



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 34 OF 2019

(Before Hon. Justice Mathews N. Nduma)

FRANCIS ANGUEYAH OMINDEPETITIONER

VERSUS

HE. DR. WALTER OTTICHILO.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF VIHIGA.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF VIHIGA3RD RESPONDENT

AND

HENRY MAG'ONG'O LUMBASION 1ST INTERESTED PARTY

ALFRED INDECHE2ND INTERESTED PARTY

GEOFFREY LUKAYA LUGALIA3RD INTERESTED PARTY

PAUL JISEVE MBUNI.....4TH INTERESTED PARTY

PAMELA MBAGAYA KIMWELE5TH INTERESTED PARTY

JUSTUS INONDA MWANJE6TH INTERESTED PARTY

FELISTUS OKUMU7TH INTERESTED PARTY

AMOS KUTWA8TH INTERESTED PARTY

KENNETH ELAVUNA KESEKO9TH INTERESTED PARTY

MARITA M. AGUFANA10TH INTERESTED PARTY

CHRYSOSTOME MKHUMBIRI AGAVA11TH INTERESTED PARTY

ABISAI AMATALO12TH INTERESTED PARTY

RICHARD KEMBOI13TH INTERESTED PARTY

CHRISTOPHER ETALE TUNYA14TH INTERESTED PARTY

ARNOLD MAMADI15TH INTERESTED PARTY

CLEMENT MANYULU.....	16 TH INTERESTED PARTY
PAMELA BUSUMU	17 TH INTERESTED PARTY
MARY ANYENDA	18 TH INTERESTED PARTY
PHILIP GAVUNA	19 TH INTERESTED PARTY
LUCY AJAI	20 TH INTERESTED PARTY
GILBERT VIDIJA.....	21 ST INTERESTED PARTY

RULING

1. The application dated 2nd October 2019 sought an order in the following terms:
2. A conservatory order to issue in terms that pending the hearing and determination of the petition, the provision in the petitioner's appointment letter and in the appointment letters issued to the interested parties limiting their respective tenures to 2 or 3 years in each case are suspended and the petitioner and interested parties shall remain in office and continue to serve in their respective positions until the petition is heard and determined.
3. Interim conservatory order in terms stated above was issued by the Court on 16th October 2019 pending hearing and determination of this application.
4. Meanwhile the terms of the interested parties whose terms were to end in October 2019 were varied and the terms extended by three years ending on various dates from the year 2020.
5. Therefore, the matters that remain alive are that of the petitioner and that of the 7th interested party Felistus Okumu who deposes that the 1st and 3rd respondents intend to replace him as an Executive committee member of the 3rd respondent with one Mary Nelima Amalemba.
6. The 1st and 3rd respondent also filed an application under certificate dated 2nd November 2019 seeking to set aside the ex parte order issued in favour of the petitioner and interested parties. The court directed on 4th December 2019 that both applications be heard together by way of written submissions.
7. Furthermore, on 19th November 2019 eight (8) interested parties whose terms had been extended to the full term of 5 years filed affidavits disassociating themselves from the petition. These include the 1st, 2nd, 8th, 12th, 18th, 19th, and 21st interested parties.
8. The aforesaid parties having disassociated themselves from the suit are now struck out from the suit.
9. The issue for determination in the two applications is whether the application dated 2nd October 2019 met the threshold for grant of conservatory order in terms of the interim orders already issued pending the hearing and determination of the petition.
10. In this matter, having considered the founding affidavits in both applications, the replying affidavits and the written submissions, the court proceeds thus: -
11. The test for grant of conservatory orders in public law dispute was set by the supreme Court in the case of **Gatirau peter Munya – VS- Dickson Mwenda Kithinji and 2 others (2014) eKLR** as follows: -
12. *“Conservatory orders bear a more decided public law connotation for these orders are to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court, in the public interest, conservatory orders, therefore, are not unlike interlocutory injunctions linked to such private party issues as the prospects of irreparable harm occurring during the pendency of a case or high probability of success in the supplicant’s case for orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cause.”*
13. The court is mindful that during the interlocutory stage of court proceedings, the court should avoid pre-determining disputes of facts on the merits.
14. In the present matter however the facts advanced by the parties are common cause being that the petitioner and the interested parties left in the suit were on diverse dates appointed by the 1st and 3rd respondents as Executive committee members of the County Government of Vihiga in different portfolios for periods of between 2 or 3 years.
15. That the terms of the appointments were nearing expiry when this matter was filled for the court to determine whether it is lawful and constitutionally sound for the Governor to appoint Executive members for periods of less than the five (5) year elective term of the Governor.
16. This is the matter to be determined on the merits upon hearing the petition.

17. The arguments advanced by the petitioner/interested parties/ applicants is that the Governor is obliged to appoint the CECs for a full five years term and not abridge their tenure to 2 and 3 year contracts. That the action by the Governor to abridge appointments is unlawful and unconstitutional and therefore null and void.
18. The respondents rely on the case of **National Bank of Kenya Ltd – VS- Piplastic Sanbicolit (K) Ltd & another (2001) eKLR** in which the Court of Appeal held that: -
19. *“ A court of Law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. ” for the proposition that the abridged contracts are lawful and the Court lacks authority to rewrite them and extend the terms of the applicants to five (5) year period as prayed by the applicants.*
20. The Principle was also set out in *Pius Kimayo Langat –VS- Co-operative Bank of Kenya Ltd (2017) eKLR* where the court stated: -
21. *“ We are alive to the hallowed maxim that it is not the business of the Courts to rewrite contracts between parties. They are bound by terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”*
22. Article 179 of the constitution of Kenya 2010 provides: -
23. *“(2) The County Executive committee consists of: -*
- a. The County governor and Deputy County governor and*
 - b. Members appointed by the county Governor with the approval of the assembly from among persons who are not members of the assembly.”*
24. The provision does not state the period which the Executive Committee members are to hold office for but under sub – Article (7) thereof, is provided: -
25. *“ If a vacancy arises in the office of the County Governor the members of the County Executive Committee appointed under clause 2(b) cease of hold the office.”*
26. It would appear therefore that the terms of service of Executive Committee members and that of the Governor are tied by the constitution on the hip.
27. Furthermore, section 42(1) of the County Governments Act 2012 Provides: -
28. *“when a general election is held for a County Government the outgoing County Executive committee shall remain in office until a new county Executive committee is constituted after the election.*
29. *(2) The constitution of a new executive after an election under sub- section (1) shall be finalized within 21 days of the swearing in of the members of the County assembly.”*
30. The Act also provides for removal of County Executive Committee under sections 31,39 and 40 thereof.
31. The issue whether the Governor may lawfully abridge the term of an Executive committee member at the time of appointment to a lesser term than that of the governor in a written contract is a weighty matter that require full determination upon hearing of the petition on the merits.
32. Accordingly, the petitioner/interested party applicants in the application dated 2nd October 2019 have satisfied the criteria set out in the Munya case (Supra).
33. Accordingly, the application by the 1st and 3rd respondent dated 2nd November to set aside interlocutory orders granted by the court on 16th October 2019 is dismissed and the application dated 2nd October 2019 is granted thereby confirming the conservatory orders issued on 16th October 2019.
34. Accordingly, a conservatory order is issued prohibiting the 1st and 3rd respondents from limiting the respective tenure of the petitioner/interested parties/ applicants to 2 or 3 years and replacing anyone or all of them with other persons named or not in this suit until the petition is heard and determined.
35. For the avoidance of doubt, this order applies to all Executive committee members whose terms have not been extended to full five (5) year term in their letters of appointment.
36. Furthermore, due to the constraints presented by COVID – 19 Pandemic, the court takes this opportunity to give directions on the hearing and determination of the petition as follows: -
37. The respondents/interested parties to file responses to the petition within 14 days of the Ruling. The petitioner to file final submissions

within 7 days of service and the respondents/interested parties to file final submissions within 7 days of service.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

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 March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Musiega for petitioner/Applicant

Mr. Mwamu for 7th interested party

Mr. Juma for 1st and 3rd respondents.

M/s khasyela for 2nd Respondent.

Chrispo: Court Clerk