



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

HC MISC. CIVIL APPLICATION NO. 1 OF 2018 (JR)

ELRC JR. 7 OF 2019

IN THE MATTER OF ARTICLES 2(1)(2), 10(1), 21(1), 22, 23, 27, 47(1), 73, 75, 159(1)(2), 165(3), 179(2)(7), 182, 232(1), 259 & 260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT (NO. 7 OF

2012)

BETWEEN

SHEILA WARUGURU GITHAIGA.....APPLICANT

AND

THE GOVERNOR, NYERI COUNTY.....1ST RESPONDENT

THE COUNTY SECRETARY, NYERI COUNTY.....2ND RESPONDENT

JUDGMENT

1. The Applicant initiated her Judicial Review Application in the High Court and the High Court in a considered Ruling delivered on 16th May 2019 remitted the matter to this Court as the Applicant was asserting her employment rights which the High Court found to fall within the mandate of the Court established under Article 162(2)(b) of the Constitution. That is how this matter is before this Court.

2. In the main, the Applicant herein asserts that upon application for consideration for appointment as County Executive Committee Member (CEC) in charge of Youth, Gender, Sports and Social Services (present Department of Gender, Sports and Social Services) in Nyeri County and upon nomination by the Governor followed by successful interview and vetting by the County Assembly of Nyeri Committee on Appointments and eventual approval by the whole sitting of the County Assembly of Nyeri appointed to the position of CEC Youth, Gender, Sports and Social Services. The Applicant was however neither sworn into office nor given a letter of appointment during the term of the late Governor Wahome Gakuru. The Applicant asserts that this was despite the appointees to other CEC portfolios and County Secretary taking the oath of office and being given letters of appointment and officially assuming their duties. The Applicant asserts that upon the demise of the late Governor Wahome Gakuru and the assumption into office of His Excellency Governor Mutahi Kahiga the 1st Respondent, the latter in exercise of powers conferred upon him by Article 179 of the Constitution retained the appointees picked by his predecessor and had them sworn into office albeit to the exclusion of the Applicant despite her being among the initial nominees picked by the late Governor. The Applicant thus sought an order of mandamus to compel the Respondents to immediately and unconditionally facilitate the swearing in of the Ex parte Applicant as the duly appointed County Executive Committee Member in charge of Gender, Sports and Social Services for Nyeri County. Contemporaneously the Applicant sought an order of prohibition to bar the Respondents from recruiting, selecting, nominating or appointing and/or allowing any other person other than the Ex parte Applicant from assuming office as County Executive Committee Member in charge of Gender, Sports and Social Services for Nyeri County.

3. The Respondents filed a Replying Affidavit sworn by the County Secretary of the 2nd Respondent and in it, the Respondents assert that the Judicial Review motion by the Ex parte Applicant was frivolous, vexatious, fatally defective and an abuse of the court process as the entire application had not raised any justiciable issue for determination by this Court as the Ex parte Applicant was only nominated by the late Governor of Nyeri County as the County Executive Committee Member in charge of Youth, Gender, Sports and Social Services but however had not been appointed for reasons as articulated in the Ex parte Applicant’s verifying affidavit. The Respondents assert that even if she had

been appointed as a County Executive Member the law provides that upon the death of the Governor the County Executive Members ceases to hold office with immediate effect so as to allow the Governor who assumes office discretion to appoint his own County Executive Committee. The Respondents assert that the 1st Respondent cannot be compelled to appoint the Applicant to office and that in any case the 1st Respondent had already appointed a holder to the said office and consequently the orders sought cannot be granted. The Respondents are of the view that an order of mandamus cannot be issued against the Governor to compel him to swear the Applicant into office before she is formally appointed under the law and that there is no public duty that the 1st Respondent has failed to perform. The Respondents assert that the appointment of another person to hold the office of County Executive Committee Member in charge of Gender, Youth, Sports and Social Services was not unconstitutional, unfair, discriminatory or illegal as the appointee met the requirements set out under Section 35(3) of the County Governments Act 2012 and the Constitution. The Respondents finally assert that the decision to retain and swear into office 9 other CECs and one County Secretary previously appointed by Governor Wahome Gakuru (deceased) to her exclusion was not discriminatory nor violation of the basic tenets of fairness in the discharge of public duty as baseless and untrue.

4. The Applicant seeks to be appointed as a CEC in the ministry of Gender, Youth, Sports and Social Services in the County Government of Nyeri as she was ostensibly nominated and vetted for the position during the term of Governor Wahome Gakuru now deceased. Under the Constitution of Kenya 2010, Article 179(7) provides as follows:-

179(7). If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.

From the clear reading of the Constitution, where the Governor ceases to hold office, the members of the County Executive Committee appointed to office as provided for in Article 179(2)(b) cease to hold office. As the Ex Parte Applicant was a putative holder of the office when the late Governor of Nyeri H. E. Governor Wahome Gakuru passed away, she ceased to hold office automatically. There is no Constitutional duty the 1st Respondent who is the present Governor of Nyeri County owed the Ex Parte Applicant to appoint her to office or otherwise process her nomination past this constitutional imperative to drop her. As such, this Judicial Review application is wholly devoid of merit and is an abuse of the Court process only fit for dismissal. The application is dismissed with costs to the 1st and 2nd Respondents.

5. This decision was rendered in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50 and is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 28th day of May 2020

Nzioki wa Makau

JUDGE