



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 34 OF 2019

**IN THE MATTER OF ARTICLES 1, 3, 6, 10, 19, 20, 21, 22, 23, 27, 28, 32, 35, 41, 47, 176, 179, 180, 183, 185(3), 195,
230(5)(b), 232, 235, 236, 258 and 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF OF OTHER RELEVANT LAWS ENACTED TO ENABLE THE FULL
IMPLEMENTATION OF THE CONSTITUTION**

BETWEEN

FRANCIS ANGUEYAH OMINDE.....PETITIONER

v

DR WILBUR OTTICHILO 1st RESPONDENT

COUNTY ASSEMBLY OF VIHIGA2nd RESPONDENT

COUNTY GOVERNMENT OF VIHIGA.....3rd RESPONDENT

AND

HENRY MANGOGO LUMBASIO....1st INTERESTED PARTY

ALFRED INDECHE.....2nd INTERESTED PARTY

GEOFFREY LUKAYA LUGALIA.....3rd INTERESTED PARTY

PAUL JISEVE MBUNI4th INTERESTED PARTY

PAMELA MBAGAYA KIMWELE..... 5th INTERESTED PARTY

JUSTUS INONDA MWANJE.....6th INTERESTED PARTY

FELISTUS OKUMU.....7th INTERESTED PARTY

AMOS KUTWA.....8th INTERESTED PARTY

KENETH ELAVUNA KESEKO.....9th INTERESTED PARTY

MARITA M. AGUFANA10th INTERESTED PARTY

CHRYSOSTOM MAKHUMBIRI

AGAVA.....11th INTERESTED PARTY

ABISAI AMATALO.....12th INTERESTED PARTY

RICHARD KEMBOI13th INTERESTED PARTY

CHRISTOPHER ETALE

TUNYA 14th INTERESTED PARTY

ARNOLD NAMADI..... 15th INTERESTED PARTY

CLEMENT MANYULU.....16th INTERESTED PARTY

PAMELA BUSUMU.....17th INTERESTED PARTY

MARY ANYENDA.....18th INTERESTED PARTY

PHILIP GAVUNA.....19th INTERESTED PARTY

LUCY IJAI.....20th INTERESTED PARTY

GILBERT VIDIJA.....21st INTERESTED PARTY

JUDGMENT

1. The office of the Governor County Government of Vihiga advertised for 10 positions of County Executive Committee members and 15 positions of County Chief Officers around 29 August 2017.
2. Francis Angueyah Ominde (the Petitioner) and the 21 Interested Parties applied, were shortlisted, interviewed and nominated by the Governor for the positions of County Secretary, County Executive Committee members (1st to 10th Interested Parties) and Chief Officers (11th to 21st Interested Parties) respectively.
3. The County Assembly vetted and approved the appointments.
4. Through a Gazette Notice dated 24 October 2017, the Governor appointed the Petitioner and the Interested Parties to named dockets.
5. After gazettelement, the Petitioner and the Interested Parties received appointment letters indicating that they would serve contracts of 2 to 3 years.
6. Since the advertisement and the gazette notice did not spell out the full tenure of contracts, the Petitioner and the Interested Parties felt disadvantaged and felt that the decision to set the contracts at 2 to 3 years was unilateral and in violation of several cited Articles of the Constitution, the County Governments Act, the Leadership and Integrity Act, the Fair Administrative Actions Act and the Employment Act.
7. The Petitioner, therefore, moved the Court on 2 October 2019 asserting that the Governor had violated the aforesaid Constitutional provisions.
8. Filed with the Petition was a Motion under a certificate of urgency seeking conservatory orders suspending the 2 to 3 years tenure of the respective contracts.
9. The Court issued a conservatory order on 16 October 2019 suspending the clause limiting the respective contracts to 2 or 3 years pending *inter partes* hearing of the Motion.
10. On the same day, Francis Rakewa, Principal Legal Counsel filed a Memorandum of Appearance on behalf of the County Assembly of Vihiga (2nd Respondent).
11. The Petitioner sought the following orders

(a) A declaration do issue in terms that the tenure of a County Executive member, a County Secretary and a Chief Officer in the County Government is governed by Articles 179 and 235 of the Constitution of Kenya, 2010, sections 31(a), 35, 44 and 45 of the County Governments Act as long as the said provisions of the law remain in force and any appointment to any of the offices that purports to vary the tenure or confer a discretion on the County Governor to limit the tenure in a manner that is not consistent with the said legal provisions is null and void to the extent of the inconsistency, and of no legal effect.

(b) This Honourable Court do find and declare as *ultra vires*, null and void a provision in the letters of appointment issued to the humble Petitioner and Interested Parties by the 1st Respondent limiting their respective tenure to 2 or 3 years contract as the case may be and in particular the provision for the renewal of the contracts based on the sole discretion of the Governor.

(c) A declaration to issue to the effect that a County Governor lacks the required authority to terminate or renew the contracts of employment of the humble Petitioner and the Interested Parties in the manner proposed in the appointment letters without the involvement of the County Assembly and/or adherence to the governing provisions of the law.

(d) An order of compulsive injunction do issue to compel the Respondents and/or any of them to retain the humble Petitioner and the Interested Parties in their respective employment and not to interfere with their tenure save in accordance with the Constitution, the County Governments Act and other legislation authorising such interference.

(e) Costs arising from or occasioned by these proceedings be recovered from the Respondents.

12. On 4 November 2019, the firm of J.O. Juma & Co. Advocates filed a Notice of Appointment of Advocates to act for the Governor and County Government of Vihiga (1st and 3rd Respondents).

13. The Governor and the County Government of Vihiga filed a joint *Response to the Petition* on 4 November 2019. At the same time, they filed an application to vacate the *ex-parte* conservatory order granted on 16 October 2019 (the application was dismissed on 25 June 2020 and the conservatory order confirmed pending the hearing and determination of the Petition).

14. The firm of Mwamu & Co. Advocates filed a Memorandum of Appearance to act for Felitus Okumu (7th Interested Party) on 6 November 2019.

15. On 19 November 2019, Henry Mang'ong'o Lumbasio (1st Interested Party), Alfred Indeché (2nd Interested Party), Amos Kutwa (8th Interested Party), Richard Kemboi (13th Interested Party), Abisai Amatolo Imbwana (12th Interested Party), Mary Susan Anyiendah (18th Interested Party), Philip Gavuna (19th Interested Party) and Gilbert Vidija (21st Interested Party) filed affidavit's disowning the Petition (the 1st Interested Party later disowned the affidavit disowning the Petition).

16. Since these Interested Parties filed affidavits disowning the Petition, the Court strikes their names from the Petition.

17. On 14 April 2020, the 7th Interested Party moved the Court seeking an order restraining the Governor from interfering with his contract (a similar application was filed on 19 May 2020).

18. The Court granted a conservatory order on 14 April 2020.

19. The Respondents moved the Court to set aside this latter conservatory order but the Court dismissed the application on 25 June 2020.

20. The Respondents lodged a Notice of Appeal on 3 July 2020.

21. Pursuant to Court directions on 25 June 2020, the Petitioner filed his submissions on the Petition on 22 July 2020 while the Governor and the County Government filed their submissions on 15 September 2020.

22. On 30 July 2020, the firm of S.M. Onyango & Associates Advocates filed a Notice of Appointment of Advocates to come on record for the Governor and the County Assembly of Vihiga.

23. Meanwhile, on 16 September 2020, the firm of Mwamu & Co. Advocates filed a Notice of Change of Advocates to come on record for the Petitioner.

24. The Petitioner filed another set of submissions on 13 October 2020. The 7th Interested Party filed his submissions on 30 October 2020.

25. When the Petition was mentioned before this Court on 3 November 2020 (the Judge who had hitherto been dealing had been transferred), the parties confirmed compliance with the directions on the filing of submissions and requested the Court to prepare and deliver Judgment.

26. When the Respondents raised the question of the Petitioner having filed 2 sets of submissions, Mr. Mwamu who had now come on record for the Petitioner asserted that his set of filed submissions should take precedence.

27. The Court gave clear timelines for the filing and exchange of submissions. The Petitioner's submissions filed on 13 October 2020 were filed outside the set timelines. No leave was sought to file and/or admit them on record and therefore the Court will not consider them.

28. The Petitioner identified 6 Issues for determination

- (i) Did the Governor have the legal authority to abridge the appointments as he did?
- (ii) Did the signing of the abridged terms by the Interested Parties and acceptance to serve under the abridged terms insulate the Governor and his actions from legal inquiry and audit?
- (iii) What are the Constitutional and legal implications of abridging the terms to various periods ranging between 2 to 3 years?
- (iv) Were the Interested Parties entitled to prior information on the exact period of service and were they provided with such information prior to the appointment?
- (v) Were the Constitutional provision on fair labour practice violated by the Respondents?
- (vi) What is the overall public consequence of the Governor's exercise of power in abridging the terms under challenge?

29. The Governor and the County Government raised 2 Issues

- (i) Whether the Court can order the suspension of the terms in letters of appointments of the Petitioner and Interested Parties limiting their tenure to 2 to 3 years.
- (ii) Whether the Court can interfere with contracts willingly entered into by parties.

30. The 7th Interested Party on his part set out 4 Issues

- (i) Whether the actions of the 1st and 3rd Respondents violates Articles 20(3), 47 and 259 of the Constitution?
- (ii) Whether the 1st Respondent can hire and fire the County Secretary, County Executive Committee member and Chief Officers in any other manner set out under the Constitution and the County Governments Act?
- (iii) Whether the varying contracts periods of employment of the Petitioner and the Interested Parties was discriminatory?
- (iv) Whether the 2nd Respondent (County Assembly) failed in its supervisory powers?
- (v) Whether the Court has jurisdiction to determine this matter?

31. The Court has considered the Petition, affidavits and submissions and condensed the Issues as identified by the Parties as examined hereunder.

Practice and Procedure

32. The firm of S.M. Onyango & Associates purported to file a Notice of Appointment on 30 July 2020 to act for the Governor and County Assembly of Vihiga alongside the firm of Ms JOJ & Co. Advocates.

33. By that time, the firm of J.O. Juma & Co. were already on record for the Governor but not the County Assembly.

34. The Notice of Appointment is therefore expunged from the record as it relates to the County Assembly.

Jurisdiction

35. In their submissions, the Respondents asserted that Courts should be slow to question proceedings before the legislative authorities.

36. The Court has carefully examined the pleadings and come to the view that the Petition is not an attempt to question legislative proceedings but rather the lawfulness of the decision to restrict the contracts of County Executive Committee members and Chief Officers to a period less than the term of the Governor.

37. And while noting that the County Assembly has a role in the recruitment process of County Executive Committee members and Chief Officers, the role is not legislative.

38. Consequently, the Court finds that it has jurisdiction over the subject dispute.

39. Having disposed of the jurisdiction challenge, the Court will address the primary question arising from the pleadings, the legal role of the Governor in setting the terms and conditions of office of the County Secretary, County Executive Committee members and Chief Officers.

The legal authority of the Governor

Tenure of County Secretary

40. The Petitioner was appointed as the County Secretary for a 3-year term. As the County Secretary, he served as head of the county public service.
41. By dint of section 44 of the Governments Act, the Petitioner served as a Secretary to the county executive committee. Based on that assertion, the Petitioner contended that he was entitled to serve for a 5-year term like any other county executive committee member unless lawfully removed.
42. Consequently, the Petitioner was of the view that the limiting of his term to 3 –years was unlawful and beyond the powers given to the Governor.
43. The Petitioner anchored his challenge to the legal authority of the Governor on the assumption that he was a county executive committee member or had the status of a county executive committee member and therefore entitled to similar term/tenure of office.
44. The Respondents, however, urged that since there was a deafening silence in the County Governments Act on the term of office of the County Secretary, the terms and conditions of service could be provided for in the letter of appointment.
45. The office of the County Executive Committee member is established under Articles 176 and 179 of the Constitution while the office of the County Secretary is a creation of a statute, specifically section 44 of the County Governments Act.
46. Under section 44 of the County Governments Act, the role of the Governor is to nominate a person as the County Secretary after a competitive recruitment process and with the approval by the County Assembly, appoint the County Secretary.
47. A County Secretary sits in the meetings of the County Executive Committee as secretary and not as one of them. Under section 44(3)(d) of the County Governments Act, the County Secretary is at the beck and call of the County Executive Committee but he is not one of them nor does he have the status of a County Executive Committee member.
48. Under sections 55(b) and 59 of the Act, the organ entrusted with the power for the organization, staffing and functioning of the county public service is the County Public Service Board.
49. Essentially, the Board is responsible for the human resource function over the county public service.
50. In the instant case, it was the function of the County Public Service Board to set the terms and conditions of service for the Petitioner after consultations with the Salaries and Remuneration Commission.
51. The Governor was perfectly in order to gazette the appointment of the Petitioner as County Secretary but it was the reserve of the County Public Service Board on the advice of the Salaries and Remuneration Commission to set the terms and conditions of office.
52. It was therefore irregular of the Governor to unilaterally set to limit the term of the Petitioner. Despite the irregularity, the Petitioner did not present any evidence that the County Public Service Board was not involved in the setting of his terms and conditions of service.
53. It is also instructive that the Petitioner did not include the County Public Service Board as a party in this petition.

Tenure of County Executive Committee members

54. In respect of the County Executive Committee members, the Petitioner contended that the role of the Governor was restricted by Article 179(2)(b) of the Constitution and that this did not include the fixing or limiting of terms of office.
55. The term of the County Executive Committee member, the Petitioner argued, could be inferred from section 42 of the County Governments Act and was tied to the term of the Governor, 5-years. The provision provides that after a general election, the county executive committee would remain in office until anew committee is appointed.
56. Unless removed by virtue of section 40 of the County Governments Act, the Petitioner submitted, a county executive committee member's term could not be abridged or limited as the office was statutory and not subject to rules of ordinary contracts.
57. For the Respondents, the position was taken that because there was no express provision on the term of office of a County Executive Committee member, and since the office of the Governor was elective unlike that of the County Executive Committee member, it was open to the Governor to limit the term of a County Executive Committee member.
58. The Constitution and the primary statute, the County Governments Act have not explicitly set out the term of a County Executive Committee member.
59. However, the supreme law and the primary statute contemplate situations how a County Executive Committee member may vacate or be removed from office.

60. Under Article 179(6) of the Constitution, the member shall cease to hold office upon a vacancy arising in the office of the Governor who appointed him or her.

61. The second avenue for a County Executive Committee member to leave office is through removal on the grounds outlined in section 40 of the County Governments Act.

62. The third way that a County Executive Committee member may leave office is after a general election and the appointment thereafter of new County Executive Committee members as set out in section 42 of the Governments Act.

63. And of course, a County Executive Committee member may opt to resign or may cease to hold office through death. But the grounds and means are not limited to these.

64. It is often asserted, and the principle has been generally acknowledged that it is always easier for the legislature to provide for an eventuality such as is the subject of disputation herein.

65. The legislature did not expressly provide for the term of a County Executive Committee member. But it provided for the avenues through which a County Executive Committee member would cease to hold office.

66. There must have been mischief. The mischief, in the view of the Court, was to limit the power of the Governor to, at will set out the term of the County Executive Committee member.

67. The Court will therefore agree with the Petitioner that the term of a County Executive Committee member is tied to the term of the appointing Governor unless the term is curtailed in the manner of removal as contemplated by the aforesaid legal provisions.

Tenure of County Officer

68. The office of the Chief Officer is established under section 45 of the County Governments Act. The Act does not set out the term and conditions of office.

69. The Petitioner was of the view that the Governor did not have the power to abridge the term and that by implication, the term of the Chief Officer was tied to that the Governor.

70. The Petitioner further asserted that by virtue of Article 235(1) of the Constitution, there was a need for a framework of uniform norms and standards in the establishment and abolition of offices within the county public service.

71. The Respondents again took a similar position to that in respect of the County Executive Committee members, that since there was no express statutory prescription on the term, the same could be agreed and set out in the letter of appointment.

72. Citing *Florence Khadenje O Khaguli v Governor, County of Vihiga & Ar* (2017) eKLR and *David Ogega Kebiro v County Public Service Board, Kisii & Ar* (2017) eKLR, the Respondents urged that the term of a Chief Officer was not tied to the term of the Governor.

73. Faulting the filing of the Petition while the Interested Parties were still in office, the Respondents argued that the Petitioner was inviting the Court to interfere with an executive function by re-writing the contracts.

74. According to the Respondents, the parties had legal fixed-term contracts which were willingly entered into and which subsisted by the time the Court was moved.

75. Finding solace in the Court of Appeal authority of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Ar* (2001) eKLR, the Respondents urged the Court to be wary of attempting to re-write the contracts in contention.

76. The office of a Chief Officer is an office within the county public service. It is the responsibility of the County Public Service Board to recommend to the Governor, persons for appointment as Chief Officers.

77. Under Part VII of the County Governments Act (sections 56 and 59), it is the mandate of the County Public Service Board to manage the human resource function of the County Government. It is their function to set terms and conditions of service with the advice of the Salaries and Remuneration Commission.

78. The County Public Service Board, unfortunately, was not made a party to these proceedings. There was no disclosure from the Petitioner and/or Respondents whether the County Public Service Board was involved in setting the terms and conditions of service of the Chief Officers.

79. It may therefore be concluded that the Governor acted unilaterally and outside his lawful mandate.

Conclusion and Orders

80. The Court already outlined hereinabove the reliefs sought by the Petitioner. They were verbose and repetitive.

