



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E055 OF 2021

LAMECH MACHUKI NYARIKI

LEWIS OBURU NYARIBO

DOUGHLAS MECHA OSORO

DAN ISAA ONYANCHA.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT

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

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

RULING

1. This ruling relates to a Notice of Motion application dated 20th September, 2021, expressed to be brought pursuant to the provisions of Articles 27(1), & (2), 30, 41, 47(1) & (2), 50(1) and 23(1) of the Constitution, the County Government Act and Sections 3, 4 and 12 of the Fair Administrative Actions Act.

2. The Petitioners seek the following orders:

1. That this Honourable Court be pleased to grant conservatory orders staying the implementation of any action that adversely changes the contract of employment of the Petitioners which may result in demotion, variation downwards of salaries, benefits and allowances of the Petitioners and other staff members of the 1st Respondent pending the hearing and determination of this petition.

2. That the Respondents meet the costs of this application.

3. The application is supported by grounds on the face of the application and an Affidavit dated 20th September, 2021 sworn by Mr. Lamech Machuki Nyariki, one of the Petitioners herein.

4. The application was certified urgent and interim conservatory orders granted pending the hearing and determination of the application interparties. The application was heard interparties on 18th October, 2021.

5. The Counsel for the Petitioners submitted that the Petitioners have brought this application on their own behalf and on behalf of other affected staff of the Respondent. He submitted that the Petitioners are employees of the 1st Respondent employed on permanent and pensionable terms of service.

6. The petitioners further case is that they were upgraded and promoted by the 3rd Respondent, which promotions gave them additional duties and responsibilities as well as increased salaries.

7. The Petitioners argued that when the 2nd Respondent was sworn in upon the death of the 1st Respondent's first Governor, he appointed a Promotions Review Committee and issued them with terms and conditions of their appointment. The Committee passed recommendations which were adopted and acted upon, without the participation of the Petitioners, who the court was told only learnt about the report when they received their salaries in August, 2021.

8. The Petitioners argue that they received transfer letters and re-allocation of duties, which they were not informed about and only got to see the Committee's report through a reply made in this matter.
9. The Petitioners urge this court to grant them conservatory orders on the grounds of violation of the Constitution, the County Government Act, Employment Act and the Fair Administrative Actions Act.
10. The Petitioners argue that the adhoc Committee was appointed by the 2nd Respondent instead of the 3rd Respondent and that it was composed of persons who are not employees of the 1st or 3rd Respondent. They argue that under Section 59 of the County Government Act, only the 3rd Respondent can establish and abolish offices, discipline, remove, promote or deal with employees of the county government.
11. The Petitioners' case is that although the law allows for limited delegation, only the 3rd Respondent can delegate its mandate to another entity and that the law clearly states to whom such delegation lies. They aver that the persons co-opted to the adhoc committee, are not among persons for whom delegation is allowable under the county government Act.
12. The Petitioners aver that the actions of the Respondents violated Article 47(1) of the Constitution as read with Section 12 of the Fair Administrative Actions Act on fair administrative Action and Article 236 of the Constitution which accords public officers protection from dismissal, removal or disciplinary action devoid of due process. They sought to rely on the holding in the case of **Samuel Okuro & 7 others v Kisumu County Public Service Board the Government Kisumu County & another [2017] eKLR**, where the court held that a Governor who initiates removal, demotion or alteration of terms and conditions of an employee, acts against the Constitution and their action unconstitutional.
13. Petitioners aver that they have brought this petition pursuant to Section 4 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and Articles 2 and 3 of the Constitution, as they, like every other Kenyan, has an obligation to protect the Constitution.
14. Mrs. Ligunya acting for the Respondents, argued that the conservatory orders ought to be reviewed as the four Petitioners have no authority to act on behalf of any other person. It is her position that even if this were a class suit, authority should have been sought. They sought to rely on the case of **Abdulla Abshir & 38 others v Yasmin Farah Mohamed [2015] eKLR** to support their position.
15. It was submitted for the Respondents that the Court should balance the interests of the parties, constitutional values and granting of orders in matters touching on public funds. It is their position that the petitioners herein have not proved a prima facie case and they will suffer no harm, while the Respondents continue to pay persons who fraudulently awarded themselves promotions.
16. The Respondents submitted that the Governor has power to give governance and be accountable for use of County resources. It is the Respondents' position that the Governor formed the promotions review committee, upon investigations revealing irregular promotions within the county government.
17. The Respondents states that what was done is neither irregular nor unlawful as the committee recommended and forwarded the names to the 3rd Respondent for verification and ownership and that the 3rd Respondent conducted investigations through this committee.

Determination

18. I have considered the application subject of this ruling, the responses thereto, the oral submissions made on behalf of the parties and the authorities cited. The issues for determination arising from this application is firstly, whether the Petitioners have authority to file this application and petition on behalf of other employees of the 3rd Respondent and secondly, whether the conservatory orders should issue pending the determination of the main petition.

Whether the Petitioners have authority to file this application and petition on behalf of other employees of the 3rd Respondent

19. Article 22 (2) of the Constitution and Section 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides as follows:

“(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—

(i) a person acting on behalf of another person who cannot act in their own name;

(ii) a person acting as a member of, or in the interest of, a group or class of persons;

(iii) a person acting in the public interest; or

(iv) an association acting in the interest of one or more of its members.

20. The Petitioners herein have lodged this application alleging violation of Constitutional rights enshrined under Articles 27(1), & (2), 30,

41, 47(1) & (2), 50(1) and 23(1) of the Constitution. The Petitioners have filled the application and petition being employees of the 1st Respondent and in the interest of other employees of the Respondents whose rights have allegedly, equally been violated. These provisions do not require or refer to the need for authorization prior to instituting such suits, unlike if the suit was filed through a plaint or Statement of claim.

21. As submitted by the counsel for the Petitioners, the law does not require that one obtains authorization to institute constitutional petitions intended to protect against violation of constitutional rights and freedoms. The court holds that the Petitioners have *locus standi* to institute the instant application and by extension the petition.

Whether the conservatory orders should issue pending the determination of the main petition.

22. In determining whether conservatory orders should issue at this stage, the jurisdiction of the court is limited to examining and evaluating the material placed before it, to determine whether the Petitioners have made *prima facie* case to warrant grant of the orders. **(See Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011 eKLR)**

23. The question for this court is whether from the materials before it, the Petitioners stand to suffer prejudice as a result of the violation or threatened violation of the Constitution, if the conservatory orders are not granted.

24. The Petitioners bear the burden to prove that they will suffer imminent, evident and actual danger if the conservatory orders are not granted.

25. The Petitioners have alleged violation of their Constitutional rights enshrined under Articles 27(1), & (2), 30, 41, 47(1) & (2), 50(1) and 23(1) and 236. They further aver that they were demoted, re-deployed and transferred to various department without being afforded an opportunity to be heard.

26. The Petitioners have also produced pay slips issued by the Respondents upon implementation of the recommendations of the adhoc committee, which indicate that indeed, their salaries had been reduced substantially pursuant to a decision to demote them to lower grades.

27. The Respondents on the other hand, aver that their action is premised on an investigation that revealed fraudulent and irregular promotions within the Respondents' public service. These are serious questions of facts that can only be determined upon hearing of the substantive petition.

28. From the evidence before this court, the Petitioners' salaries have been substantially reduced and there is imminent danger of this remaining that way, if the conservatory orders are not granted. The court finds and holds that the Petitioners have proved a *prima facie* case for grant of conservatory orders.

29. The upshot is that Conservatory Orders are hereby granted staying the implementation of any action that adversely changes the contracts of employment of the Petitioners which may result in demotion, variation downwards of salaries, benefits and allowances of the Petitioners and other staff members of the 1st Respondent, pending the hearing and determination of the petition.

30. Costs shall abide the cause.

31. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Namusubo H/B for Mr. Ojuro the Petitioners

Mrs. Ligunya present for the Respondents

Ms. Christine -C/A