



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**PETITION NO. E008 OF 2020**

**LAWRENCE MWANGANGI MWANIA.....PETITIONER**

**-VERSUS-**

**THE GOVERNOR, NAKURU COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NAKURU.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioner instituted this suit vide the Petition dated 15<sup>th</sup> December, 2020, seeking the following prayers:-

- a) A declaration that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relieving the Petitioner of his duties and terminating his contract as the Nakuru County Executive Committee Member for Public Service, Training and Devolution, is in breach and violation of the Petitioner's constitutional rights under Articles 27, 28, 41, 47, 73, 232 & 236 of the Constitution of Kenya 2010, and is also in breach of sections 31 & 40 of the County Governments Act, and of section 4 of the Fair Administrative Actions Act and section 41 of the Employment Act and that the said action is null and void for all intents and purposes.
- b) A declaration that the position of Nakuru County Executive Committee Member for Public Service, Training and Devolution held by the Petitioner is not vacant and is not available for fresh recruitment or replacement.
- c) A judicial review Order of Certiorari to remove to this court and to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as contained in their letter of termination dated 23/06/2020 relieving the Petitioner of his duties and terminating his contract as Nakuru County Executive Committee Member for Public Service, Training and Devolution.
- d) An Order of Prohibition, prohibiting the 1<sup>st</sup> & 2<sup>nd</sup> Respondents from proceeding with or completing any nomination, appointment or recruitment of any fresh nominee/person for the position of Nakuru County Executive Committee Member for Public Service, Training and Devolution, and from forwarding the name of any such person/nominee to the Nakuru County Assembly for vetting or approval in respect of the said position, and from presenting any such person for, or allowing such person to take, or witnessing the taking by such person of, the Oath or Affirmation of Office of Nakuru County Executive Committee Member for Public Service, Training and Devolution.
- e) An Order of Mandamus commanding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to reinstate the Petitioner to his office and position as Nakuru County Executive Committee Member for Public Service, Training & Devolution, with all the benefits appurtenant thereto pursuant to the Petitioner's Employment Contract dated 15<sup>th</sup> November 2017.
- f) An order of injunction restraining the 1 and 2 Respondents herein, by themselves their servants, agents, representatives, successors and assigns, including their agent and fund administrator Family Bank Ltd from demanding, recovering, or enforcing recovery of the aforesaid staff loan of Kshs. 5,000,000.00 granted to the Petitioner and also restraining them from taking any other adverse action against the Petitioner over the said loan, including not reporting or listing the Petitioner as a loan defaulter with the Credit Reference Bureaus unless and until the Respondents have first reinstated the Petitioner to his position as the Nakuru County Executive Committee Member for Public Service, Training & Devolution, or unless the Respondents have fully paid the Petitioner his terminal benefits as computed herein, or as the court may order

**In the Alternative, and Without Prejudice to prayers (a) to (f) above:**

**g) An Order for payment by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the Petitioner of all salaries, benefits, and all dues that the Petitioner would have earned for the remainder of his contract term, from July 2020 to November 2022, tabulated as hereunder,**

**i. July 2020 to October 2020- 4 months' x Kshs. 306,250. 00 =1,225,000. 00**

**ii. November 2020 to October 2021- 12 months' x Kshs. 328,125.00= 3,937,500.00**

**iii. November 2021 to November 2022- 13 months' x Kshs. 350,000.00= 4,550,000. 00.**

**iv. One month pay in lieu of Notice of termination. -Kshs. 306,250.**

**v. Payment in lieu of annual leave (5 years)-November 2017 to November 2022=11,615,625.00**

**vi. Add Gratuity at 31% of Kshs. 9,712,500.00 (as per contract)= 3,010,875.00**

**Grand Total Kshs. 14,626,500 00**

**LESS applicable taxes.**

**h) Compensation and/or damages for violation of the Petitioner's constitutional rights, and for his unfair termination.**

**i) Interest on (f) and (g) above at court rates from 1<sup>st</sup> July 2020 till payment in full.**

**j) Costs of this Petition and interest thereon at court rates.**

**k) Any other or further relief as the court may deem fit to grant.**

2. The Petitioner's case is that he was employed by the respondents vide an employment contract dated 15.11.2017 in the position of County Executive Committee Member(CECM) for Public Service, Training and Devolution, following a competitive recruitment process. His salary was Kshs. 306,250.

3. He stated that he worked for the respondents diligently until 18<sup>th</sup> June, 2020 when the Respondent without Notice to him released a press statement appointing one Jackline Mongina Osoro to replace him. That he learnt of the said press release and his sacking from friends who called him to inquire on the turn of events.

4. On 1<sup>st</sup> July, 2020 the Petitioner was served with a termination letter dated 23<sup>rd</sup> June, 2020 which letter alleged to have terminated the services of the Petitioner pursuant to the powers given to the 1<sup>st</sup> Respondent under Section 31 of the County Government Act. No wrongdoing on the part of the Petitioner was indicated in the said termination letter.

5. The petitioner sought to injunct the action of the Respondent on the basis that he was wrongfully terminated from employment and also for the reason that he had legitimate expectation to continue working till the end of his contract.

6. It is on the legitimate expectation that the Petitioner committed himself and took up a loan of Kshs. 5,000,000/- which was to be cleared in 40 months within the duration in which he was an employee of the Respondents.

7. The Petitioner avers that the Respondent, in defiance of the law have failed to pay him his terminal dues which exposed him to more financial risk including the risk of losing his only family land in Kajiado that was used as security in securing the said loan. He therefore prays for an injunction against the said lender from exercising its statutory powers until he is reinstated and or paid his terminal dues by the Respondent.

8. The petitioner stated that the loan fund which was advanced to the Respondent employees, belong to the Respondent and was only managed by family bank, therefore Family bank was acting as an agent of the Respondent. He therefore contends that if the Respondents paid him his terminal dues on time he would have been in a position to clear the said loan, and the default is occasioned by the Respondent actions of withholding his terminal dues.

9. It was stated that the Respondent were expected under the employment Act to follow due process before terminating his services as provided for under Article 236 of the Constitution. Also that no reason or Notice was given for the said termination as envisioned under Article 47 of the Constitution as read with section 4 of the Fair Administrative Actions Act.

10. He stated that when he was terminated unceremoniously, he was humiliated and his dignity lowered contrary to the provision of Article 28 of the Constitution. Further that the Respondent did not grant him fair administrative process.

11. He also stated that he had taken 5 years' unpaid leave in order to render his services to the County government of Nakuru for the 5 years.

12. The Respondents entered appearance on the 26<sup>th</sup> January, 2021 and mounted a joint response to the Petition on the 16<sup>th</sup> February, 2021.

13. According to the Respondents section 31(a) of the County Government Act as read with the terms and conditions of the employment contract of the petitioner, empowers the Respondent to terminate the contract of employment the way they did. The respondent cited clause 1.0.2.2 of the employment contract which provides that the contract may be terminated upon swearing in of a new County Executive Committee member as contemplated under section 42 of the County Government Act.

14. The Respondent averred that the prayer for reinstatement is superfluous since the said office has already been occupied by a new CECM who was sworn in on the 25<sup>th</sup> January, 2021 and to pay the petitioner the sum of monies prayed in the petition would amount to unjust enrichment in light of the fact that the petitioner is an employee with the ministry of interior who is merely on leave.

15. The Respondents also stated that the Petitioner took up a mortgage loan while he was an employee of the county government and now that his services were terminated, he is required under the law to clear the said mortgage.

16. The Respondent prayed for the Petition to be dismissed.

17. In addition to the response, the Respondents filed a replying affidavit deposed upon on the 21<sup>st</sup> September, 2021 by **Benjamin Njoroge**, the county secretary and head of public service at the County Government of Nakuru, who reiterated the averments of the response to the petition and in particular stated that the Petitioner being a CEC is a right hand man of the 1<sup>st</sup> Respondent who can be fired at the discretion of the 1<sup>st</sup> Respondent and that the governor exercised that discretion and fired him.

#### **Petitioner's Submissions**

18. The petitioner submitted that as much as the 1<sup>st</sup> Respondent has been clothed with powers under section 31 of the County Government Act to fire its CECM, the said termination has to be preceded by a notice giving reasons to affirm the necessity or appropriateness of the said termination. It was argued that the pleasure doctrine exercised by the governor has limitation. In support of his arguments the petitioner cited the case of **County government of Nyeri & Another V Cecelia Wangechi Ndungu [2015] eklr** where the Court of Appeal held that;

**“We are of the considered view that the Section 31 (a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously.”**

19. The petitioner also cited the case of **Richard Bwogo Birir V Narok County Government & 2 others [2014] eklr** where the Court of Appeal had this to say on the pleasure doctrine.

**“To answer the 1<sup>st</sup> issue for determination being whether the pleasure doctrine applies in Kenya’s public service and particularly in this case, the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010. The court further finds that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the petitioner by the 2<sup>nd</sup> respondent as was purportedly advanced for the respondents. Finally, the court holds that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The court further holds that it is through the application of the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subdued by the people who are the holders of sovereign power in the new Republic.”**

...

**“... In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic’s constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.”**

20. Accordingly, it was submitted that the 1<sup>st</sup> Respondent cannot exercise the powers under section 31 whimsically but exercise the same reasonably.

21. The Petitioner submitted further that his constitutional right was violated by the Respondent when the Respondent failed to subject him to due process under Article 236 of the Constitution. In essence his right to fair administrative action under Article 47, Fair Labour practices under Article 41 and fair hearing under Article 50 of the Constitution were violated. The petitioner then prayed for compensation both for the unfair termination and for violation of his constitutional rights and cited the case of **Anarita Karimi Njeru V Republic [1979] eklr**.

22. The Petitioner in conclusion prayed that his petition be allowed as prayed.

#### **Respondents submissions.**

23. The Respondent submitted from the onset that the Petitioner has failed to plead with precision the Provisions of the constitution that has allegedly been violated by the Respondent to the standard required in **Anarita Karimi Njeru V Republic [1979] eklr**.

24. The Respondent then submitted that the 1<sup>st</sup> Respondent exercised his executive power given to him under section 31 of the County Government Act therefore the Respondent did not breach any constitutional provisions as alleged.

25. On whether due process was followed, the Respondent submitted that the Governor acted within his power and cited the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** where the Court of Appeal sitting in Nyeri held that:-

**“...We are of the considered view that the Section 31 (a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously. Why do we say so? Firstly, By dint of Article 179(1) of the Constitution and Section 34 of the County Governments Act the executive authority of a County is vested in the County Executive Committee. The County Executive Committee comprises of the Governor, Deputy Governor, members of the County Executive Committee who are appointed by the Governor. The members of the County Executive Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities. (See Article 179 (6) of the Constitution and Section 39 of the County Governments Act.) A County Executive Committee member is the Governor’s right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member. Where such confidence is lost the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.**

26. The Respondent also urged the Courts to restrain from interfering with the Executive powers and instead promote the same when its warranted and cited the case of **Speker of the senate and another –v Attorney General & 4 Others[2013] eKLR**.

27. The Respondent in conclusion submitted that the Petitioner is not deserving of the reliefs sought for the reason that he has not proved his case to the required standard and to compensate the petitioner as prayed would unjustly enrich him considering that he is an employee of Ministry of interior who was only on unpaid, leave.

28. I have examined the evidence and submissions of the parties herein. It is not in dispute that the petitioner was indeed a CECM of the respondent having been employed as such as per the contract of employment dated 17/11/2017.

29. As per this contract the claimant was expected to serve for 5 years implying that the contract was to expire on 10/11/2022. It is also not in dispute that the petitioner was fired by the 1<sup>st</sup> respondent herein vide a letter dated 23<sup>rd</sup> June 2020.

30. The 1<sup>st</sup> respondent indicated that the termination was pursuant to Section 31(a) of the County Government Act 2012 as read with the terms and conditions of the contract the petitioner had signed with the County Government.

31. Under the contract of service that was referred to by the 1<sup>st</sup> respondent, the termination could only be done after issuance of a one month’s notice which the respondent didn’t give.

32. Other than there being no notice before termination, the respondent argued that he has power under Section 31(a) of the County Government Act to dismiss the Petitioner and therefore there was no any breach.

33. Indeed Section 31 (a) of the County Government Act, the respondent has power to terminate the services of the petitioner. This power should however not be exercised whimsically for no apparent reason and without following due process.

34. In the case cited by both the petitioner and the respondent i.e **County Government of Nyeri & Another Vs Cecilia Wangechi Ndungu** the COA in Nyeri explained clearly that though the County Government has power to terminate services of a CECM, the power is qualified and can only be exercised reasonably and not arbitrarily or capriciously.

35. The Court of Appeal also restated this position in **Richard Bwogo Birir VS Narok County Government & 2 others (2014) eKLR** where the Court of Appeal indicated that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the Republic under the constitution of Kenya 2010.

36. The Court of Appeal further held that it is through the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subdued by the people who are holders of sovereign power.

37. The Court of Appeal reemphasized the fact that the pleasure doctrine is dead and buried under the Kenya Constitution as Kenya is a sovereign state and power belong to the people and shall be exercised only in accordance with the constitution.

38. That said and done, it is indeed true and the position of this court that the 1<sup>st</sup> respondent treated the petitioner without any aota of fairness, he did it with humiliation first through a press conference followed by a termination letter.

39. The rights of the petition even to a notice period was not adhered to. It is also sad that to date the petitioner has not been paid his gratuity which was expressly provided for under the contract.

40. It is my finding that the respondent breached the petitioner’s rights under the constitution as submitted plus breach of article 4 of the Fair Administrative Action Act and Section 41 of the Employment Act 2007.

41. In the circumstances of this case I find for the petitioner and I award him as follows;

**1. A declaration that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relieving the Petitioner of his duties and terminating his contract as the Nakuru County Executive Committee Member for Public Service, Training and Devolution, is in breach and violation of the Petitioner's constitutional rights under Articles 27, 28, 41, 47, 73, 232 & 236 of the Constitution of Kenya 2010, and is also in breach of sections 31 & 40 of the County Governments Act, and of section 4 of the Fair Administrative Actions Act and section 41 of the Employment Act and that the said action is null and void for all intents and purposes.**

**2. An order that the petitioner is entitled to payment by the respondent of all his salaries, benefits and all dues that the petitioner would have earned for the remainder of the contract period from July 2020 to November 2022 as tabulated by the petitioner totaling = kshs.5,617,500/=**

**3. 1 month pay in lieu of notice = 306,250/=**

**4. Payment in lieu of leave for 1 year = 306, 250/=**

**5. Payment of gratuity payable at 31% of salary as per contract**

**= 31% x basic pay**

**= 3,010,875/=**

**6. Damages for violation of the petitioner's constitution rights and for unfair termination**

**= 5M**

**GRAND TOTAL = 12,240,875/=**

**Less statutory deduction**

**7. The respondents will pay cost of this suit plus interest at court rates with effect from the date of this Judgment on account of future salary and from the date of filing suit for salary already accrued from July 2020 to date.**

**DATED AND DELIVERED IN OPEN COURT THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gatu Magana for petitioner – present

Makori holding brief for Nyamwange for respondent – present

Court assistant - Fred