



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. E067 OF 2021**

**IN THE MATTER OF THE CONTRAVENTION OF THREATENED CONTRAVENTION OF ARTICLE 1, 2, 3, 6, 10, 22, 23 41(1), 47, 181, 182 (4) (5) & (6), 232, 235, 236 & 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTIONS 55, 56, 59, 59a, 60, 61, 62, 63, 66, 67, 68, 74, OF THE COURT GOVERNMENT ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF SECTION 35, 24, 45, 78 OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: THE CHALLENGE OF ULTRA VIRES, UNCONSTITUTIONAL AND THREATENED REMOVAL FROM OFFICE OF THE PETITIONERS**

**AND**

**IN THE MATTER OF THE CONSTITUTIONAL PETITION BY:**

**BRIAN WEKE.....1<sup>ST</sup> PETITIONER**

**GEOFFREY GITAU MWANGI.....2<sup>ND</sup> PETITIONER**

**MARSHA MALOWA OLUOCH.....3<sup>RD</sup> PETITIONER**

**PETER MUCHIRI.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**ANN KANANU MWENDA.....1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY PUBLIC SERVICE BOARD....2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**THE SPEAKER NAIROBI CITY COUNTY.....INTERESTED PARTY**

**JUDGMENT**

**INTRODUCTION**

1. On 3.12.2010, the Governor of Nairobi city county was impeached and since there was no Deputy Governor in office, the Speaker of the

County Assembly (Interested Party) ascended to the Office of Governor in Acting Capacity under Article 182(4) of the constitution. As a result, the interested party and the 2<sup>nd</sup> respondent appointed the petitioners and a Mr. Mutunga Mutungi to various positions. The 1<sup>st</sup> Petitioner was appointed the Legal Advisor to the interested party, 2<sup>nd</sup> Petitioner was appointed the Political Adviser, 3<sup>rd</sup> Petitioner was appointed personal Assistant and 4<sup>th</sup> Petitioners was appointed Economic Advisor for the interested party as the acting governor.

2. The petitioners performed their duties until strangers purporting to be appointed of the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent ambushed the petitioner's office and threatened to evict them forcefully. The petitioners demanded to be told the reasons for the termination of their appointment but they never not told. Instead the Secretary to the 2<sup>nd</sup> Respondent issued the petitioners with a notice of termination dated February 2021 but oddly spared Mr. Paul Mutunga Mutungi from the purported termination.

3. The Petitioners were aggrieved by the Respondents action and brought this petition seeking the following reliefs

a. A Declaration that the attempt by the 1<sup>st</sup> Respondent to masquerades and purport to execute the mandate of the Ag. Governor of the Nairobi City County in cohort with or with the help of the 2<sup>nd</sup> respondent or any person or authority, violates, threatens and or infringes Articles, 1, 2,10,232,235,236 and 182 of the constitutions of Kenya 2010.

b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents purported decision to terminate the employment of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners vide a termination notice dated 10<sup>th</sup> February,2021 is ultra vires and unlawful.

c. A declaration that 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Petitioners' rights under articles 41(1) and 47 of the Constitution of Kenya are threatened, violated and or infringed by the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to purport to terminate them, unlawfully.

d. A declaration that pending the election of a substantive Governor of the Nairobi City County, the Constitutionally Recognized holder of the office of the Governor in acting Capacity is the Substantive holder of the Office of the Speaker of the Nairobi City County Assembly, as provide for under articles 182(5) & (6) of the Constitution of Kenya, 2010.

e. A declaration that any attempt by the Ag. Governor of Nairobi City County to purport to hand over power to any person other than an elected Governor in accordance with the provisions of article 182(6) of the Constitution is unconstitutional and void.

f. An order of Certiorari to quash the termination notice of the 10<sup>th</sup> February 2021 and any consequent appointment letter issued thereunder.

g. Any other relief that the court may deem just, fit and expedient to grant in the circumstances.

h. That the costs of this Petition be borne by the Respondents.

4. The petitioners averred that the new appointees were purportedly in relation to the office of the Governor. The petitioners further averred that the Office of the Governor was vacant following the said impeachment and as such, there being no Deputy Governor left in office, no one has the mandate to fill the office of Governor except the interested party in acting capacity, by demerit of Article 182(4) & (5) of the constitution.

5. The Petitioners are of the view that the persons purporting to be appointed to replace them were appointed by persons without the constitutional mandate to make the appointment. They argued that the Office of the governor in the circumstances of this case can only be filled through election under Articles 182 of the constitution. They maintained that until such elections are held, the Interested Party ought to assume office under Article 182 above. Consequently, the Petitioners contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are acting in cahoots to orchestrate a coup within the County Executive

6. The Petitioners averred that the respondents have violated the constitution and also violated the Petitioners constitutional rights to fair labour practices and fair administrative action under Article 41 and 47 of the constitution

7. Despite service with the petition and appearing in court severally, the respondents never filed any response to oppose the petition.

8. The petitioners filed written submissions to dispose of the suit. The submissions basically reiterated the averments made in th petition. They maintained that where a Governor is removed from Office before the vetting and approval of a nominee for the position of Deputy Governor, then the vetting and approval of the nominee ought to be halted since the appointing authority being the substantive governor has ceased to hold office. For emphasis they relied on Article 182 of the constitution and **Re speaker of Embu {2018} e KLR**

9. They maintained that a speaker to the county Assembly in acting capacity can only handover the office to an elected substantive governor. In their views, the purported resignation of the interested party and handing over power to the 1<sup>st</sup> respondent is unconstitutional.

10. They further submitted that a speaker of a county Assembly cannot resign as acting governor without resigning as a speaker of the county Assembly. They contended that the purported appointment by 1<sup>st</sup> Respondent are illegally and of no consequences as long as the 1<sup>st</sup> respondent was not given the mandate by the people through an election under Article 182 (6) of the constitution.

11. Finally the petitioners reiterated that their constitutional rights under Article 41 and 47 of the constitution have been violated by actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent and for that reason they ought to be granted the reliefs sought plus costs.

## Analysis and determination

12. There is no dispute that the interested party have took over the office of Governor Nairobi City County in acting capacity following the impeachment of the substantive governor. There is also no dispute that the Interested Party appointed the petitioners to the various positions stated above. It is also a fact that the interested party handed over the office of the governor to the 1<sup>st</sup> Respondent without any election by the residents of Nairobi City County. Finally it is a fact that following the 1<sup>st</sup> Respondent's ascend to the office of Governor, the petitioners' appointments were terminated and other persons appointed to replace them.

13. The issues for determination are:

- a. Whether the 1<sup>st</sup> respondent lawfully took over the Office for Governor Nairobi City County;
- b. Whether the termination of the Petitioners' employment was unfair, unlawfully and in violation their constitutional rights;
- c. Whether the petitioner are entitled to the reliefs sought

### **Whether 1<sup>st</sup> Respondent lawfully assumed the position of Governor of Nairobi City County**

14. The petitioners made spirited effort to urge the court to make a determination that the 1<sup>st</sup> respondents took over the governor's office contrary to Articles 182 of the constitution

However, as acknowledged by the petitioners, there has been a plethora of suits relating to the status of the 1<sup>st</sup> respondent. The petitioners did not show to this court how fair those other suits have gone or what decisions, if any, have been made. Consequently, I will exercise caution by not making any determination on that matter to avoid a possible conflict of decisions which may embarrass the cause of justice.

### **Whether the termination of petitioners' employment was unfair and in breach of their Constitutional rights.**

15. The claimants' contention that they were dismissed without prior notices, without being informed of the reason for the termination and without being accorded any hearing has not been controverted. As public officers they were protected by Article 236 (b) of the constitution from dismissal without following due process of the law.

16. Again under section 45 of the employment Act they were protected from being dismissal without a valid and fair reason, and without being accorded fair hearing. In this case they were ambushed by strangers who claimed to have been appointed to replace them. They were not served with any prior notice of the termination, they were not told the reasons for the tarnation and they were not accorded any hearing.

17. In **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, the Court of Appeal held that:-

**“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....”**

**Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.**

18. The foregoing binding authority is one of very many cases where the Courts in this country have agreed that for termination of an employee's contract of service to pass the test of fairness, there must be a valid and fair reasons, and a fair procedure must be followed by according the employee a fair hearing in the first instance and on appeal. Under section 43 and 45 of the employment Act, the burden of proving the reasons and fair procedure rests on the employer

19. As noted above, the respondents did file any response to controvert the facts in the petition, and they did not participated in the hearing by filing submission. Consequently, they have failed to discharge the said burden of prove and as such I hold that the termination of the Petitioners' employment contract was unfair within the meaning of section 45 of the Act.

20. In addition to the foregoing, I find that the manner in which the whole exercise of terminating the employment of the petitioners was done, breached their rights to fair labour practices. The employer were never gave them prior notice them of the intended termination, and in fact even the termination was communicated to them by strangers who ambushed their office and threatened to evict them forcefully.

21. Again, the termination violated Article 47 of the constitution which requires that before taking any administrative action against a subject, the decision maker must in inform the subject the reasons and accord him/her an opportunity to be herd.

22. The above right to fair administrative action has been amplified by section 41 of the Employment Act and section 4 of Fair Administrative Actions Act. Consequently, I find and hold that the dismissal of the petitioners in the manner stated above also violated the Petitioners right to fair administrative action.

## Reliefs

23. For the reasons stated above I make declaration that the termination notice dated 10/2/2021 was unlawful and the petitioner's rights under Articles 41 and 47 of the constitution were violated through the unfair and unlawful terminations.

24. However, I decline to grant the order of certiorari to quash the termination notice of 10/2/2021 and the consequent appointment letter issued there under because such an order would result to a reinstatement of the petitioners to their respective positions. In **Kenya Airways Limited v. Aviation & Allied Workers Kenya & 3 Others [2014] eKLR** the Court of Appeal stated that before granting reinstatement the court ought to consider the following factors:

**“...the wishes and expectation of the employee; common law principle that there should be no order of specific performance in a contract of service except in very exceptional circumstances; the practicability of the reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment.”**

25. In this case the petitioner did not demonstrate that reinstatement is practicable and showed some exceptional ground for granting the relief. It is clear that the appointment of the 1<sup>st</sup> Respondent governor has not been nullified nor have the appointments done by her been quashed. In fact the petitioners notified the court during one of the mention dates that they had been evicted from office during the pendency of this suit. Consequently, having considered all the above matters, I find and hold that the order of reinstatement is not practicable and it is declined.

26. All the other relief sought have been declined because they are based on the constitutionality of the 1<sup>st</sup> Respondents' assumption of the office of Governor, which is the subject in other suits whose decision have not been made known to this court.

27. In the end I dismiss the Petition save the order that the termination of the Petitioners employment was unlawful and in breach of their rights under Article 41 and 47 of the Constitution. The Petitioners are awarded costs of the suit and interest.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OCTOBER, 2021**

**ONESMUS N. MAKAU**

**JUDGE**

**2021**

**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> April 2020, this ruling 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**