



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. E002 OF 2021

IN THE MATTER OF: ARTICLES 1,2,3(1), 10,19,20,21,22,27(1)(2) & (3), 28,41(1). 47(1) & (2), 48, 50(1), 165(3)(B) & 258(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(1), (2) &(3), 28, 41(1), 47(1) and 50(1) OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF: RULES 4,10,11,13 and 20 OF THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF: SECTIONS 31 OF THE COUNTY GOVERNMENTS ACT NO 17 O 2012, LAWS OF KENYA

AND

IN THE MATTER OF: ACTIONS ACT: SECTION 45 OF THE FAIR ADMINISTRATIVE

AND

IN THE MATTER OF: SECTIONS 45 OF EMPLOYMENT ACT

BETWEEN

JOB ONG' OMBE GESEMBE.....PETITIONER

-VERSUS-

H.E AMOS KIMWOMI NYARIBO

THE GOVERNOR NYAMIRA COUNTY.....1ST RESPONDENT

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

NYAMIRA COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

RULING

1. This Ruling is in respect of the 1st Respondents application dated 21st April, 2021,brought pursuant to section 3 and 3A of the Civil Procedure Act, Order 2 Rule 15(a), Order 51 of the Civil procedure Rules and all 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 based 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 based on the following grounds.

a) that the petitioner herein filed this petition sometimes on 28th January, 2021 seeking interalia to declare the termination of his employment unfair, to restrain the Respondents from filling in the positions of Culture, Heritage and Art advisor he held in the county government before their dismissal and in the alternative he be compensated for the alleged unfair dismissal.

b) That the Petition herein was informed by the then existing employer employee relationship between the Petitioner and the Late Governor John Obiero Nyagarama, who died on the 18th December, 2020 and equally anchored on the now obsolete letter of appointment dated 1st May, 2020.

c) That by an application dated 27th January, 2021 the petitioner sought for interim restraining Order against the Respondents from ejecting him from office and filling the position he held prior to the termination until the said application was heard and determined.

d) That the application was heard and the Ruling delivered on 16th March, 2021 dismissing the said application for lacking merit. Further that the Court ruled that the petitioner had not established a prima facie case with any chance of success.

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 as 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 24th May, 2021 deposed upon by the Petitioner, **Job Ongombe Gesembe** and based on the following grounds:-

a) That as much as the application filed together with the petition herein was dismissed, the Court has not had an opportunity to hear the parties on merit with regard to the Petition.

b) He averred that he was employed by the County service Board and attached to the office of the Governor therefore if the issue are not ventilated by hearing the Petition herein he will be greatly prejudiced. He attached a copy of the Appointment letter marked as JOG-1.

c) That even if the Governor was uncomfortable working with him as his advisor, the County service Board could have redeployed him to other department and not dismiss him in the manner they did.

d) That the Application is fatally defective having been brought under the Civil Procedure Act instead of the Constitution of Kenya protection of rights and fundamental freedoms practice and procedure rules of 2013.

e) He contends that as much as the Application was dismissed, the Court at that stage was not to make any findings with regard to the main Petition therefore the matte need to be led its course till it conclusion.

f) 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 Petition.

g) 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.

h) That Article 179(7) of the Constitution should not be read in isolation. Also that the he was not the late governor Appointee but rather an employee of the County service Board.

i) 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.

j) 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.

k) That the Petitioners will be greatly prejudiced if their Petition is not heard on its merits. Further that the petition as filed or as will be amended carries weight constitutional issue which need to be determined by this Court on merit.

l) The stated that the Court has not decide on the substantive issue regarding employment relationship herein as alleged in the Applicant ground (g).

m) He therefore urged this Court to disallow the application and hear parties on merit in the main Petition.

4. The Application was conversed by way of written submissions, with the Applicant/ Respondents filing their submissions dated 25th May, 2021 and the Petitioner Respondent filed his on 19th July, 2021.

Applicants/Respondents Submissions

5. The Advocate for the Respondents/Applicants submitted that owing to the verdict of the Petitioners Application of 27th January, 2021, the suit as filed is not only hopeless but discloses no reasonable case of action. Further that the prayers 1-7 in the application of 27th January, 2021 are similar to prayer a to c 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 relief sought on whether the termination of the petitioner employment was fair cannot stand in light of the Court's findings that the employment of the petitioner was premised on the life of the said governor which ceased by the death of the Governor as such the contract 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 in his dictum 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 prayers (a) – (c) of the Petition is spent by virtue of the Ruling of this Court leaving only prayer (d) 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. The Applicant submitted that Court have been called upon to exercise its discretion under Order 2 Rule 25 cautiously so as not to drive a litigant out of the seat justice but in the same breath consider the need not to drag a party to the seat of justice when the case against such a party is a non-starter and reinforced this position by citing the case of **Crescent Construction Co Limited –v- Delphis Bank Limited [2007] eklr.**

12. 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.

13. The Applicant prayed that the Application be allowed as prayed.

Petitioner/ Respondent's submissions.

14. The Petitioner's Advocate submitted that, the petition raises several trial issue such as the employment relationship between the Respondents and the petitioner which can only be adjudicated upon during hearing of the main petition. He argued that to strike out the suit at this stage will immensely prejudice the Petitioner.

15. On whether the Court determination of the application has any effects on the main petition, it was submitted that the facets upon which a court considers in deciding on an application during an interlocutory stage is quite different from the conditions the court will look at while deciding a case in the main suit. He cited the case of Board of management of Uhuru Secondary school –v- City county director of Education and 2 others [2015] eklr.

16. The Petitioner also cited the case of **Kevin K. Mwiti & OTHER –V Kenya School of Law and other [2015] eklr** where Justice Odunga Held that;

“The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application.”

17. Accordingly, it was submitted that the Ruling of this court dismissing the Application does not have any nexus to the merits of the main Petition.

18. On whether the employment of the petitioner ceased by operation of law and upon the demise of the governor, it was submitted that the

petitioner was not employed by the Governor but by the County Service Board as such is an employee of the County government of Nyamira and not a personal appointee of the late Governor. He argued that under section 182 of the County Government Act, the current governor, who was the deputy of the former Governor, assumed office to take up the remainder term of the Late Governor which term is not attributable to the current Governor.

19. He submitted that to strike out the Petition at this stage would have an effect of denying the petitioner his inalienable right to be heard enshrined under Article 50 of the Constitution. Further that the Petitioner will be greatly prejudice if the Court strikes out the petition without hearing it on merit.

20. The petitioner thus prayed that the Application be disallowed and the matter proceeds.

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

22. I believe the petitioner is still free to pursue his petition if he so wishes. I will therefore decline to grant orders dismissing the petition.

23. The petition will be heard by the incoming Judge at Kericho where the parties are free to take directions accordingly.

24. 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