



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 12 OF 2020

(Before Hon. Justice Mathews N. Nduma)

GEOFFREY AGWERA NDUBIPETITIONER

VERSUS

HON. JOHN OBIERO NYANGARAMA1ST RESPONDENT

THE COUNTY ASSEMBLY OF NYAMIRA2ND RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA3RD RESPONDENT

MR. SHEM KIAGE4TH RESPONDENT

DR. STELLA MORAA5TH RESPONDENT

MS. STELLA NYAMORAMBO6TH RESPONDENT

DR. SAMSON BARONGO7TH RESPONDENT

AND

GLADYS BOGONKO MOMANYI.....1ST INTERESTED PARTY

PERIS NYABOKE OROKO.....2ND INTERESTED PARTY

JOHNSTONE OBIKE NDEGE.....3RD INTERESTED PARTY

SAMUEL MOKUA MAIKO.....4TH INTERESTED PARTY

RULING

1. The petitioner/Applicant in the application dated 21st April 2020 sought an order in the following terms *inter alia*:
2. That pending the hearing and determination of this petition the court be pleased to grant conservatory orders restraining the 1st and 3rd respondents from interfering with the tenure of the interested parties or replacing the interested parties as Executive Committee members of the 3rd respondent with the 4th, 5th, 6th and 7th respondents or any other person.
3. The court granted an interim conservatory order pending the hearing and determination of this application.
4. The respondents filed an urgent application dated 29th April 2020 seeking an order *inter alia* to set aside the interim conservatory orders issued by the court on 21st April 2020 and dated 23rd April 2020.

5. The court issued an order joining the applicant in the application dated 29th April 2020 as an interested party in this suit and the application dated 29th April 2020 was deemed to be a response to the application dated 21st April 2020 and the applicant in the new application was directed to file a replying affidavit to the earlier application together with written submissions.

6. The parties have adhered to the directions in the matter including filing written submissions and the matter is due for ruling on the first application dated 21st April 2020.

Determination

7. The issue for determination is whether the petitioner/Applicant has satisfied the requirements for grant of a conservatory order in a public law suit as set out in the case of **Gatirau Peter Munya – VS- Dickson Mwenda Kithinji and 2 others (2014) eKLR** as follows: -

8. *“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, orders 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.”*

9. The Court is mindful as guided by the East African Court of Justice in Mary Alividza case that during the interlocutory stage of proceedings, it should refrain from determining disputes of fact on their merits.

10. In the present matter however, the facts advanced by the parties are common cause being that the interested parties were appointed on diverse dates as Executive Committee members of Nyamira, County Government after elections of 2017.

11. That the interested parties expected to serve the 5 year term but were given letters of two (2) years fixed term contract. That other members of the Executive Committee were granted the full five (5) year term. That upon appointment the interested parties’ appointments were gazetted in a gazette notice dated 8th November 2017 which did not indicate that their appointment was for two (2) year period.

12. That the 1st respondent is in the process of replacing the interested parties with the named 4th to 7th respondents in the County Executive Committee.

13. That arguments by the petitioner/interested parties/applicants is that the action by the Governor to abridge their appointments to 2 year fixed contract is unlawful, unconstitutional and therefore null and void.

14. That the said action in any event neglect the legitimate expectation by the interested parties that they were to serve the full five (5) year term until the next general election is conducted, unless they are lawfully removed from officer in terms of the constitution and the applicable provisions of the County Governments Act, 2012.

15. The respondents on the other hand have submitted that the application lacks merit in that the applicants have not satisfied the requirements for issuance of conservatory orders in public institutions and rely on the case of **Securicor Courier (K) Ltd – VS- Benson David Onyango & another (2008) eKLR** where the Court of Appeal cited **L’ ESTRANCE F. GRAUCOB LTD (1934) 2 K. B. 394** as follows: -

16. *“ When a document containing contractual terms is signed, in the absence of fraud or willful misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not” and Denning L. J. in Curtis –VS- Chemical Cleaning Dyeing Co. Ltd (1951) 1 aii e. r 631 as follows: -*

17. *“ If a party affected signs a written document knowing it to be a contract which governs the relation between him and the other party, his signature is irrefragable evidence of his assent to the whole contract including the exemption clauses to be obtained by fraud or misrepresentations.”* for the proposition by the respondents that the applicants are bound by the terms of the two year contracts they signed between themselves and the County Government and cannot now be heard to say that they were appointed and should serve a five (5) year term.

18. The respondents submit therefore that the Court cannot rewrite the contracts of appointment of the applicants and grant them a five (5) year term. See the case of **National Bank of Kenya ltd –VS- Piplastic Sanbkolit (k) Ltd & another (2001) eKLR** in which the Court of Appeal held that: -

‘ ‘ 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. ‘ ‘.

19. The respondents pray the application be dismissed with costs.

Determination

20. Article 179 of the constitution of Kenya 2010 provides: -

21. “(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.”

22. The provision does not state the period which the Executive Committee members are to hold office but under Sub – Article (7) thereof is provided: -

23. “ If a vacancy arises in the officer of the County Governor the members of the County Executive Committee appointed under clause 2(b) cease to hold office.”

24. 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.

25. On this, the Court of Appeal in the case of **Kisumu County Service Board & another –VS- Samuel Okuro & 7 others (2018) eKLR** stated: -

26. “ In regard to removal of County executive committee members, section 39 and 40 of the CGA provided that the County Executive Committee members are accountable to the Governor in the performance of their duties and gives the Governor powers to remove a County Executive Committee member on grounds such as incompetence, abuse of office, gross misconduct, failure to attend 3 consecutive meetings and gross violation of the constitution.”

27. Even more important for the purpose of this suit the Court of Appeal went on to state: -

28. “Further, under Article 179 (7) the term of office of executive committee members appointed by the Governor is tied to the term of the appointing Governor such that if the Governor cease to occupy the office, the appointment of the Executive Committee member also ceases.”

29. Without preempting determination of the petition on the merits, the court finds that the petition herein presents very weighty public law issues for determination on the merits in this petition.

30. Accordingly, the court finds that the applicants have satisfied the test set in the Munya case (supra). The court finds therefore that the application has merit and is granted.

31. The Court therefore confirms the interim conservatory orders issued on 21st April 2020 and dated 23rd April 2020 in the extract.

32. For the avoidance of doubt the court orders as follows: -

33. Pending the hearing and determination of the petition, the Court grants conservatory orders restraining the 3rd respondents from interfering with the tenure of the interested parties or replacing the interested parties as Executive Committee members of the 3rd respondent with the 4th, 5th, 6th, and 7th respondents or any other person.

34. 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: -

35. The respondents and interested parties to file their response to the petition (if not yet filed) within 14 days of the Ruling. The petitioner to file final submissions within 7 days of service and the respondents and interested parties to file their final submissions within 7 days of service.

36. Costs in the cause.

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. Mwamu for the petitioner/Applicant

M/s Abisa & Co. Advocates for 1st and 3rd Respondents

M/s. Onsongo & Co. Advocates for the 4th, 5th, 6th and 7th Respondents.

M/s Anyasa & Co. Advocates for 5th interested party.

The 1st, 2nd, 3rd and 4th interested parties in person (and represented by the 4th interested party).

Chrispo: Court Clerk.