally when deciding a conservatory application, delve into the merits of facts and of the law as the same are a preserve of the main Petition.

c) That the Petition has not been heard on its merit and that as much as the application was declined by the Court does not necessary mean that the main Petition should equally be dismissed.

d) That as much as Article 179(7) of the Constitution supports the Respondents/ Applicants argument, the constitution should not be read in isolation but together with Article 47 and 182(3) of the Constitution.

e) That there are weighty constitutional issues, such as mortgages which security was their payslips, that can only be ventilated upon if parties are heard in the main suit.

f) That the petitioners had legitimate expectations to serve the County till the expiry of their term on 22nd August, 2022 on which basis the petitioners obtained loans which were to be deducted till the expiry of their term.

g) That the Applicant is misleading the Court in its ground (e) as the Court did not make any finding on the Merit of the entire Case as alleged.

h) The Petitioner contends that the Constitution does not envisage a vacancy in the office of the Governor in light of the presence of deputy county governor as such Article 179(7) should not be read in isolation.

i) That the Petitioners will be greatly prejudiced if their Petition is not heard on its merits. Further that the issue of employer-employee relationship has not been determined exhaustively by the Court.

4. The Application was conversed by way of written submissions, with the Applicant/ Respondents filing their submissions dated 11th May, 2021 however the Petitioner had not filed their submissions.

Applicants/Respondents Submissions

5. The Advocate for the Respondents/Applicants submitted that owing to the verdict of the Petitioners Application of 13th January, 2021, the suit is not only hopeless but discloses no reasonable case of action against the Respondent. Further that the prayers in the application of 13th January, 2021 are similar to prayer 1 to 7 of the Petition filed alongside it which have substantially been dealt with by the Court leaving only

the alternative prayer for damages.

6. He argues that the prayer for payment of damages cannot stand in light of the Court findings that the employment of the petitioners ceased by operation of law as such the contracts held by the Petitioner became obsolete.

7. On whether the Application before Court is merited, it was submitted that, they have made out a case under Order 2 Rule 15 of the Civil Procedure Act that would warrant the issue of the Orders for striking out the Petitioner suit.

8. They cited the case of **Susan Rokih –v- Joyce Kandie & 6 others [2018] Eklr** where Justice Githua held that;

“I wish to start by pointing out that under Order 2 Rule 15 of the Civil Procedure Rules, the Court has power to strike out pleadings on several grounds which include striking out where the pleadings in question does not disclose any reasonable cause of action or Defence in law. Order 2 Rule 15(2) makes it clear that application seeking to strike out pleadings for not disclosing a reasonable cause of action should not be supported by evidence. All an applicant needs to do is to state concisely the ground on which the application is premised.”

9. It was submitted that the Court is mandated to look at the pleadings as filed and consider whether there is any reasonable cause of action that will warrant the need of the Court to hear the petition as was held in **Jevaj Shariff & Co advocates –v- Chotail pharmacy stores [1960] EA 374**.

10. Accordingly, it was submitted that prayer 1 to 7 of the Petition is spent by virtue of the Ruling of this Court of 18th February, 2021 leaving only prayer 8 which he argued does not constitute an act of the part of the Respondent that will give the Petitioner cause of complaint against the Respondents.

11. It was submitted also that Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules does not provide for procedure and rules of striking out pleadings, informing the need to invoke Order 2 Rule 25 of the Civil Procedure Rules.

12. It was submitted in conclusion that no matter which means the Petitioner uses to inject life to the Petition herein Article 179 and 182 of the Constitution will catch up with them and the Petition will eventually fail. He thus urged this Court to strike out this Suit for lacking merit.

13. I have examined the averments of the parties herein. I note I made some determination on the application herein. I did not delve into the merits of the petition.

14. The law is that the petitioner cannot be condemned unheard. I will decline to grant the orders sought and remit this petition back to Kericho to be heard by the incoming Hon. Judge.

15. Costs in the petition.

Ruling delivered virtually this 21ST day of **SEPTEMBER, 2021**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Court Assistant - Fred

No appearance for parties