



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 NDUBI.....PETITIONER

VERSUS

HON JOHN OBIERO NYAGARAMA.....1ST RESPONDENT

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

THE COUNTY GOVERNMENT OF NYAMIRA.....3RD RESPONDENT

MR. SHEM N. KIAGE.....4TH RESPONDENT

DR. STELLA MORAA.....5TH RESPONDENT

MS. STELLA NYAMORAMBO.....6TH RESPONDENT

DR. SAMSON BARONGO.....7TH RESPONDENT

AND

BLADYS BOGONKO MOMANYI.....1ST INTERESTED PARTY

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

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

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

VINCENT MARITA OMAO.....5TH INTERESTED PARTY

JUDGMENT

1. The petitioner lodged the instant petition on the account of public interest. Contemporaneous with the filing of the petition, the petitioner also filed a Notice of Motion Application under certificate of urgency pursuant to which interim conservatory orders were issued pending hearing and determination of the petition on the merits.

2. In his petition the petitioner herein seeks the following substantive orders:

(a) A declaration that the 1st and 2nd respondents have violated the Constitution and the County Governments Act.

(b) A declaration that the two year contracts are illegal, discriminatory and the interested parties are lawfully in office with full pay and benefits and any attempts to remove them from office are unprocedural, illegal and unconstitutional.

(c) A declaration that the 2nd Respondent failed to observe the national values and principles of governance as set out in Article 10 and Article 185(3) of the Constitution in the manner they handled the interested parties issues by refusing, failing and neglecting to call the 1st and 3rd Respondent to account for illegal and unconstitutional actions.

3. Principally, the petitioner's petition is anchored on the following grounds:

- (a) That the 1st, 2nd, 3rd and 4th interested parties were hired on the understanding that they were to serve for an uninterrupted term of five (5) years;
- (b) That to their surprise, they were issued with a contract of two (2) years;
- (c) That the issue of tenure was raised by the residents of Nyamira County and that they were assured that the said interested parties would serve for five (5) years.
- (d) That the hiring, vetting and Gazzetment was for a term of five (5) years;
- (e) That no notice of non-renewal of the contract was issued to the interested parties.

4. The legal foundation of the suit is anchored on Articles 2(1);2(4), 3, 10, 22, 27, 28, 47, 165(3) (d); 258(i) (d) (c).

5. Further facts in support of the petition are set out in paragraphs 19 to 28 of the petition. The petitioner is a member of the public and a resident and a voter in Nyamira County, the 3rd respondent herein.

6. The 1st and 2nd interested parties were previously County Executive Committee members from 2013 to 2017 and they served their full five (5) year term until they were reappointed in the subsequent County Government following the 2017 general elections.

7. The County Government of Nyamira declared vacancies in the office of County Executive Committee members in 2017. The interested parties applied for the position and were interviewed by the relevant body and their names forwarded to the 2nd respondent for vetting and approval and subsequently, the 1st respondent appointed them as follows:

- (i) The 1st interested party was appointed the CEC in charge of Education and Youth Empowerment.
- (ii) The 2nd interested party was appointed CEC in charge of Agriculture, livestock and fisheries.
- (iii) The 3rd Interested party was appointed as the County CEC Trade Industry Tourism and Cooperative Development and
- (iv) The 4th Interested Party was appointed CEC Environment, Water, Energy and National Resources.

8. That the 2nd respondent vetted the appointees on the basis that the interested parties were to serve for 5 years in accordance with the law unless they were removed as provided in the Constitution and the County Governments Act, 2012.

9. That a gazette notice dated 8th November 2017 gazetted the interested parties as CEC members without mentioning the period of service by the interested parties. However, the interested parties going by the first term of office in the County government were aware and expected to serve the full term of the County Government being a period of five (5) years until the next general election in the year 2022.

10. That upon the said gazette, the interested parties were surprised to find that their letters of appointment purported to appoint the CEC members for a two (2) years contract period instead of the five (5) years contract as was the case in the first County Government of Nyamira.

11. The petitioner states further that the criteria and the legal basis for a bridged contracts of service has never been explained to the petitioner and the interested parties.

12. That in the advertisement, recruitment and vetting process there was no indication that there was going to be a two (2) year contractual appointments and the term was set arbitrarily without consulting the interested parties.

13. That the contractual term violates the constitution of Kenya and is unlawful, null and void.

14. That the court grants the petitioner the reliefs sought.

RESPONSE

15. The 1st to 7th respondents and the 5th interested party opposed the petition and the gravamen of the opposition is as follows:

16. That Section 30 of the County Governments Act, enumerates the functions and responsibilities of the County Governor, the 1st

respondent herein and subject to the constitution, the County governor shall *interalia*:

- (a) Appoint with the approval of the County Assembly the County Executive Committee in accordance with Article 179(2) (b) of the Constitution.
- (b) Constitute the County Executive Committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county.
- (c) By a decision notified in the County gazette, assign to every member of the County Executive Committee responsibility to ensure the discharge of any function within the county and the provision of related services to the people.

17. That after the 2017 general elections, the 1st respondent caused to be advertised the positions of CEC members vide a notice produced and marked Annex JNNI dated 23rd August 2017. The positions were explained in the notice to be for a period of two (2) years renewable subject to satisfactory service delivery.

18. Several people including the 1st to 4th interested parties applied and were shortlisted, interviewed, selected by the interviewing panel, vetted by the County Assembly and appointed by the Governor.

19. That the 1st and 4th interested parties were appointed accordingly in terms of gazette notice marked "JON4" dated 8th November 2017.

20. The 1st respondent issued Gazette Notice No. 10939 appointing ten (10) CEC members including the 1st to 4th interested parties. The Gazette Notice did not indicate the term or period of service of the appointees.

21. By letters of appointment dated 1st November 2017, the 1st respondent appointed the said CEC members to hold office on contract terms of two years renewable subject to their conduct and satisfactory performance.

22. The letter also stated the remuneration applicable to the office of the CEC member including payment of gratuity for the term served.

23. The CEC members were requested to signify in writing their acceptance of the appointment within seven (7) days from the date of the letters.

24. The CEC members including the 1st to 4th interested parties wrote letters of acceptance of the appointment on diverse dates to the 1st respondent as requested in the letters of appointment.

25. Subsequently, upon completion of the two-year period the 1st respondent wrote letters dated 30th October 2019 to the interested parties in the following terms.

"RE: HANDING OVER

"As you are aware, your contract as a County Executive Committee member Nyamira County government elapsed on 4th November, 2019. You shall however remain in office until new County Executive Committee Member is appointed in your docket that you shall hand over to"

26. The respondents state that there was no understanding between the respondents, the petitioner and the interested parties that the interested parties were to serve for a period of five (5) years as alleged or at all.

27. That the tenure of service of the interested parties was premised on the terms in the letters of appointment and the interested parties duly accepted those terms and at no time did the interested parties question the letters of appointment or any of the terms therein as alleged or at all.

28. That the contracts of service of the 1st to 4th interested parties lapsed by effluxion of time and they were issued with letters to remain in office until substantive appointments after due evaluation and vetting was conducted following declaration of vacancies in the office of CEC members at Nyamira County via an advertisement dated 30th September 2019 marked annex '8'.

29. That the 1st respondent subsequently and in terms of *Article 179 of the Constitution and Section 30 (2) (d) of the County Governments Act, 2012*, appointed the new CEC members excluding the 1st to 4th interested parties on renewable contracts of two years.

30. That the said replacement was lawful and constitutional. That the petition lacks any legal basis and it be dismissed with costs.

31. That the interested parties participated in the new recruitment exercise and were shortlisted and interviewed together with others but were not re-appointed.

32. That the respondents did not discriminate against the interested parties as alleged or at all since the process of recruitment was open, free and fair and each member was given an equal opportunity to prove their suitability for reappointment.

33. That the 1st respondent had prior and after the completion of the recruitment process reviewed the performance of interested parties and all other CEC members and had held discussions with each one of them on their performance.

34. That the petition be dismissed with costs as same is untenable and devoid of merit.

Determination

35. The parties filed their written submissions and the court has delineated issues for determination as follows:

(i) Whether abridgement of appointment of the term of CEC members to a two years contractual term is supported by statute law and the constitution of Kenya 2020 and therefore lawful.

(ii) Whether the petitioner is entitled to the reliefs sought.

36. The court shall deal with the two issues for determination together. The court considers the issue of *Locus Standi* and jurisdiction moot in this matter having already heard and determined interlocutory issues in a ruling dated 25th June 2020 in which the court granted conservatory orders to the petitioner pending hearing and determination of the petition.

37. For the avoidance of doubt, the court is satisfied that it has jurisdiction to hear and determine the issues raised in the petition and the petitioner being a member of the public and a resident of Nyamira County has sufficient interest in this matter to file the petition in public interest.

38. The question for determination is not personal in nature but is one of great public interest in that the decision of the court shall give guidance to this and subsequent County Governments on the manner of appointment and the term of service of County Executive Committee members which is a constitutional body and a central one, for that matter in the proper governance of County Government of Nyamira and County Governments at large.

39. The court is justified in this endeavor by the judgment of the court of Appeal in the case of **Daniel N. Mugendi vs Kenyatta University and 3 others (2013) eKLR** where the court held:

“...one should set out concisely the allegations upon which he/she wishes to rely in consecutively numbered paragraphs. The petitioner also must set out exact orders sought.....The petition must be supported by an affidavit”.

40. The petitioner herein has satisfied the above requirements.

41. The Court of Appeal went on to cite Majanja J. ***in Petition No. 170 of 2012, United States International University (USIU) vs The Attorney General and others*** as follows:

“49. A correspondent court to the High court has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with matters of employment and labour matters whether filed in the High Court before or after the establishment of the Industrial Court”.

42. The court of Appeal cited also the ***South African case of Gieba vs Minister of Safety and Security and others CCT 64/08 (2009) ZACC 26***, quoted also by Majanja J. as follows:

“I would adopt the position of the constitutional court of South Africa in Gieba vs Minister of Safety and Security (supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court it must have jurisdiction TO ENFORCE LABOUR RIGHTS in Article 41 and the jurisdiction TO INTERPRET THE CONSTITUTION and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain....”.

43. The present petition falls squarely within the stated jurisdiction of this court to interpret the constitution on employment related matters including the employment of state officers such as the CEC members in a County Government.

44. The next question for determination therefore is whether the 1st respondent has violated the provisions of the constitution in purporting to appoint CEC members on abridged contracts as he did and with respect to the interested parties herein.

45. The respondents supported by the 5th interested parties have argued relying on the case of ***Securicor (K) Limited vs Benson David Onyango and another (2008) eKLR where*** the Court of Appeal cited L Estnace F. Cirancob Ltd (1934) 2KB 394 as follows:

“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”.

46. Denning LJ in ***Courts vs Chemical Cleaning Dyeing Company Ltd (1951) 1aiier631*** stated as follows:

“if a party affected signs a written document knowing it to be a contract which governs the relation between him and 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”.

47. It is the respondents’ case that the 1st to 4th interested parties are bound by the letters of appointment and the terms thereof which they duly accepted by writing letters of acceptance to the 1st respondent. It is a fact that the interested parties were aware of the terms of the job they had applied for since the 1st respondent had in the advertisement indicated clearly that the appointments to the office of CEC Nyamira County was for a period of two years renewable.

48. The 1st to 4th interested parties accepted these terms by their letters of acceptance and specific performance by actually reporting to office on the stated terms. The 1st to 4th interested parties were not truthful in their deposition before court that they were not aware that the 1st respondent had abridged the term of the office of a CEC to be occupied by them for two years. These officers should have been candid in this respect in their pleadings and supporting affidavits but were not.

49. However, the lack of truthfulness by the 1st to 4th interested parties does not negate the role of the court to interpret the provisions of Article 179 of the Constitution and determine whether the 1st respondent is in violation of the same in granting CEC members contracts of two years, renewable.

50. Article 179 of the constitution of Kenya 2010 provides:

“(2) The County Executive 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.”

51. The provision does not provide the period or the term of service of a CEC member, however Article 179(7) provides:

“(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”.

52. It is the finding of court that the office of CEC member is tied in the hip to the office of the Governor. The two offices arise upon conclusion of a general election and their term is to run continuously to the next general election unless the officer is removed from office in terms of section 39 and 40 of the County Governments Act 2012.

53. In this regard, the court of Appeal in the case of **Kisumu County Service board and another vs Samuel Okuro and 7 others (2018) eKLR** stated:

“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 constitution”.

54. It appears to the court and the court finds that the 1st respondent had devised an ingenious, albeit, unlawful method of by passing the provisions of Article 179 of the constitution of Kenya 2010 as read with section 39 and 40 of the County Governments Act Act, to remove CEC Members mid-term under the guise of having reviewed their performance and/or non-performance without following the rigours of a lawful process of removal guided by the constitution and applicable statute.

55. The so called two year contracts, renewable are indeed illegal documents meant to circumvent the law and are *void abinitio*.

56. The court finds that a holder of the office of CEC member is appointed for the full term to be served by the Governor of 5 years between the general elections unless the CEC member is removed from office in terms of *Sections 39 and 40 of the County Governments Act, 2012*.

57. The Court of Appeal in the Samuel Okuro case (supra), fortified this position as follows:

“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 ceases to occupy the office, the appointment of the executive committee member also ceases”.

58. Accordingly, the petition has merit and is granted and the court issues the following orders in favour of the petitioner and the 1st to 4th interested parties against the respondents and the 5th interested party as follows:

(a) The 1st and 2nd respondents have violated the constitution and the County Governments Act, 2012.

- (b) The two year contracts granted to the 1st to 4th interested parties are unconstitutional and therefore unlawful, null and void.
- (c) The 1st to 4th interested parties are to serve their full term of office of five (5) years unless otherwise lawfully removed from office.
- (d) The purported letters of expiry of contract are removed to this court by issuance of an order of certiorari and quashed.
- (e) The 3rd respondent to pay the costs of the petition.

Judgment Dated, Signed and delivered at Kisumu this 15th day October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment 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

Mwamu and Company Advocates for the petitioner.

M/S Abisai and Company Advocates for 1st and 3rd Respondents.

M/S Nyachiro Nyagaka and company Advocates for 2nd respondent.

4th to 7th respondents in person.

Angasa and company Advocates for the 5th interested party.

Chrispo- Court clerk