



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

PETITION NO E 006 OF 2021

**IN THE MATTER OF ARTICLES 2(1), 10(2) (b) (c), 22(1), 23(1) 41(1), 47(1), 48, 50(1),
165,236(b) 251(1) 252(1) (a) (b), and 258(1) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION AND
VIOLATION OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS PARTICULARLY
ARTICLES 27(1) (2) 28, 35, 41(1), 47, 48, 50(1) AND 251 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE DECISION
BY THE 1ST RESPONDENT OF INTERDICTING THE PETITIONER WITHOUT
GIVING A FAIR HEARING IN VIOLATION OF ARTICLE 47(1)**

AND 50 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE EMPLOYMENT ACT 2007, LAWS OF KENYA

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

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 04 OF 2015

- BETWEEN -

ANNAH KERUBO MWASI.....PETITIONER/APPLICANT

- VERSUS -

COUNTY PUBLIC SERVICE BOARD NYAMIRA COUNTY.....1ST RESPONDENT

CHAIRPERSON COUNTY PUBLIC SERVICE BOARD NYAMIRA COUNTY....2ND RESPONDENT

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

THE COUNTY GOVERNMENT OF NYAMIRA.....4TH RESPONDENT

THE COUNTY SECRETARY, NYAMIRA COUNTY.....5TH RESPONDENT

DONALD OKOYO.....6TH RESPONDENT

RULING

1. This ruling relates to the petitioner's notice of motion dated 25/4/2021 seeking for orders:-

a. Staying action on the 1st Respondent's interdiction letter Ref No. NPSB/039-21/04/CH/jg dated 14th April, 2021

b. Restraining the Respondents by either themselves, their agents, servants, or any other person acting under their instructions from blocking the Petitioner's access to her office to perform her public duties as the Nyamira County Public Service Board Secretary or howsoever discriminating, victimizing, harassing or removing the Petitioner from office.

c. Restraining the Respondents by either themselves, their agents, servants, or any other person acting under their instructions from interfering with salary and allowances payable to the Applicant.

d. Restraining the Respondents from recruiting or advertising as a vacant office the position of Nyamira County Public Service Board Secretary.

e. The Respondents bear the costs of his application

2. The Application is supported by the Applicants' Affidavit sworn even date and it is opposed by the 2nd Respondent vide the Replied Affidavit on 24/5/2021 by Dr. Peter Kereri, Chairman of the 1st Respondent. The application was disposed of by written Submissions disposed of the Application.

Applicant's case

3. The applicant is the Secretary of the 1st Respondent since 5/7/2019 which appointment is for 6 years non-renewable contract. On 5/8/2020 during a Board meeting, she had a heated exchange with another member of the Board one Mary MoraaMambolea leading to premature ending of the meeting. The Petitioner reported the use of offensive language by Mary MoraaMambolea to the 1st Respondent but no action was taken.

4. Instead, she was arrested and charged with offensive conduct contrary to section 94 of the penal code at the instance of Mary MoraaMambolea, 2nd Respondent and other close confidants of Mary MoraaMambolea. The Petitioner was released on a cash Bail of Kshs 20,000 but she was interdicted by the letter dated 21/4/2021 and her duties allocated to the 6th Respondent unlawfully.

5. According to the Petitioner, the interdiction was unlawful because the respondents have no legal capacity to discipline her. She submitted that the action and proceedings against her are contrary to Article 251 of the constitution and section 58 of the contrary Governments Act. She further contended that the interdiction was done before giving a chance to present her case. She urged that although the interdiction has since been lifted, she is prejudiced and her rights continue to be infringed because her duties are still being done by the 6th respondent, and she is now visited with embarrassment, ridicule and mental anguish for being paid for just sitting in the office.

6. She further submitted that there is public interest in granting the orders sought considering the political nature of her position and the need to have gender balance in the composition of the Board. For emphasis, she relied on **Shukuri Alawaso Muhamed –vs Wanjir County Secretary and 2 others [2018] e KRL**

Where this court held that the Secretary to the County Public service Board is a member of the Board under section 58 of the County governments Act.

Respondents' case member

7. The 2nd Respondents' admits that the applicant is the Secretary of the 1st respondent. He contended that during a board meeting, the applicant, threatened a member of the Board one Mary MoraaMambolea that she would stab her with a knife; that after the meeting Mary Moraa lodged a complaint with the 1st respondent but after efforts to resolve the matter failed she lodged Criminal proceedings against the applicant.

8. He admitted that the applicant was interdicted by a unanimous decision by the Board after seeking opinion from the county Attorney. However, the interdiction was later lifted and the applicant has resumed her duties where is enjoying her full pay. Therefore, he submitted that the applicant has not shown any prima facie case warranting the orders sought.

9. For emphasis he relied on the case of **Centre for rights education and awareness (CREA) & 7 others –v- Attorney General, [2011] e KLR** where the court held that a party seeking conservatory orders must demonstrate a prima facie case with likelihood of success and that unless the order is granted, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation. He further relied on **Kevin K. Mwiti & others –v- Kenya School of Law & others** where the court also held that the applicant for conservatory orders must establish a prima facie case with a likelihood of success.

10. The 2nd respondent submitted that the applicant herein has not demonstrated any iota of real danger of prejudice she likely to face if the conservatory order is denied. He maintained that the applicant's interdiction was lifted and she is back to her office discharging her duties and receiving her full salary and allowance.

11. Finally he urged the court to reject the application for conservatory order because the applicant has failed to disclose material facts and instead, she has misled the court about her reinstatement.

Issues for determination

12. Having carefully considered the pleadings, application, affidavits and the written submissions, the issues arising for determination are:-

- a. Whether the applicant has established a prima facie case with likelihood of success
- b. Whether the applicant has demonstrated a real danger of prejudice from the violation if the conservatory order is declined.
- c. Whether there is public interest in granting the order sought.

Prima facie case

13. From the cases cited above, the applicant for conservatory order must establish a prima facie case with likelihood of success. In *The Center for Education and Awareness Case, Supra*, Musinga J. (as he then was) held;

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

14. Prima facie case was defined by the Court of Appeal in *Mrao Limited –vs First American Bank of Kenya [2003] KLR 125* thus:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

15. In this case, the claimant has shown that she was interdicted and her role allocated to the 6th respondent. The 2nd Respondent has confirmed the said interdiction. The legal basis for the interdiction of the applicant by the respondent has not been shown to be in accordance with Article 251 of the constitution and 58 of the County Governments Act. It would appear from the material presented so far to this court that the petitioner's right to fair administration action and protection from unlawful disciplinary action as envisaged under Article 47 and 236 of the constitution, were violated. Consequently, I am satisfied that the applicant has made out a prima facie case with likelihood of success.

Real danger of prejudice

16. The applicant and 2nd Respondent confirmed that the interdiction has since been lifted. However, the applicant contends that her duties are being performed by the 6th respondent. The 6th Respondent did not deny the said allegations. I therefore find that the applicant has proved on a balance of probability that if the order is denied, there is a real danger of suffering prejudice from the continued interference with her duties by another person namely the 6th respondent

Public interest however the applicant contends that her duties are being performed by the 6th respondent. The 6th respondent did not deny the said allegation. I therefore find that the applicant has proved on a balance of probability that if the order of denial there is a real danger of suffering prejudice from the continued interference with duties by another person in the person of the 6th respondent

17. The law requires that the Secretary to the Board be a person possessing specified qualifications meant to impact on the performance of the Board. It is therefore in the public interest that the person holding the office of Secretary to the Board is the only one to perform the said functions of that office by virtue of the specified qualifications.

18. It is also in the public interest that the disciplinary process against the applicant be done in accordance with the law and more specifically Article 251 of the constitution and section 58 of the County Governments Act. Therefore, I find and hold that it is indeed in the public interest to grant the conservatory orders sought pending hearing and determination of the petition.

Conclusion

19. For the reasons and findings hereinabove, I allow the application by granting the following orders:-

- a. Injunction restraining the Respondents either by themselves, their agents, servants, or any other person acting under their instructions from blocking the Petitioner's access to her office to perform her public duties as the Nyamira County Public Service Board Secretary or howsoever discriminating, victimizing, harassing or removing the Petitioner from the office.
- b. Injunction restraining the Respondents either by themselves, their agents, servants, or any other person acting under their instructions from interfering with salary and allowances payable to the Applicant.
- c. Injunction restraining the Respondents from recruiting or advertising as a vacant the office the position of Nyamira County

Public Service Board Secretary.

d.. The applicant is awarded costs of the application.

e. For avoidance of doubt the above injunction orders do not bar disciplinary action from being taken against the applicant if it is done within the provision of the law

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY NOVEMBER, 2021

ONESMUS N 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 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