



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 11 OF 2018

IN THE MATTER OF OBLIGATIONS UNDER ARTICLES 3(1), 10, AND 73 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 27, 41, 47, 50, 236 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

BETWEEN

JUDY WATHATA KINYUA.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT

THE GOVERNOR KIRINYAGA COUNTY.....2ND RESPONDENT

JUDGMENT

1. The Petitioner is Dr. Judy Waithata Kinyua, the former County Executive Committee Member Gender, Culture and Social Services at Kirinyaga County. She received a letter informing her of the termination of her services and she thus sought relief through the petition and prayed for the following:-

- a. A declaration that the act of the 2nd Respondent in relieving the Petitioner of her duties is a breach of the Petitioner's constitutional rights under Articles 27(1), 41(1) & (2), and 236(1)(b) of the Constitution of Kenya and that the same is null and void;
- b. The order of judicial review to remove into the honourable court and quash the decision of the 2nd Respondent relieving the Petitioner of her duties as Member of the County Executive Committee in charge of Gender, Culture and Social Services.

She sought special damages of Kshs. 16,257,780/- being the projected salary for the period of 4 years, 3 months and 12 days from the date of the suspension to the expiry of her term, service gratuity for the 5 years at the rate of 31% of the basic pay deemed to be 60% of the gross monthly salary as well as general damages plus interest on all monetary awards at court rates from the date of judgment till payment in full and costs of the petition. To her Petition were attached various documents in support of her show cause letter as well as the correspondence between her and the Governor relating to the suspension and eventual termination as well as the memos with County officials regarding her work.

2. By way of a brief background, the Petitioner was appointed as a member of the County Executive Committee Kirinyaga County in charge of Gender, Culture and Social Services. She was duly sworn in and served as such until her suspension on 28th June 2018 for one month with effect from 1st July 2018. According to her suspension letter, this was to enable investigations to be undertaken as to her suitability to hold the office. She was suspended for alleged incompetence/underperformance in terms of delivery of her mandate. A show cause letter was issued on 30th July 2018 laying out various issues she was to respond to. She did indeed respond through her letter of 3rd August 2018. In her letter she responded to the allegations contained in the show cause letter *in extenso*. Her services were however terminated by the Governor on 20th August 2018. She thus filed this Petition on 3rd September 2018.

3. The Respondents filed a reply to the Petition through Mr. Joe Ngatia Kariuki the County Secretary of the 1st Respondent. He averred that

the Petitioner was directly accountable to the 2nd Respondent for the performance and exercise of her powers. It was the Respondents position that the Petitioner could be removed under Section 40 and 31 of the County Governments Act for *inter alia* incompetence and where the 2nd Respondent considers it appropriate to do so. The Respondents assert that pursuant to the powers under Article 185(3) of the Constitution, the County Assembly of Kirinyaga County launched investigations on the Petitioner's performance in her docket of Gender, Culture and Social Services and established that there was gross laxity in the Petitioner's docket in terms of formulation and implementation of policies and programs in the financial year 2017/2018. It was argued that the 1st Respondent also conducted its own independent preliminary investigation which *prima facie* established the Petitioner's department had failed to deliver its mandate to the expectation of the 1st and 2nd Respondents necessitating the 2nd Respondent to suspend the Petitioner from office on grounds of incompetence and underperformance for a period of one month pending further investigations. The Respondents argued that the suspension of the Petitioner was a measure taken in good faith and in furtherance of good administration to ensure thorough investigations are undertaken. It is the Respondents position that they were not under any obligation to hear the Petitioner before the suspension took effect. It was asserted that the investigations undertaken revealed that the Petitioner was incompetent and had underperformed in the course of discharging her mandate. They argue that the particulars of the said incompetence and underperformance were set out with precision on the letter of suspension dated 30th July 2018. The Respondents assert that the Petitioner was given an opportunity to defend herself and/or respond to the said grounds which she did in her letter of 3rd August 2018. The 2nd Respondent considered and took into account the grounds and the response submitted by the Petitioner and found that the Petitioner had not satisfactorily addressed the grounds raised in the letter of show cause and invoked Section 31 of the County Governments Act and dismissed the Petitioner from employment. The Petitioner argues the Petitioner did not suffer any prejudice in the matter as they followed the due process of the law.

4. In the submissions filed, the Petitioner cited various cases such as the case of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu [2015] eKLR** submitting that similar facts exist in this petition. The case of **Narok County Government & Another v Richard Bwogo Birir & Another [2015] eKLR** was also cited for the argument that the doctrine of pleasure is no longer applicable in Kenya. The Petitioner submitted that the grounds for dismissal must be valid and compelling. She cited the case of **Idris Aden Mukhtar & 2 Others v County Government of Garissa & Another [2016] eKLR** and submitted that the same reasoning should apply to this case. She argued that she had legitimate expectation her appointment would not be arbitrarily terminated before the end of her term.

5. The Respondents submitted that the suspension was not arbitrary nor was it a final action. Reliance was placed on the case of **Maurice Mangena v Nelson Mandela Metropolitan Municipality & Another (ECJ 034/2005) [2004] ZAHECHC 47; [2006] 4 All SA 589 (SE) (2 December 2004)** and the case of **Alice Njeri Ngichiri v Kenyatta University [2012] eKLR** for the argument that the suspension was not to impose discipline but was for the reason of good administration. The Respondents argued that the question of reasonableness was largely subjective. Reliance was placed on the case of **Kevin K. Mwiti & Others v Kenya School of Law & 2 Others [2015] eKLR**. The Respondents submitted that there reasons for the dismissal which can be ascertained from the letters of suspension and the letter of termination. They urged the dismissal of the Petition arguing it lacked merit.

6. The Petitioner was removed from office on grounds of incompetence and underperformance. The Respondents cited Section 31 and 40 of the County Governments Act in aid of their position that the termination was proper. The said sections provide as follows:-

31. *The governor—*

- (a) may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;*
- (b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;*
- (c) may appoint an accounting officer for each department, entity or decentralized unit of the county government; and*
- (d) shall have such powers as may be necessary for the execution of the duties of the office of governor.*

Section 40 provides:-

40. (1) *Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—*
- (a) incompetence;*
 - (b) abuse of office;*
 - (c) gross misconduct;*
 - (d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;*
 - (e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or*
 - (f) gross violation of the Constitution or any other law.*
- (2) *A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a*

motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).

(3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations—

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5)(b) is supported by a majority of the members of the county assembly—

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member.

7. Reflecting these provisions against the grounds advanced in the suspension letter and the dismissal letter, one can only reach the inescapable conclusion that the dismissal did not follow the law. Whereas the Governor has an undisputed right to dismiss a county executive committee member, in doing so, the Governor must follow the provisions of Section 40 of the County Governments Act. No resolution of the house was passed and if any was passed none was availed to Court to signify the process was in accordance with the law. The Petitioner is merited in seeking redress from Court. However, though she has legitimate expectations, the Court cannot grant her anticipated salaries till the expected expiry of her term. She will receive what is permitted in law as follows:-

- a. One month's salary in lieu of notice – Kshs. 259,875/-
- b. 12 month's salary as compensation for the unlawful dismissal – Kshs. 3,118,500/-
- c. Costs of the suit
- d. Interest on the sums in a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 18th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar