



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 71 OF 2018

1. KENNETH NJAGI MBURIA

2. M'BIRAUKA ALBERT MUGAMBI

3. M'REWA BASILIO GITONGA

4. NJERU MAGDALINE KARIMI

5. MUTEGI ANN MUGAMBI.....CLAIMANTS

AND

THARAKA NITHI COUNTY GOVERNMENT....RESPONDENT

RULING

1. The Respondent herein raised a preliminary objection in paragraphs 3 and 7 of the defence to the statement of claim. The Respondent asserts that the Court has no jurisdiction to entertain this suit as the Claimants, like the Cabinet Secretaries appointed by the President, are status employees in a pure Presidential system of Government and only the High Court has the jurisdiction to entertain disputes touching that legal relationship which they have with the State. The Respondent cited the cases of **Motor Vessel Lillian 'S' v Caltex Oil (K) Ltd. [1989] KLR 1** on jurisdiction as well as the case **Tom Luusa Munyasya & Another v Governor, Makueni County & Another [2014] eKLR** which was a decision by Rika J. and that of **Tom Luusa Munyasya & Another v Governor, Makueni County & Another [2015] eKLR** which was a decision by Lenaola J. (as he then was). The Respondent also relied on the case of **Mary Wambui Mutonyi & 5 Others v Laikipia County Government & 2 Others [2018] eKLR**. The parties were to file submissions in respect of the matter but as of the time of writing this Ruling none are on record.

2. The question that the pleadings raise is one. Does this Court have jurisdiction to handle the claim? The question of jurisdiction must be settled at the earliest point and in line with the decision in **Motor Vessel Lillian 'S' v Caltex Oil (K) Ltd (supra)** where the Court of Appeal at Mombasa (Nyarangi, Masime & Kwach JJA) dealt with a question of jurisdiction and Nyarangi JA famously stated that

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

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By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

I am in agreement with the wise words of Nyarangi JA that jurisdiction is everything. Without it a court has no power to make one more step because it would be acting without any legal basis if proceedings continue when there is no jurisdiction to do so. As the issue of jurisdiction was raised, it must be determined as such a question would determine whether the Court is properly seized of the matter before it. This Court is therefore obliged to decide the issue now that it has been raised. In brief, the Respondent asserts that the High Court is the proper forum to decide the question of appointment or removal in the position of County Executive Committee by Governors. For that proposition it is not indicated where the authority is found save that the Respondent asserts that the Claimants, like the Cabinet Secretaries appointed by the President, are status employees in a pure Presidential system of Government and only the High Court has the jurisdiction to entertain disputes touching that legal relationship which they have with the State. I do not agree. Under Article 162(2) this Court has the jurisdiction to determine a question such as the one posed herein as this Court is of equal status to the High Court. The matter before me is not one of the matters that is part of the original and exclusive preserve of the High Court.

3. County Executive Committee members such as the Claimants are appointed by a Governor in exercise of her or his political power. These appointees have to enjoy the confidence, be it full or partial, of the Governor. The Claimants served in various positions as appointees of the Tharaka Nithi Governor and thus served under the instructions of the Governor. Under the County Governments Act, there is power to dismiss a Member of the County Executive Committee. In particular, Section 31(a) of the County Governments Act 2012 grants the Governor permission to dismiss a Member of the County Executive Committee if the Governor deems it appropriate or necessary to do so. The Governor is not obliged to justify the decision. The Governor is also given the imperative to dismiss a Member of the County Executive Committee if the County Assembly makes a resolution to that effect under Section 40 of the Act as provided for in Section 31(b) of the County Governments Act. In my considered view, in as much as this Court has the jurisdiction to entertain employment disputes, there is nothing for it to entertain from the Claimants as County Executive Committee Members, cannot validly challenge the decision of the Governor to remove them under Section 31(a) of the County Governments Act 2012 as the Governor retains the prerogative to appoint or remove CEC Members. In a sense they serve until they are removed or a Governor loses the seat through demise or in an ensuing general election. The slate is then wiped clean and the incoming Governor has the latitude to make appointments of the ministers to serve in the County Government.

4. In the case of **Tom Luusa Munyasya & Another v Governor, Makueni County & Another [2014] eKLR** my brother Rika J. stated as follows:-

36. The Members of the National and County Executives do not have an ordinary contract of service. The President and the Governor are given the prerogative to dismiss them, whenever they deem it appropriate or necessary. The Constitution and the County Government Act 2012 have given the President and the Governor a prerogative in dealing with their Executive Employees, much similar to the royal prerogative enjoyed by the Monarch in dealing with Public Servants, before the era the contractual model.

37. The Employment Act 2007 recognizes that it cannot possibly apply to all employment relationships, and defines the scope of its application, under Section 3 which excludes certain Employees such as Members of the Disciplined Forces, and Employers and their dependants, where the dependants are the only Employees in a family undertaking. Under Section 3 [5] the Minister for Labour may, upon consulting the National Labour Board, by order exclude from the application of all, or part of the Act, categories of employed persons, whose terms and conditions of employment are governed by special arrangements: provided those arrangements afford protection that is equivalent or better than that part of the Act, from which those categories are being excluded. This Court is of the view that Members of the County Executive Committees as well as Cabinet Secretaries have a special employment relationship, calling for exclusion from the application of the Employment Act 2007.

38. The Claimants were not employed by the County Public Service Board. County Public Service under the Act excludes the Governor, his Deputy, County Executive Committee Members and County Assembly Members. These are State Officers, whose procedures in removal from Office must be distinguished from those of Public Servants. Section 76 of the County Governments Act 2012, covers Officers employed by the County Public Service Board. It states no Public Officer shall be punished in a manner contrary to any provision of the Law or the Constitution. Like Article 236 of the Constitution, this law seeks to strengthen the protections afforded to Public Officers against wrongful removal from Office; it does not intend to limit the prerogative of the Chief Executive Officer in acting against his appointees. The Public Officers referred to under Section 76 must be understood to be the Employees of the County Public Service Board, not Members of the County Executive Committee, who are State Officers, working completely at the pleasure of the County Governor.

5. The Respondent makes a similar argument and as I concur with Rika J. as he found above, I find and hold that the Respondent is therefore right to state that the Court has no jurisdiction to entertain the suit as there is no employee-employer relationship between the CEC Members and the County Government or the Governor to enable them get any respite from the decision to remove them under Section 31(a). I accordingly strike out the suit with costs to the Respondent as it was filed without any jurisdiction.

It is so ordered.

Dated and delivered at Meru this 6th day of October 2020

Nzioki wa Makau

JUDGE