



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO. 5 OF 2019

ENG. LUCY WANJIRU KARIUKI.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF NAKURU.....1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF NAKURU.....2ND RESPONDENT

THE GOVERNOR,

COUNTY GOVERNMENT OF NAKURU.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU.....INTERESTED PARTY

JUDGEMENT

The petitioner is seeking the following orders;

- a) *A declaration that the proceedings for the removal of the petitioner as the County Executive Committee Member (CECM) in charge of the Roads, Transport & Public Works, Nakuru County was conducted in violation of Articles 10, 25, 47 and 50 of the Constitution of Kenya, 2010 the provisions of the County Government Act, 2012 and the County Assembly of Nakuru Standing Orders and hence unconstitutional, illegal, null and void.*
- b) *An order of certiorari removing into this court and quashing the 1st respondent's proceedings for the removal of the Petitioner from the position of the County Executive Committee Member (CECM) in charge of the Roads, Transport and Public Works, Nakuru County and the resolutions passed by the 1st respondent on the 16th July 2019.*
- c) *An order of injunction restraining the 3rd respondent, Governor, Nakuru County, from dismissing the petitioner from her current position and/or her previous position of County Executive Committee Member (CECM) in charge of Roads, Transport & Public Works based on resolutions passed by the 1st respondent and delivered vide letter by the 2nd respondent dated 17th July, 2019.*
- d) *The petitioner prays for costs of this petition.*

The petition.

The petition is that the petitioner is an employee of the 1st respondent currently serving as County Executive Committee Member (CEC) in charge of Youth, Gender, Culture, Sports and Social Services and before was serving as CEC for Roads, transport and public works. The 1st respondent is the created by Article 176 and 177 of the constitution. The 2nd respondent is elected under the provisions of article 178 of the constitution. The 3rd respondent is the governor of the interested party herein. The interested party is established under the provisions of Article 176 of the constitution.

On 4th July, 2019 the petitioner received letter from the 1st respondent informing her of the resolution passed to commence impeachment proceedings against her on alleged incompetence, gross misconduct and abuse of office to which she responded and then appeared before the select committee on 10th July, 2019 to defend herself. During the hearing the petitioner requested to cross-examine two members of the county assembly who had tendered affidavit evidence, Hon. Anthony Kiprono Rotich and John Mwangi Macharia but these requests were declined without any justifiable reasons.

On 16th July, 2019 the 1st respondent passed a resolution impeaching the petitioner and the said resolution was forwarded to the 3rd respondent vide letter dated 17th July, 2019.

The petition is that the petitioner is keen to cross-examine the members and persons who gave affidavit evidence tendered to the select committee as this was not factual since she was not in office on the dates that the members alleged to have visited the petitioner's office. It was clear the affidavits were not genuine given that they alleged the deponents had similar addresses P.O. Box 1766 Kisumu, had identical grammatical and spelling errors and thus clear they were tailor made to achieve the objective of discrediting the petitioner.

It was unfair for the committee to accept the affidavit evidence that contained blatant lies and further it was unfair that she was denied a chance to cross-examine the deponents of these affidavits.

The petition is also that during the hearing the committee accepted the oral testimonies of Wycliff Agesa and Dan Murugu were accepted by the committee despite being contradictory and had no documentary evidence to support their allegations so as to ascertain the truth.

The report prepared and submitted for adoption by the 1st respondent failed to critically analyse the evidence. the committee failed to consider the evidence of Daniel Muthiga, the chief officer, roads, transport and public works despite the fact that the officer had been invited to attend vide letter dated 9th July, 2019 and was ready to testify. The committee also failed to call crucial witnesses who had important evidence to the issues under investigations especially the director of roads, or interrogate the director supply chain management.

The committee also failed to do the petitioner's evidence in its totality especially with regard to the *Boresha Barabara* programme and the street lighting programme and made gross errors of law and fact in analysing the evidence before it. The proceedings relating to removal from the position of CEC on 16th July, 2019 were unprocedural, biased and unconstitutional and should be quashed.

The petition is on the foundation that article 2, 3, 10, 19, 20, 22, and 162(3) of the constitution, 2010 declares the supremacy of the constitution, gives every person the right to defend the constitution, declares the national values and principles of governance binding everyone and article 19 declares the Bill of rights as integral to the Kenya's democratic state. The constitution give jurisdiction to the court to address employment and labour relations disputes.

The petition is also premised on the provisions of Article 47, 50, 176, 258 and 259 with regard to fair administrative action and right to a fair hearing and for the County Assembly and its committees to conduct its business in an open manner and promote the purposes, values and principles of the constitution.

The petition is that the decision to subject the petitioner to impeachment proceedings was serious and required collation, analysis and critical verification of all the allegations made. The refusal by the 1st respondent select committee to allow the petitioner cross-examine the witnesses demonstrate malice and bias and contrary to the principles under article 50 (k) of the constitution and section 4 of the Fair Administrative Action Act. The principles of natural justice were violated when the respondents became the investigator, prosecutor and judgement and thus contrary to articles 50 and 47 of the constitution. The select committee formed to investigate the petitioner arrived at three possible remedies in contravention of article 50(p) of the constitution.

The petition is supported by the petitioner's affidavit.

The petitioner avers that she is currently the CEC in charge of youth, gender, culture, sports and social services for the interested party. She was initially appointed CEC for roads, transport and public works on 4th October, 2018 after being in acting capacity while serving as CEC for lands, housing and physical planning from 20th November, 2017.

In undertaking her duties in the roads, transport and public works she was guided by the constitution, the CGA and policies in the department.

On 4th July, 2019 she received later from the 1st respondent with information that there was a resolution to commence impeachment proceedings against her for alleged incompetence, gross misconduct and abuse of office. She responded and appeared before the select committee on 10th July, 2019 to defend herself and upon request to cross-examine the witnesses Hon. Anthony Kiprono Rotich and John Mwangi Macharia but the 1st respondent declined.

The petitioner also avers in her affidavit that on 12th February, 2019 Hon. Anthony Kiprono Rotich allegedly visited the petitioner's office when she was engaged at Kuresoi from 8am to 9pm. On 20th February, 2019 Hon. John Mwangi allegedly visited the petitioner's office but she had left for Nairobi from 6am to 10pm. The affidavit evidence thus submitted by these two persons were materially without good foundation, contained lies and had the respondents well analysed them it would have been apparent they were done with malice.

The petitioner had good explanation with regard to matter put to her but the same were not put into account. With regard to the *Boresha Barabara* programme, this was an initiative of the interested party to rehabilitate 11 feeder roads within the county. Upon the launch of the programme in January, 2018 there was good progress and during the 3rd respondent meeting at 1st respondent sitting on 1st February, 2019 the members proposed for a supplementary budget to have six clusters to cover the initiative in a short period of time and on 7th February, 2019 there was a meeting with the petitioner and 3 members;

Hon. Michael Machembu Chege, chairperson Roared Committee;

Hon. Moses Ndungu Kamau, Majority leaders; and

Hon. Joel Karuri Main, chairperson budget committee.

The meeting came up with a framework and budget and the 1st respondent members were to meet and come up with a schedule and criteria for implementation per cluster. The respondent was presented to the 1st respondent and to the petitioner on 28th February, 2019 with a rider that the same would commence upon the passing of the appropriation bill.

When the budget was passed the petitioner as invited to the Assembly to appear before the Budget and Appropriation Committee to defend it and was accepted. The preparatory works started and the authority to incur expenditure was communicated to the 1st respondent vide letter dated 5th April, 2019. The implementation dates had been revised.

From 9th April, 2019 to 30th June, 2019 a total of 503km graded roads were done and 72.5km gravelled in 34 wards. The programme was working well save for interruptions due to rains and topography of the areas covered especial in Kuresoi and Molo/Njoro.

For efficiency a meeting was held on 28th March, 2019 and a team appointed to drive the programme headed by the chief office. A time of the invitation to attend impeachment proceedings the programme was on-going.

The petitioner also avers that with regard to the street lighting programme there was no freezing of the same as alleged during the impeachment proceedings. The interested party allocated sufficient funds for the roll out of the same as the installations of street lights is done jointly with the national government requiring coordination with the respondents; there is need for maintenance and payment of power bills to be met by the interested party, the power bills were uncontrolled to the effect that the interested party be forced to pay for the programme to roll out translating to ksh.180 million which was high forcing the 3rd respondent to write to the national government over the matter. The petitioner also wrote to the 1st respondent on 17th October, 2018 seeking for the replacement of conventional lights to LED flood lights which are cheaper. A further request was done on 26th June, 2019 and a report was done to the 1st respondent on 24th June, 2019.

In his address to the 1st respondent on 1st February, 2019 the 3rd respondent was able to respond to all questions with regard to the street lighting programme. The interested party also appointed Isowatt Engineering Limited in May, 2019 to carry out energy Audit and the report is pending.

The alleged gross misconduct and failure to attend meetings as stated in the impeachment report is not correct. There was no summons by the 1st respondent and failed to attend unless the proposed date/day was not convenient and this was communicated.

The petitioner also avers in her affidavit that the department had operational challenges lacking enough technical personnel to prepare bills of qualities and to address this interested party advertised for assistant engineers in October, 2018. The county has only two fire engines in Naivasha and Nakuru. To address the matter the petitioner requested the 1st respondent for budget allocation for purchase of additional fire engines and this has been done and there are personnel being trained.

The interested party conducted a staff audit through Pricewaterhouse coopers and established her department lacked enough staff.

In this regard the impeachment proceedings were premeditated, unfair and unprocedural with political motivation. There were reports that 1st respondent members were frustrating contractors and stopping works forcing the petition to direct resident engineers as the only persons to authorise or stop work. This may have triggered animosity hence the impeachment proceedings which is not justified.

With the rights violations, the court should quash the decision of the 1st respondent.

1st and 2nd respondents

The 1st respondent filed the Replying Affidavit of the Clerk, Joseph Malinda and who avers that he is has authority of the 2nd respondent to respondent therein.

Mr Malinda avers that is the legislative arm of the interested party established under article 176 (1) of the constitution with mandate under article 185 and 195 and section 8 and 9 of the CGA. The 1st respondent exercised its mandate under section 40(2), (3), (4), (5) and (6) of the CGA where he law allow the passing of motion requiring the 3rd respondent to remove a CEC on the grounds spelt out under section 40(1) of the CGA.

Under the 1st respondent's Standing orders No.67 provides for the procedure for removal of a CEC and thus exercising its mandate commenced the process of removal of the petitioner and which culminated in the 1st respondent members voting to remove the member in charge of infrastructure.

Member of the 1st respondent filed a motion proposing the removal of the petitioner from office and on 25th June, 2019 there was a vote in favour of the motion. On 3rd July, 2019 the 1st respondent through leader of the majority party moved a motion to appoint 5 members to a select committee to investigate the allegations made against the Petitioner and report back within 10 days. The select committee was approved by the 1st respondent.

Mr Malinda also avers that he notified the petitioner of her impending impeachment proceedings against her vid letter dated 4th July, 2019 and informed her to attend before the select committee on 10th July, 2019 to give her defence. Enclosed were the charges and grounds of

impeachment to enable the petitioner prepare her defence.

The allegations made were that she was incompetent in that she failed to implement and coordinate various development programmes in her department of infrastructure especially the *Boresha Biashara [barabara] programme*. The 1st respondent committee on roads, transport and public works in exercise of its mandate prepared a report on the programme and forwarded it to the petitioner vide letter dated 28th February, 2019 for implementation but she altered it and prepared her own report without the input of the 1st respondent. There was no consultation.

The petitioner was alleged to be of gross misconduct where in several occasions she failed to honour committee invitation to appear before it contrary to section 22(1-3) of the County Assembly Powers and Privileges Act and Article 195 of the constitution. She used abusive and derogatory language against members of the public, staff and members of the 1st respondent thus demeaning the office occupied.

There was abuse of office by the petitioner interfering with procurement processes contrary to the constitution and Public Procurement and Asset Disposal Act.

Mr Malinda thus avers that the select committee made preliminary observations in the conduct of its duties which were forwarded to the petitioner by letter dated 9th July, 2019 and who attended to give her defence on 10th July, 2019 in the company of her legal counsel. The petitioner was allowed to give here defence in addition to the written memorandum.

The select committee invited several witnesses to appear before it to give testimony on the allegations made. There was a visit to the sites where complaints of poor workmanship had been received from members of the public and the committee made its report.

The 1st respondent received the committee's report dated 11th July, 2019 and on the conclusion that the allegations made against the petitioner met the threshold set by section 40 of the CGA recommended that the petitioner be removed from office.

The 1st respondent in its sitting of 16th July, 2019 resolved by a majority vote to adopt the report of the select committee, the removal of the petitioner from office and communicated this to the 3rd respondent by the 2nd respondent via letter dated 17th July, 2019.

The 1st respondent discharged its mandate under the constitution and the law of initiating and resolving to remove the petitioner from office. There was due process as provide for by the constitution, the CGA and the Standing Orders. The petitioner was granted the right to a fair hearing and her defence was duly considered by the 1st respondent.

The petition that the rights under article 25 and 50 of the constitution were violated is misplaced. The 1st respondent complied with article 50 of the constitution, section 40(3) of the CGA and Standing Order No.67 and the Court of Appeal in **County Assembly of Bongoma & 2 others versus Stephen Nendela & 2 others [2017] eKLR** held that article 50 of the constitution on the right to fair hearing does not apply to disciplinary proceedings such as the current proceedings but only apply to criminal proceedings.

The 1st respondent as a legislative arm of the interested party has a constitutional and statutory mandate and its decisions cannot be overturned unless there is misapplication or misdirection under the constitution or the law in its decision; there is an outrageous defiance of logic or of accepted moral standards; or there is departure from any procedural rules governing conduct or a failure to oversee the basic rules of natural justice as enumerated in **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

In the separation of powers, courts should not be seen to act as an appellant forum over decision of the other branches of government. The proceedings undertaken by the 1st respondent for the removal of the petitioner from office were above board and there are no rights violations as alleged. The orders sought to quash the decision of the 1st respondent cannot be granted as such is only due in judicial review proceedings as held in **Benjamin Kipkoech Kosgei versus Governor Nakuru County & 2 others [2019] eKLR**.

3rd respondent

The 3rd respondent filed the Replying Affidavit of Hon. Lee Kinyanjui and who avers that the petitioner is the county chief executive committee member in charge of youth, culture, sports and social services following a transfer from the department of infrastructure with effect from 15th July, 2019. The court on 2nd August, 2019 issued orders restraining the 3rd respondent from dismissing the petitioner from her current position held with the interested party.

The 3rd respondent also avers that the 1st respondent is mandated under the constitution to oversight county executive committee subject to the principles of separation of powers and may pass a resolution requiring the 3rd respondent to dismiss a member of the CEC for incompetence, abuse of office, gross misconduct among other grounds. Before removal from officer such member is entitled to the due process which entails fair hearing before an impartial and independent tribunal or body and under the doctrine of separation of powers the office of the 3rd respondent does not take part is the decision making process of the 1st respondent in its oversight role.

During any disciplinary process by the 1st respondent against a CEC whose possible consequences are loss of office, under the law a motion is moved by the County Assembly tat proceeds to carry out investigation and prosecutes before arriving at a decision. It is only fair for the court to independently evaluate the process on the basis of fairness in conformity with the constitution and the CGA.

Interested party

The interested party filed Replying Affidavit of Benjamin Njoroge the County Secretary and avers that the petition raises weighty

constitutional issues which requires full interrogation by the court and believes the petitioner has moved the occur tin good faith and in search of justice.

All the parties filed written submissions.

The petitioner submitted that the process of impeachment was in violation of her constitutional rights to fair hearing and fair administrative action pursuant to article 41, 47 and 50(1) of the Constitution. Upon invitation for hearing before the select committee the petitioner was denied a chance to cross-examine the deponents of the affidavits dated 13th and 18th March, 2019. Article 236(b) of the constitution protects public offices from dismissal or removal from office without due process as held in **Mary Kanyaman Ekai versus County Assembly of Samburu & another [2018] eKLR** where the court held the failure by the Committee to accord the petitioner an opportunity to cross examine the witnesses who had adverse evidence against here was contrary to fair administrative action. This is reaffirmed in the case of **Walid Khalid versus County Assembly of Mombasa & 2 others [2018] eKLR**.

The petitioner also submitted that she is entitled to the reliefs sought.

The 1st and 2nd respondents submitted that the petitioner is not entitled to the reliefs sought on the grounds that the 1st respondent has the constitutional and statutory mandate to oversight county executive organs under article 185 (3) of the constitution and which thus creates a separation of powers and the decisions of the 1st respondent should only be interfered with if they fail the principles of the constitution or the law. the petitioner being an employee and officer appointed by the 3rd respondent, the 1st and 2nd respondent played their role under section 40 of the CGA by addressing the allegation made against her and investigated the same and found her culpable and thus by a majority vote recommended removal from office.

There was due process followed and the remedy of judicial review sought to quash the decision of the 1st respondent is not available to the petitioner as this can only be secured by way of judicial review proceedings. This also allows for the separation of powers as held by the **Court of Appeal in Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

The 1st respondent ensured the petitioner's right to fair hearing was guaranteed as required under article 25© of the constitution and section 40(4) of the CGA. The petitioner attended hearing before the select committee with her legal representative and was allowed written memorandum. In **Judicial Service Commission versus Gladys Boss Shollei & another [2014] eKLR** the Court of Appeal held that article 25(c) of the constitution relates to fair trial and not disciplinary proceedings or the right to fairness as addressed under article 47.

With the power to oversight the county executive committee the 1st respondent acted within the law. the petitioner cannot invoke the provisions of article 50(2) of the Constitution since the 1st respondent only conducted disciplinary proceedings against her and these were neither criminal nor quasi-judicial despite the seriousness of the allegations made against her and relied on the cases of **Stephen Mring'a Masamo & 4 others versus County Assembly – Taita Taveta & 2 others [2017] eKLR; Judicial Service Commission versus Mbalu Mutava & another[2015] eKLR**.

The attendance of the petitioner before the select committee for hearing should not be equated to criminal proceedings as held in **County Assembly of Bungoma & 2 others versus Stephen Nendela & 2 others [2017] eKLR** and the petition should thus be dismissed with costs.

The 3rd respondent submitted that the power to dismiss a CEC has to be exercised in accordance with the constitution and the CGA and the principles of natural justice which provides for due process whereby both procedural and substantive fairness are adhered to as held in **Dr. Jopkoech Siria versus The County Secretary Uasin Gishu [2017] eKLR**.

While recognising the doctrine of separation of powers and the mandate of the respondents under the constitution and CGA under article 165(7) of the constitution the court has the power to make any order or give direction it considers appropriate to ensure the fair administration of justice as held in **The County Assembly of Bungoma versus Stephen Nendela & 2 others [2017] eKLR**.

The interested party submitted that under section 40 of the CGA the 1st respondent has constitutional and statutory mandate to oversight the county executive committee and any other executive organ and propose for the removal or dismissal of any CEC on the grounds of incompetence, abuse of office and gross misconduct.

The interested party submitted that the petitioner's contests that there process which resulted into the 1st respondent's decision and to recommend removal from office was in violation of the principles of natural justice as held in the case of **Stephen Mring'a Masamo & 4 others versus County Assembly – Taita Taveta & 2 others [2017] eKLR**.

In this regard, where the court finds the 1st respondent was in violation of the principles of natural justice then it will automatically follow that such decision recommending the removal from office of the petitioner is null and void.

Article 165 of the constitution allows the court supervisory jurisdiction over all bodies exercising a judicial or quasi-judicial function but not over superior court. the decision of the 1st respondent in this case is subject to interrogation by this court and where it does not met the constitutional and statutory threshold the same cannot stand as held in **Stephen Mring'a Masamo & 4 others versus County Assembly – Taita Taveta & 2 others [2017] eKLR** and **The County Assembly of Bungoma versus Stephen Nendela & 2 others [2017] eKLR**.

On the pleadings, the affidavits and written submissions the issues which emerge for determination can be summarised as follows;

Whether the 1st Respondent's motion and proceedings for the removal of the Petitioner from the Infrastructure CEC Portfolio was conducted

in accordance with the Constitution of Kenya, 2010, the County Governments Act, 2012 and the Nakuru County Assembly Standing Orders;

Whether the Petitioner is entitled to the reliefs sought;

Who should pay costs?

Article 47 of the Constitution, 2010 provides that fair administrative action is a constitutional as held in **Judicial Service Commission versus Mbalu Mutava & Another [2014] KLR**. It is also common ground that section 40(4) of the same Act dealing with the removal of a County Executive Member.

According to the petitioner, the proceedings before the 1st respondent's select committee on 10th July, 2019 and the sitting of the County Assembly on the 16th July, 2019 which resolved to the impeach her was without due process as during the hearing and in her defence she requested to be allowed to cross examine two members of the 1st respondent who had tendered affidavit evidence, Hon. Anthony Kiprono Rotich and Hon. John Mwangi Macharia but these requests were declined without any justifiable cause. That these two persons had tendered evidence which was adverse to the petitioner, it was not factual and required interrogation and the denial of the request to cross-examine these witnesses compromised the due process contrary to rules and procedure provided for in the Constitution, the CGA and the Nakuru County Assembly Standing Orders.

The 1st and 2nd respondents case is that in the impeachment proceedings against the petitioner were conducted within the law, there was notice issued informing her of the charges and invitation to attend the hearing which was done and her legal counsel and allowed to attend where she made both oral and written memorandum. The 1st respondent's select committee addressed all the allegations made and found the petitioner culpable. the decision taken can only be interfered with by the court taking into account there is separation of powers and the 1st respondent was undertaking its constitutional and statutory mandate and its decision cannot easily be overturned unless it is shown that the 1st respondent misapplied or misdirected itself; was outrageous and in defiance of logic or departed from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice.

The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. This is aptly captured by the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.

Therefore, when an issue arises as to the constitutionality of any act done or threatened by any person, entity or organ of government and the devolved unit such as the respondents, it falls upon the laps of the Judiciary to determine the same, As was held in **Jayne Mati & Another versus Attorney General and Another - Nairobi Petition No. 108 of 2011** at paragraph 31:

...separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution.

In my view the issue for determination before this Court is the manner in which the 1st respondent's select committee and ultimately the 1st respondent carried out the process of removal of the petitioner. It is the petitioner's case that in conducting its proceedings, the committee violated the provisions of the law and the Constitution. Various constitutional provisions were relied upon by the petitioner in this regard. There is no doubt at all that in undertaking its mandate the 1st Respondent is under a constitutional obligation to comply with the law and the Constitution since in so doing, the 1st and 2nd Respondents are required to apply the Constitution and the law. Clearly therefore there can be no doubt that before the said process of removal of the petitioner herein had to comply with the constitutional principles. The attendant principles are well outlined in the case of **Trusted Society of Human Rights Alliance versus Attorney-General & 2 Others [2012] eKLR** relied upon by the parties herein. See also **Francis Maliti versus County Assembly of Machakos & 2 others; Governor, Machakos County (Interested Party) [2019] eKLR**.

In the case of **County Government of Nyeri & another versus Cecilia Wangechi Ndungu Civil Appeal 2 of 2015** the Court of Appeal held that there were two methods by which a member of a County Executive Committee could be dismissed from service. Under section 40, a Governor could dismiss a County Executive Committee member on any specified ground following a resolution by the County Assembly for dismissal. Under section 31(a), a Governor could dismiss a County Executive Committee member on his own motion at any time if he considered it appropriate and necessary to do so.

Whichever method applies in the removal of a CEC it is qualified to the extent that that power could only be exercised reasonably and not arbitrarily. The court, cited above went on to state as follows;

From the language adopted by the legislator in enacting Sections 40 & 31(a) we discern two methods through which a member of a County Executive Committee can be dismissed. Firstly, under Section 40 a Governor can dismiss a County Executive Committee member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal is initiated by the County Assembly. Secondly, under Section 31(a) a Governor can dismiss a County Executive member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second mode that appears to vest an

element of discretion on the part of the Governor and which is the subject of interpretation in this appeal.

The respondent was dismissed from office by a letter dated 24th June, 2014 from the 2nd appellant pursuant to **Section 40 (1)** of the **County Governments Act**. Subsequently, by a letter of even date, the 2nd appellant corrected the earlier letter by indicating that the respondent's dismissal was pursuant **Section 31(a)** of the **County Governments Act**. ...

Faced with serious allegation likely to lead to removal of office, the petitioner was entitled to constitutional and statutory protections as the procedures envisaged under section 40(3) of the CGA are in their nature requires the call of evidence both oral and or written. So important is the principle of due process that article 236(b) of the constitution makes it mandatory to accord a public officer faced with due process before dismissal, removal from office or demotion;

A public officer shall not be—

(a) ...

(b) *Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.*

the sacrosanct of the principle of due is applied in the case of **Mary Kanyaman Ekai versus County Assembly of Samburu & another [2018] eKLR** that;

*I am satisfied from the material now before the court that the vetting of the Petitioner by the Respondent did not accord with the requirements for fair administrative action set out in **Article 47** of the Constitution of Kenya, 2010. The vetting was substantially based upon an adverse report of a previous ad hoc committee compiled without according the Petitioner an opportunity to cross-examine the witnesses who had given adverse evidence against her, and without according her an opportunity to testify and call witnesses to counter the allegations made against her. The case against her had not been served upon her before-hand as it should have been, so that she could prepare her defence. Her participation in the proceedings of the ad hoc committee was only as a witness who had been summoned to testify, just as other witnesses had been called to testify. It is not clear at what point the mandate of the ad hoc committee changed and became an investigation into the Petitioner's conduct. In any event, if there was any such change of mandate, the ad hoc committee ought to have put in place all necessary measures to ensure that from thence there was administrative fairness in respect to the Petitioner. She should at that point have been served with the allegations made against her and accorded necessary opportunity to prepare her defence, confront her accusers in cross-examination, and to testify on her own behalf and to call witnesses if she were so minded.*

The 1st respondent does not contest that the petitioner requested to cross-examine two members, Hon. Anthony Kiprono Rotich and Hon. John Mwangi Macharia and this request was declined. Such members had made affidavits with adverse information against the petitioner and faced with the possibility of removal from office, her request is hereby found legitimate and reasonable in the circumstances.

Also the 1st respondent does not address the fact that there were two witnesses Wycliff Agesa and Dan Murugu with contradictory evidence and that the petitioner in her defence requested to have the evidence of Engineer Daniel Muthiga the director of roads and director of supply chain management which was declined thus impeding the entire process and findings of the select committee.

Ultimately, the findings by the select committee that the petitioner was incompetent, of gross misconduct, was in abuse of office whereas it locked out key and crucial evidence and denied the petitioner the fair chance to cross-examine the witness called or call her own witnesses, the findings on her culpability became subjective and without basis. Without the due process of a fair administrative action, to proceed and recommend the impeachment of the petitioner under the provisions of section 40 of the CGA was premature.

In **Walid Khalid versus County Assembly of Mombasa & 2 others [2018] eKLR** the court held that under Article 236 (b) of the constitution, which protects public officers from dismissal or removal from office without due process of the law.

In view of the matters aforesaid, I grant prayer (a) of the petition that is, a declaration that the first respondent's recommendation for the impeachment and removal from office of the petitioner was unconstitutional and unlawful on account of violation of section 40 of the CGA as read with Article 47 and 236 of the Constitution. The failure to follow a mandatory statutory procedure for the removal of a CEC who is a public officer under the constitution, was an affront to Article 236(b) constitution which protects public officers from dismissal, or removal from office without following due process of the law.

On the relief for an order of certiorari to quash the decision of the 1st respondent, the findings above on the unconstitutional and unlawful procedures, the decision cannot stand as there is no foundation.

Accordingly, the petition is allowed and a declaration hereby issues that the proceedings for the removal of the petitioner from the infrastructure Portfolio of the interested party was conducted in violation of the Constitution, 2010 the provisions of the County Governments Act, 2012 and the Nakuru County Assembly Standing Orders, and hence unconstitutional, illegal, null and void.

Each party shall bear on costs.

Delivered at Nakuru this 27th day of February, 2020.

M. MBAR?

JUDGE

In the presence of: