



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 228 OF 2019**

**IN THE MATTER OF: ARTICLES 1, 2(1), 3, 10, 19, 20, 21, 22, 23, 24, 47, 48, 165(3), 174, 175, 176, 179, 183, 236 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011**

**AND**

**IN THE MATTER OF: SECTIONS 35 AND 40 OF THE COUNTY GOVERNMENTS ACT, 2012**

**AND**

**IN THE MATTER OF: SECTIONS 4, 5, AND 6 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF: ORDERS 62, 63 AND 64 OF THE KITUI COUNTY ASSEMBLY STANDING ORDERS**

**BETWEEN**

**PHILIP MUTINDA MUMO.....PETITIONER**

**v**

**GOVERNOR, COUNTY OF KITUI.....1<sup>st</sup> RESPONDENT**

**SPEAKER, COUNTY ASSEMBLY OF KITUI.....2<sup>nd</sup> RESPONDENT**

**COUNTY ASSEMBLY KITUI.....3<sup>rd</sup> RESPONDENT**

**DAVID THUVI.....4<sup>th</sup> RESPONDENT**

**ALEX N. MUSILI.....5<sup>th</sup> RESPONDENT**

**JACOB M. KAVOLONZA.....6<sup>th</sup> RESPONDENT**

**ANNE M. MUMO.....7<sup>th</sup> RESPONDENT**

**BONIFACE K. KATUMO.....8<sup>th</sup> RESPONDENT**

**PETER M. KILONZO.....9<sup>th</sup> RESPONDENT**

**JUDGMENT**

1. Philip Mutinda Mumo (Petitioner) was gazetted as the County Executive Committee member for Trade, Co-Operatives and Investments,

County Government of Kitui on 8 November 2017.

2. Prior to the appointment, the Petitioner was interviewed, vetted and approved by the County Assembly of Kitui on or around 2 November 2017.
3. On 3 July 2019, the County Assembly after a public outcry resolved to inquire into the authenticity of academic qualifications/educational credentials of all the County Executive Committee Members. The Committee on Appointments was tasked with the responsibility.
4. The Committee on Appointments carried out the mandate and it presented a Report on Verification of Educational Credentials for the Kitui County Executive Committee Members sometime in July 2019.
5. Amongst the recommendations of the Committee was that the Governor removes from office the Petitioner within 7 days on the ground that he had violated section 35(3) of the County Governments Act (it was alleged the Petitioner had presented a forged degree certificate from Mt. Kenya University) and in default, the County Assembly should proceed to impeach him.
6. The County Assembly approved/adopted the recommendation on 6 August 2019 and the Governor was notified through a letter dated 8 August 2019.
7. In a response dated 14 August 2019, the Governor indicated that because of the illegal and unprocedural manner the County Assembly had reached the decision, she would not remove the Petitioner from office. The Governor also reminded the County Assembly that it had approved the appointment of the Petitioner in 2017, after a rigorous process.
8. The Governor having rebuffed the resolution of the County Assembly to remove the Petitioner from office, the County Assembly initiated an impeachment process by debating a motion for the removal of the Petitioner as result of which it appointed a 5 member Special Committee.
9. The Special Committee recommended to the County Assembly that the Petitioner be removed in terms of section 40(6)(b) of the County Governments Act as read together with Standing Order 62(10).
10. The County Assembly adopted the recommendation on 20 November 2019.
11. On 29 November 2019, the Petitioner moved this Court under a certificate of urgency seeking a conservatory order restraining the Governor, County of Kitui from removing him from the position of County Executive Committee member.
12. Filed together with the Petition was a motion which was determined (over time the Court gave various directions which the parties did not comply with within the agreed timelines as well as various interlocutory questions).
13. Instead of progressing the Petition to a hearing on the merits, the Petitioner filed another application dated 22 June 2020 and when the application came up on 3 July 2020, the Court directed that both the motion and the Petition would be heard together.
14. In this regard, the Court directed the parties to file and exchange affidavits and submissions.
15. Pursuant to the directives, the following were filed
  - (i) A replying affidavit sworn by the Speaker of the County Assembly on 1 July 2020.
  - (ii) A further affidavit by the Petitioner sworn on 9 July 2020.
  - (iii) Petitioner's final submissions on 10 July 2020.
  - (iv) 1<sup>st</sup> Respondent's submissions on 29 July 2020.
  - (v) 2<sup>nd</sup> to 9<sup>th</sup> Respondents submissions on 16 July 2020.
16. The Court has considered all the material placed before it including the case-law.
17. The Petitioner isolated 7 Issues as arising for the Court's determination, to wit
  - (i) Whether the Honourable Court is clothed with jurisdiction to adjudicate the matter, and if so, to what extent.
  - (ii) Whether the County Assembly *Re-vet* (sic) the Petitioner.
  - (iii) Whether the County Assembly could carry out the authentication/investigation of the Petitioner's degree certificate.
  - (iv) Whether there was substance in the resolution for removal of the Petitioner from the County Executive of Kitui County.

(v) Whether the process leading to the resolution was procedurally fair and constitutional.

(vi) Whether the Petitioner has proved his case.

(vii) What order to costs?

18. The 1<sup>st</sup> Respondent identified 5 Issues for the Court's determination

(i) Is the Court seized with a justiciable issue?

(ii) Was the 2<sup>nd</sup> to 9<sup>th</sup> Petitioners (sic) engaged in *re-vetting* or an impeachment process?

(iii) Whether this exercise was driven by standing order no. 62 (removal from office) or no. 42 on approval of public appointments?

(iv) Did the County Assembly exercise procedural fairness while calling for the removal of the Petitioner from office?

(v) Does section 31 of the County Governments Act set a time frame within which the Governor can dismiss a CEC once an assembly passes a resolution for their removal?

19. On their part, the 2<sup>nd</sup> to 9<sup>th</sup> Respondents identified 2 Issues for determination being

(i) Whether the County Assembly has powers to vet and deliberate on the conduct and competence of County Executive Committee members.

(ii) Whether there has been any violation of the Petitioner's fundamental rights and freedoms?

20. Save for language, the Issues identified by the parties are broadly the same.

21. For the record, it is pertinent to note at this juncture that the Governor supported the Petition(er).

### **Jurisdiction of the Court**

22. In paragraphs 21 and 22 of the Petition, the Petitioner set out the jurisdictional foundation of this Court and the High Courts' mandate as relates to disputes concerning the interpretation of the Constitution as the same may relate or arise from employment and labour relations.

23. In the same vein, the Petitioner outlined in paragraphs 49, 51, 52 and 53 of the Petition why he had opted to approach this Court.

24. The replying affidavits filed on behalf of the Respondents (Speaker and Deputy Clerk, County Assembly) did not at any one point question the jurisdiction except on the ground of separation of powers (responding to assertions introducing the question of the impeachment of the Governor and the initial motion).

25. Indeed, the authorities cited by the Petitioner (*County Government of Nyeri v Cecilia Wangeci Ndungu* (2015) eKLR; *Eunice Jepkoech Siria v County Secretary, Uasin Gishu* (2017) eKLR and Nairobi High Court Petition No. 209 of 2020, *Charity Kaluki Ngilu v County Assembly of Kitui & 2 Ors* (unreported) point to the jurisprudence that the Courts have jurisdiction over disputes relating to the removal and/or dismissal of a County Executive Committee member.

26. The rationale being that when debating and proposing the removal of a County Executive Committee member, the Assembly is exercising power and sitting as a quasi-judicial tribunal subject to the jurisdiction of the Court.

27. Considering that it is the Petitioner who invoked the jurisdiction of the Court, the Court is at a loss as to why he in the same breathe appeared to believe the Court lacked jurisdiction.

28. The Court finds that it has jurisdiction.

### **Re-Vetting/Investigation of a County Executive Committee member**

29. Issues 2, 3 and 5 as identified by the Petitioner and Issue 1 as presented by the Respondents speak to one broad question, whether a County Assembly is clothed with the mandate to relook at the qualifications and/or eligibility of a County Executive Committee member after initial approval.

30. The Petitioner maintained that because he had undergone a vetting before the appointment as a County Executive Committee member, wherein his academic qualifications were part of the criteria evaluated, it was not open to the County Assembly to purport to re-vet him on the same criteria without affording him an opportunity to be heard.

31. For the assertion, the Petitioner drew comfort from the decision of the High Court in *Adrian Kamotho Njenga v Attorney General & 2 Ors* (2020) eKLR.

32. On whether it was open to the County Assembly to purport to investigate the authenticity of his degree certificate, the Petitioner and Governor relying on *William Kabogo Gitau v Ferdinand Ndungu Waititu* (2016) eKLR, asserted that the allegations should have at the first instance been placed before the criminal investigative bodies, the Kenya Police Service and the Director of Public Prosecutions.

33. The Petitioner also asserted that the County Assembly could not purport to rely on or investigate afresh documents (degree certificate) he had provided during the (initial) approval process and determine that it had been forged.

34. Section 40 of the County Governments Act places the function of removal of a County Executive Committee members on the shoulders of both the Governor and the County Assembly.

35. The grounds for removal are outlined in the section and prior criminal investigations by the Kenya Police Service or Director of Public Prosecutions is not one of the grounds.

36. If the agencies were to investigate, in the view of the Court, such investigations would have other objectives and purposes under the criminal justice system.

37. In the instant case, the Petitioner was removed allegedly for having been in gross violation of the Constitution as read with section 35(3) (b) of the County Governments Act in that he presented a forged degree certificate, giving of false information in violation of the First Schedule of Public Appointments (County Assemblies Approval) Act, and incompetence in that he did not possess a degree, a prerequisite for appointment as County Executive Committee member thus rendering him automatically unqualified.

38. It appears that the question of the degree certificate being a forgery was not considered during the initial approval process.

39. About two years after approval, due to public outcry, the County Assembly decided to look afresh at the certificates of all the County Executive Committee members.

40. Was it unlawful for the County Assembly to revisit the eligibility criteria?

41. The Court does not think so, and more so in an instant like the one under consideration where there was the discovery of new material which had not expressly been unearthed at the initial approval hearing.

42. The question of whether the degree certificate provided by the Petitioner was genuine or valid was never put for the determination during the approval process.

43. If it was, there was nothing placed on record to suggest that a decision was reached on the point. It cannot, therefore, be that the County Assembly considered whether it was a forgery or not.

44. A County Executive Committee member is a state officer and there are certain minimum legal criteria one should possess to qualify for the office.

45. Article 73 of the Constitution provides that authority assigned to a state officer should bring honour and confidence in the integrity of the office. Personal integrity is one of the guiding principles for such a position.

46. The principles are given context in the Leadership and Integrity Act and more so section 13 of the Act.

47. The Petitioner was under an obligation to give full and accurate information during the approval process. If doubts arose after approval, it is the view of the Court that it would still be open to the County Assembly to inquire into the doubts under the gross misconduct ground.

48. The removal process of a County Executive Committee member is also primarily a political one but ring-fenced by procedural legal protections, and in the view of the Court provided the procedural protections are adhered to, there should be no hindrance to a County Assembly using new facts and/or information which may have been implicated in the approval hearing for removal proceedings.

#### **Procedural fairness/administrative fairness**

49. Issue 5 as raised by the Petitioner was captured by the Governor as Issue No 4 and by the other Respondents as Issue 2.

50. Article 47 of the Constitution assures every person of the right to fair *administrative action* that is expeditious, efficient, lawful, reasonable and procedurally fair.

51. Article 236 protects public officers from removal from office without due process.

52. The Petitioner's relationship with the Respondents was more than that of an ordinary employee and the Court has no hesitation in finding that he was entitled to the right to fair administrative action and due process of the law.

53. The process leading to the recommendation for the removal of the Petitioner was conducted in at least three stages.

54. The first stage involved the resolution in or around 3 July 2019 to mandate the Committee on Appointments to inquire into the

authenticity of the Petitioner's academic qualifications/certificates.

55. The resolution was preceded by the debate on a motion moved by a Member of the County Assembly.

56. The report by the Committee on Appointments (July 2019) does not on its face indicate whether the Petitioner was granted an opportunity to appear and be heard. The Committee, however, recommended to the County Assembly the commencement of removal proceedings if the Governor did not act.

57. The Petitioner did not draw the attention of the Court to any express provision of the law, Standing Orders of the County Assembly and/or any practice and tradition of a legislative assembly entitling a party to be afforded a hearing before such a type of motion is debated.

58. The Governor did not agree with the course suggested by the Committee on Appointments and/or County Assembly to remove the Petitioner and this triggered the second phase of the process.

59. The second phase commenced with a motion being moved for the removal of the Petitioner on 29 October 2019. The motion was anchored on section 40 of the County Governments Act and Standing Order 62 of the County Assembly's Standing Orders.

60. Upon approval of the motion, a Special Committee was appointed on 5 November 2019. The Committee presented its Report to the plenary of the Assembly on 20 November 2019.

61. The Report indicates that the Petitioner was summoned to appear before the Committee with any witnesses and he appeared on 9 November 2019, together with his advocate. According to the Report, the Petitioner declined to give evidence under oath but opted to rely on submissions.

62. The Report also indicates that the Governor, the Speaker of the County Assembly, the mover of the removal motion, the mover of the motion to authenticate academic qualifications and a Deputy Registrar, Academic Administration of Mt. Kenya University testified.

63. The Report further indicates that the allegations against the Petitioner were substantiated and recommendation made to the County Assembly that the Petitioner be removed. The County Assembly adopted the recommendations on 20 November 2019.

64. In challenging the fairness of the process, the Petitioner asserted that he was denied an opportunity to cross-examine the Deputy Registrar of Mt. Kenya University and the mover of the motion to question the authenticity of his academic qualifications.

65. The Hansard of the proceedings before the Special Committee was not filed in Court. The Petitioner was accompanied by an advocate during the appearance before the Special Committee.

66. It is not clear what intervention the advocate may have made in relation to the cross-examination of witnesses or even whether such a request was made and denied.

67. In the circumstances, the Court is unable to find that the Petitioner's right to fair administrative action or due process was breached by the Respondents or the Special Committee.

68. The third phase of the proceedings was before the plenary of the County Assembly on 20 November 2019 when it debated the recommendation of the Special Committee.

69. The Petitioner contended, concerning this particular phase, that he was not supplied with a copy of the Report of the Select Committee before debate by the County Assembly; was not notified of the date and venue of the debate by the County Assembly of the Report by the Select Committee contrary to standing order 64; the County Assembly acted as complainant and investigator, and that he was not furnished with records from Mt. Kenya University.

70. In a further affidavit, the Petitioner contended that he was out of the country when the letter and Report were delivered to his office.

71. Are the factual assertions by the Petitioner true?

72. There is evidence on record that both the Petitioner's then advocate and the Petitioner were supplied with a copy of the Report of the Special Committee through a letter dated 15 November 2019 ahead of the plenary debate on 20 November 2019.

73. The letter also indicated that it served as a 3-day notice under the requirements of Standing Order 63(2) and it invited the Petitioner to appear before the plenary of the Assembly.

74. There was no affidavit from the Petitioner's erstwhile advocate denying service of the notice and Report.

75. Since the invitation and the Report were served upon both the Petitioner and his advocate, and even though he was out of the country, it was incumbent upon the advocate and/or the Petitioner to seek for postponement of the debate. That was not done.

76. Equally, a copy of the Standing Orders was not filed before the Court to enable the Court to determine whether personal service was mandatory and/or whether service on the advocate then acting for the Petitioner constituted proper service.

77. The Court, in effect, finds that the Petitioner did not prove to the requisite standard that the Respondents denied or breached his right to be heard before the plenary of the County Assembly.

#### **Substance in the resolution to remove the Petitioner**

78. The Court has opted to examine this question only because it was raised by the Petitioner as Issue No. 4.

79. The Petitioner did not deny that he presented to the Respondents a copy of a degree certificate from Mt. Kenya University.

80. An official from the University was called as a witness before the Special Committee. He testified without any interrogation or rebuttal that the copy of the degree certificate did not originate from the University. The Petitioner and his advocate were present during the testimony but did not cross-examine the Deputy Registrar.

81. On a balance of probability, the Court finds that there was substance in the resolution. The question posed by the Petitioner is answered in the affirmative.

#### **Time frames**

82. The Governor raised the question of whether section 31(b) of the County Governments Act set any time frames for a Governor to act on a removal resolution by the County Assembly.

83. The Governor did not attempt to suggest an answer (other identified Issues were also not isolated for submissions).

84. For the comfort of the Governor, the section does not set any time frames but directs that the dismissal is mandatory.

85. Under section 58 of the Interpretation and General Provisions Act, where no time is prescribed for the performance of a duty or function, it should be done without unreasonable delay, and as often as due occasion arises.

86. Unless there is any legal handicap or stay by a competent Court, this Court would have been of the view that a Governor should act forthwith on a resolution for the dismissal of a County Executive Committee member.

87. Before concluding, the Court regrets that a copy of the Standing Orders of the County Assembly of Kitui was not placed before it despite the Petitioner citing it as having been material and relevant.

88. The Petitioner and Governor who alleged violations of the Standing Orders should have caused a copy to be placed before the Court.

89. Having addressed the substance of the Petition, the Court is of the view that it need not specifically apply its mind to the two applications which were on file. The applications, logically fail by the wayside.

#### **Conclusion and Orders**

90. From the foregoing, the Court finds no merit in the Petition and orders it dismissed with costs to the 2<sup>nd</sup> to 9<sup>th</sup> Respondents.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 5<sup>th</sup> day of August 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr. Mwinzi instructed by Mwendwa Mwinzi & Associates

For 1<sup>st</sup> Respondent Mr. Oloo instructed by Oloo & Oloo Advocates

For 2<sup>nd</sup> – 9<sup>th</sup> Respondents Mr. Muinde instructed by Apollo Muinde & Partners Advocates

Court Assistant Judy Maina