



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 13 OF 2017

IN THE MATTER OF ARTICLES 41 AND 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF S. 12(1)(A) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT CAP 24 (B) LAWS OF KENYA

AND

IN THE MATTER OF THE STOPPAGE OF SALARY OF NANCY NJOROGE (MEMBER OF THE COUNTY PUBLIC SERVICE BOARD, COUNTY GOVERNMENT OF MURANG'A)

BETWEEN

NANCY WAITHERA NJOROGE.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MURANG'A.....1ST RESPONDENT

PATRICK MUKURIA (sued as COUNTY SECRETARY

COUNTY GOVERNMENT OF MURANG'A).....2ND RESPONDENT

JUDGMENT

1. The Petitioner seeks through the Petition she filed on 26th July 2017 for the following orders/reliefs:-

- a. A declaration that the stoppage of the Petitioner's salary is a violation of Article 41, 47, 232 and 251 of the Constitution of Kenya.
- b. An order directing the 1st and 2nd Respondents to restore the Petitioner's salary, pay any outstanding salaries and pay all subsequent salaries due to the Petitioner as a member of the Murang'a County Public Service Board unless due process of the law is followed in stopping the same.
- c. Costs incidental to this petition.

2. The Respondents filed a reply to the Petition dated 29th August 2017 stating that the issues raised are unrelated to the Petition and should be directed to the Murang'a County Public Service Board. They further stated that the Petitioner absconded duty without any reasonable explanation to the Respondents hence the reason why the Murang'a County Public Service Board recommended that her salary be stopped and disciplinary process commenced against the Petitioner.

3. By way of a brief background, the Petitioner was appointed by the County Government of Murang'a as a member of the Murang'a County

Public Service Board. In the year 2016 the Petitioner successfully sued the County Government of Murang'a for the denial of an opportunity to be considered for the position of Chairperson of Murang'a County Public Service Board. In the suit handled by the predecessor of this Court, the orders issued were to the effect that the refusal by the County Government of Murang'a to process the appointment of the Petitioner as the Chairperson Murang'a County Public Service Board as recommended by a competent human resource recruitment agency, Manpower Services, was a violation of her rights to equal opportunity and freedom from discrimination as guaranteed by Article 27 of the Constitution as well as her rights to fair labour practices as guaranteed by Article 232 of the Constitution. An order thus issued directing the County Government of Murang'a to proceed with the recruitment exercise of the Chairperson Murang'a County Public Service Board only in accordance with the process initially undertaken and recommended by the recruiting agency. In apparent compliance with the said Judgment, the Respondent by a letter dated 23rd December 2016 invited the Petitioner to an interview on 3rd January 2017. Later in a letter dated 28th December 2016, the Respondent informed the Petitioner that the interview had been postponed. Since then no interview has ever been conducted and no further communication about the interview process was done. It was asserted that in an attempt to frustrate the judgment of the court, the acting chair of Murang'a County Public Service Board started running the affairs of the Board to the exclusion of the Petitioner prompting the Petitioner via a letter dated 9th January 2017 to protest her exclusion from the affairs of the Board after which she was served with a letter of a notice to show cause which she promptly responded to. The sum total of the foregoing is that the Petitioner was understandably aggrieved by the recommendation of the Murang'a County Public Service Board to stop her salary and filed the Petition herein.

4. The main issue in dispute arising from these facts is about the unlawful stoppage of salary for the Petitioner without due process. The Petitioner states that she learnt of the stoppage on 6th July 2017 when she checked her account and realized that the salary for June 2017 had not been remitted. Upon rechecking on 8th July she noted that the salary had not been remitted yet. She therefore informally checked with one of the officers who manages the payroll and he informed her that the salary had been stopped by the County Executive Committee Member in charge of the Public Service. The Petitioner by a letter dated 10th July 2017, sought to know the reasons for the stoppage of salary from the 2nd Respondent and on 11th July 2017, the Petitioner met the acting Chairman of the Board Mr. Titus Waithaka and informed him of the stoppage but Mr. Waithaka did not comment on the issue and directed her to find out why her salary had been stopped from the 2nd Respondent. Upon contacting the 2nd Respondent, he made a promise that he will follow up and respond, however the Petitioner did not receive any communication hence the decision to file this Petition. The Petitioner asserts that she also learnt that a benefit in the form of two daily newspapers she normally received from the County Government had been withdrawn. The Petitioner was therefore scared that even the July salary may not be remitted hence the decision to seek for conservatory orders under a certificate of urgency dated 26th July 2017 and a notice of motion of even date which orders were duly granted. The Petitioner in her Petition averred that as a member of the County Public service Board, she has security of tenure under Section 58 of the County Governments Act and the Respondents acted illegally by not invoking the procedure provided for in the Act. She further argued that the stoppage of salary is a disciplinary process and the Respondents have no color of right to invoke such a process as against a member of the County Public service Board. The Petitioner further contended that the foregoing acts on the part of the 1st Respondent are a gross violation of Articles 27, 41, 47, and 232 of the Constitution of Kenya and the letter and spirit of Section 58 of the County Government Act as read with Article 251 of the Constitution.

5. The Respondents in reply to the Petition averred that the issues raised by the Petitioner are unrelated to the petition and refer to the Petitioner seeking the post of Chairperson. They stated that the Petitioner seemed to be complaining about her exclusion from the Board affairs in conducting an interview for the Chairperson a position that the applicant was interested in and she thus could not actively participate in the said exercise. Similarly, the Respondents argued that the issues raised should be directed to the Murang'a County Public Service Board and not the 1st Respondent. Further they contended that the Petitioner has never been excluded in the conduct of the Murang'a County Public Service Board affairs, as she is the one who deliberately absented herself and failed to report for work. The arguments further go on to assert that the 1st Respondent was thereafter instructed by the Murang'a County Public Service Board to commence disciplinary process against the Petitioner who had absconded duty and to stop her salary payments pending the said process. The Respondents have insisted that the Petitioner should not be paid for days not worked.

6. The parties opted to file submissions to have the matter resolved. On the part of the Petitioner, she contended that the Respondents' attempt to shift blame is an exercise in futility as the Murang'a County Public Service Board is an agent of the County Government. Further, she submitted that the Petitioner has always reported on duty, and the Respondents did not provide any proof to support their allegation of her absconding from duty. The Petitioner further submitted that, even if she had absconded duty as alleged, the only lawful step that the Respondents could have taken is to initiate the removal of the Petitioner from office in accordance with the provisions of Section 58(5) of the County Government Act. She asserts that stoppage of salary is not one of the disciplinary measures that can be taken against a member of the Public Service Board. The Petitioner further contended that the Petitioner was discriminated against since the rest of the members had received their remuneration and other benefits but she was left out unreasonably and without any lawful justification.

7. In their submissions the Respondents insisted that the right party to be sued is the Murang'a County Public Service Board as it is a body corporate capable of suing and being sued. On that note they submitted that the Petition is improper, incurably defective and should not stand. Further they contended that the instructions to withhold the Petitioner's salary payment were from the Murang'a County Public Service Board due to continued absenteeism from work and her non-involvement in board activities. The Respondent asserts that the Petitioner also failed to declare her wealth as a stipulation relating to employment and that the breach was cause for the Ethics and Anti-Corruption Commission (EACC) to step in and initiate disciplinary process for a party who refuses to comply. The Respondents therefore averred that they within the law in taking the action they took.

8. The court distills the following issues for determination.

- i. Whether the 1st Respondent is the correct party to be sued.
- ii. Whether the Petitioner's stoppage of salary amounted to a violation of her rights and whether the 2nd Respondent had authority to do so.
- iii. Whether the Petitioner is entitled to the remedies sought.

On the first issue as to whether the 1st Respondent is the correct party to be sued, the Petitioner was appointed by the Murang'a County Government to be a member of Murang'a County Public Service Board. It is not controverted that the Murang'a County Government stopped her salary after being instructed to do so by the Murang'a County Public Service Board. Even though the Murang'a County Public Service Board is a body corporate that can sue and be sued; it is created under the County Government and the Murang'a County Government is the Petitioner's appointing authority thus the 1st Respondent is responsible for the stoppage of the Petitioner's salary as her employer. In the case of **Grace Kavinya Muimi v Governor, Kitui County & 2 others [2018] eKLR** Onyango J. held that *"I find this reasoning not sufficient to warrant the drastic action of dismissal of the petition as proposed by the Respondents. In my opinion, suing the office of the Governor as Head of the County Government, the County Secretary as Head of the County Public Service and the County Public Service Board is sufficiently representative of the County Government. I find that the respondents as named in the petition were necessary parties in the determination of the issues raised in the petition"*.

9. On the second issue which is as to whether the Petitioner's stoppage of salary amounted to a violation of her rights and whether the 2nd Respondent had authority to stop her salary as they did, it is uncontroverted that the 1st Respondent stopped the Petitioner's salary on allegations that the Petitioner had absconded duty and that she had failed to declare her wealth according to the EACC requirements. Under Article 47 of the Constitution, public bodies are required to observe fair administrative actions and practices as required by that Article. This has been further amplified by the Fair Administrative Action Act, 2015 which contains stringent and elaborate procedures to be observed by Public bodies whenever they take administrative actions by observing the principles of fair hearing and natural justice. Article 47(1) of the Constitution is in mandatory terms that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) makes it even more forceful that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action. The Court of Appeal stated in the case of **Judicial Service Commission v Mbalu Mutava & Another [2014] eKLR** that -

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

Additionally in the case of **Dry Associates Ltd v Capital Markets Authority and Another [2012] eKLR** Majanja J. observed as follows:-

"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution."

10. Taking the above jurisprudence into consideration, the Respondents violated the Petitioner's right to a fair administrative action contrary to Article 47 of the Constitution. According a party a hearing before taking action against her is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is a constitutional right that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional edict failure of which renders any action taken unconstitutional, null and void.

11. Even though a notice to show cause was issued to the Petitioner, she was never invited for a disciplinary hearing to defend herself neither was she given a notice or reasons necessitating the stoppage of her salary. This manifest failure to observe due process violated Article 47 of the Constitution and the Fair Administrative Action Act. The Respondents did not provide any evidence of absenteeism. The Respondent contend in their replying affidavit that they had warned the Petitioner through memos and emails, but they did not provide any proof in respect to those assertions making all they said about her mere allegations. The Respondents have also not provided any communication between either them and the Petitioner to the EACC requiring her to declare her wealth and a letter showing that disciplinary processes should be instituted against her for failing to comply. Section 58(5) of the County Governments Act provides that a member of the Board may only be removed from office on grounds set out under Article 251(1) of the Constitution thereby securing the position and insuring it from the vagaries of every day politics and machiavellian schemes. Stoppage of payment of salary is therefore not provided for by law and due process should always be followed where a member is said to have disciplinary issues.

12. Article 236(a) of the Constitution provides that a public officer shall not be:-

(a)Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.

13. The Petitioner was not accorded due process as held in the case of **Richard Bwogo Birir v Narok County Government & 2 others [2014] eKLR**. In that case Ongaya J. stated that *"The court has found that the claimant was entitled to the due process of law. The court finds that the 2nd respondent dismissed the petitioner in obvious contravention of the enumerated relevant provisions of Articles 10, 41, 47, 50(1) and 236 of the Constitution as read together with Section 41 of the Employment Act, 2007 that entitled the claimant to a notice and a hearing before termination"*.

14. The Petitioner had submitted that the 2nd Respondent had no power to exercise disciplinary control against her or any member of the Public service Board. Section 44(3)(b), (c) and (d) of the County Governments Act provides for the functions of the county secretary and clearly these powers do not encompass suspending or exercising disciplinary control over the chairperson and members of the county public service board or indeed any other officer in the county public service. In the case of **Richard Bwogo Birir v Narok County Government & 2 Others (supra)** the court held that *all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court*

holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.”

Accordingly, the 2nd Respondent lacked authority to stop the salary payment of the Petitioner.

15. As to whether the Petitioner is entitled to the remedies sought, the Petitioner prayed that a declaration be issued that the stoppage of the Petitioner's salary is a violation of Article 41, 47, 232 and 251 of the Constitution of Kenya. I opine that the stoppage of salary was issued without authority and with no due process and the court finds that the same violated the cited statutory and Constitutional provisions that safeguarded the Petitioner. Having found as I have above, an order is hereby issued directing the 1st and 2nd Respondents to restore the Petitioner's salary, pay any outstanding salaries and pay all subsequent salaries due to the Petitioner as a member of the Murang'a County Public Service Board until her removal in accordance with the law.

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