



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION NO. 90 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 6<sup>th</sup> February, 2019)**

**IN THE MATTER OF ARTICLES 10, 27, 28, 33, 41, 50, 179, 232 AND 236 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 41 AND 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012 (ACT NO. 17 OF 2012)**

**AND**

**IN THE MATTER OF THE ILLEGAL COMPULSORY LEAVE IMPOSED ON THE PETITIONERS**

**KENYA COUNTY GOVERNMENT UNION WORKERS.....1<sup>ST</sup> PETITIONER**

**JOHN BARONGO OMBONGI.....2<sup>ND</sup> PETITIONER**

**EVANS MOGIRE.....3<sup>RD</sup> PETITIONER**

**ERICK ODHIAMBO ABWAO.....4<sup>TH</sup> PETITIONER**

**NEWTON MUNG'ALA.....5<sup>TH</sup> PETITIONER**

**KARISA IHA.....6<sup>TH</sup> PETITIONER**

**JULIUS KIHANYA NDICHU.....7<sup>TH</sup> PETITIONER**

**BERNARD P. W. MURAGE.....8<sup>TH</sup> PETITIONER**

**VIOLET AVOGA OYANGI.....9<sup>TH</sup> PETITIONER**

**JOHN MBUGUA KARUKU.....10<sup>TH</sup> PETITIONER**

**NYAGARA NYAMWEYA.....11<sup>TH</sup> PETITIONER**

**BENJAMIN MWANGI WANG'OMBE.....12<sup>TH</sup> PETITIONER**

**PETER M. MURIITHI.....13<sup>TH</sup> PETITIONER**

**VERSUS**

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAIROBI.....1<sup>ST</sup> RESPONDENT

HON. MIKE MBUVI SONKO

THE GOVERNOR, NAIROBI COUNTY.....2<sup>ND</sup> RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....3<sup>RD</sup> RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF NAIROBI.....4<sup>TH</sup> RESPONDENT

### JUDGMENT

1. The Petitioners filed suit on 17<sup>th</sup> October 2017 through the firm of Brian Otieno & Company Advocates seeking the following prayers:-

*a. THAT a declaration be issued to declare the statements made by the 2<sup>nd</sup> Respondent against the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners to be defamatory in nature and damaging to their reputation.*

*b. THAT this Court be pleased to issue an order for damages for the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners defamed by the 2<sup>nd</sup> Respondent.*

*c. THAT this court be pleased to issue an order by way of injunction restraining the Respondents, their officers, staff, agents, servants and/or any other persons acting at their behest howsoever or any of the Respondents from victimizing or presenting or referring to the 2<sup>nd</sup> to 13<sup>th</sup> Petitioner in any manner whatsoever adverse to their reputation and standing or which ridicules and portrays them negatively in the eyes of the general public.*

*d. THAT an order of Certiorari be issued to bring into this Honourable court for purposes of being quashed the decision made by the Respondents to send the 2<sup>nd</sup> to 13<sup>th</sup> Petitioner in the legal department on compulsory leave vide a letter dated 26<sup>th</sup> September 2017 for being in contravention of Articles 47 and 236 of the Constitution 2010.*

*e. THAT the Honourable Court be pleased to find and uphold that the decisions, actions and omissions of the 2<sup>nd</sup> Respondent in respect of sending the 2<sup>nd</sup> to the 13<sup>th</sup> Petitioners on compulsory leave constitute conduct that violates Articles 10, 41 and 236 of the Constitution.*

*f. THAT the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners be reinstated to their positions in the legal department of the Nairobi City County Government.*

*g. THAT the Honourable Court be pleased to order for compensation and general damages to issue for violation of the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners' rights and an inquiry into quantum be undertaken.*

*h. THAT the costs be awarded to the Petitioners.*

2. The 2<sup>nd</sup> to 13<sup>th</sup> Petitioners aver that they are employed on permanent and pensionable basis.

3. It is the Petitioner's case that vide the letter dated 26<sup>th</sup> September 2017, the 1<sup>st</sup> Respondent illegally and un-procedurally sent the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners on compulsory leave effective immediately. Thereafter, the 2<sup>nd</sup> Respondent issued various press statements, in particular, on 4<sup>th</sup> October 2017 vide Daily Nation Newspaper, the reason for the compulsory leave was communicated. The Petitioners aver that the 2<sup>nd</sup> Respondent's act was actuated by malice and ill-will and was contrary to the provisions of law.

4. The Petitioners aver that they are apprehensive that the Respondents may move to advertise a vacancy and fill their positions. It is further averred that the Respondents have denied the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners an opportunity to know the complainants, when the complaints were made, particulars of the allegations and the reasons why there was delay in communicating the complaints to them.

5. The Petitioners aver that the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners were recruited through a competitive process and appointed based on merit. They had the legitimate expectation to serve their full term unless removed through known and established due process. The Petitioners further aver that their removal is because the 2<sup>nd</sup> Respondent seeks to reward his campaigners.

6. The Petitioners aver that the Respondents' actions and omissions violate the principles of law, natural justice and the provisions of Articles 10, 27 (1), 33, 47, 50, 232 and 236 of the Constitution.

7. In their Supporting Affidavit sworn by Roba S. Duba on 17<sup>th</sup> October 2017 and filed in Court on even date, the Petitioners assert that under Section 79 of the County Act (sic) the County Service Board is prohibited from meting out punishment contrary to the Constitution.

8. It is the Petitioners' case that they were not served with any notices to show cause or taken through a disciplinary process before their dismissal.
9. On 4<sup>th</sup> December 2017, the Respondents filed an even dated Notice of Preliminary Objection arguing that the Petition was premature because it was filed without following the procedure laid out in Section 77 of the County Government Act and Section 85 of the Public Service Commission Act. The Court dismissed the Preliminary Objection in its ruling delivered on 6<sup>th</sup> June 2018 because it was of the opinion that the disciplinary process was flawed. The Respondents were ordered to initiate proper disciplinary proceedings.
10. The Respondents sought leave to file their response to the Petition and the same was granted. Subsequently, on 23<sup>rd</sup> July 2018 the Respondents filed the Replying Affidavit of Peter Kariuki, sworn on even date.
11. They aver that several complaints were lodged with the 2<sup>nd</sup> Respondent while he was still the Senator of the 3<sup>rd</sup> Respondent, over sale of private land and eviction of private land owners engineered by the office of the 3<sup>rd</sup> Respondent.
12. That upon investigation, the 2<sup>nd</sup> Respondent discovered that there was a cartel involving employees from various departments of the 3<sup>rd</sup> Respondent who would conspire to manipulate the Court process to fraudulently sell and evict private land owners from their properties. In particular, there was a complaint relating to land reference number Nairobi Block/209/403/3 which had purportedly been sold in execution of a decree issued in favour of the 3<sup>rd</sup> Respondent.
13. Investigations revealed that the 3<sup>rd</sup> Respondent's officers through the 6<sup>th</sup> Petitioner had created a take demand for rates of Kshs. 12,920,000.00 over the said parcel of land and filed Civil Case No. 7 of 2013 at the Magistrates Court. The pleadings were drafted by the 6<sup>th</sup> Petitioner who was not to do so as he had not taken a current practicing certificate. Further, at the time of filing this suit the Defendant had been deceased for 3 years.
14. The Respondents aver that after the sale of the said parcel of land, Nairobi ELC Misc. No. 144 of 2014 seeking vesting orders was filed. The vesting orders were issued but the Registrar declined to register the property because the land was subject to ownership in common. Upon this realization, the 6<sup>th</sup> Petitioner fraudulently added the names of the other owners in the vesting order and the vesting order was then registered.
15. The Respondents also aver that the 5<sup>th</sup> Petitioner instituted civil proceedings, obtained an *ex parte* judgment in default in Nairobi HCCC No. 555 of 2009 and sold the property known as Nairobi Block/93/1257 in purported execution of the decree then pocketed all the proceeds. The Respondents further aver that there are several other cases of fraudulent transactions by the Petitioners.
16. The Respondents aver that upon taking office, the 2<sup>nd</sup> Respondent invited the DCI to investigate the operations of the departments in the 3<sup>rd</sup> Respondent with a view of safeguarding the private properties of the members of the public. However, the Petitioners interfered with the investigations by hiding or interfering with documentation. For this reason, the Petitioners were sent on compulsory leave. The Respondents aver that investigations are still ongoing.
17. The Respondents assert that any person dissatisfied by a decision of the County Government Public Service Board may appeal to the Commission. However, the Petitioners have refused to comply with that process.
18. The Respondents aver that the Petition is premature, frivolous, vexatious, unmerited and an abuse of the Court process. They further aver that this Honourable Court lacks the jurisdiction to deal with defamation cases.
19. On 1<sup>st</sup> October 2018, the Petitioners filed the Further Affidavit of Roba S. Duba sworn on 28<sup>th</sup> September 2018, in response to the Respondents' Replying Affidavit. The Affidavit reiterates the averments in the supporting affidavit but the Petitioners assert that the averments in the Replying Affidavit are inaccurate and irrelevant to this suit.
20. The Petitioners aver that this Court has unequivocal jurisdiction to deal with matters on constitutional interpretation and violation of human rights. They also aver that the disciplinary process was halted because it was flawed and the 4<sup>th</sup> Respondent directed to initiate proper and legal disciplinary proceedings. This notwithstanding, the Petitioners have lost faith in the procedure.
21. The Petitioners aver that the Commission lacks the jurisdiction to hear matters concerning constitutional violations.
22. The Petitioners further aver that the allegations concerning land grabbing are false, irrelevant, frivolous, unmerited and lack substantial proof. In particular, that the allegations brought against the 5<sup>th</sup> and 6<sup>th</sup> Petitioners constitute a fishing expedition.
23. The Petitioners aver that demand for rates were made and the 6<sup>th</sup> Petitioner only filed Civil Case No. 7 of 2009 upon there being non-compliance of payment of rates of the suit premises. The suit was not defended resulting in a summary judgment and a decree issued. The property was subsequently sold vide public auction. The Petitioners also aver that when the suit was instituted, the 6<sup>th</sup> Petitioner was unaware of the Defendant's passing and the identity of the owners of the suit premises. The owner's identity became known to him while he was registering the vesting orders and made an application to enjoin the co-owners.
24. The Petitioners contend that the 6<sup>th</sup> Petitioner was treated as a state counsel by virtue of being a government employee. They also aver that the right procedure was followed in the sale of the suit premises and that the 6<sup>th</sup> Petitioner acted diligently and professionally in prosecuting the matter.

25. The Petitioners contend that the 5<sup>th</sup> Petitioner took over HCCC No. 555 of 2009 in his capacity as a private practitioner and conducted the same with integrity and professionalism until its conclusion. The Petitioners aver that the public auction was not objected to.

### **Submissions by the Parties**

26. The Petitioners (save for the 11<sup>th</sup> Petitioner) in the written submissions dated 28<sup>th</sup> September 2018 and filed on 1<sup>st</sup> October 2018, isolated the issues for determination as follows: whether the Petition was filed in breach of specific procedure, whether the Court has jurisdiction to address matters of constitutional violations, whether the Petitioners' rights have been violated and whether the Petitioners are entitled to the remedies sought.

27. It is the Petitioners submissions that the Petition herein as filed, adheres to the laid down procedure in law. They posit that the Commission does not have jurisdiction to hear and determine matters concerning the Petitioners' constitutional rights and that Section 77 of the County Government Act does not limit the jurisdiction of the Court to hear and determine the matter as an appeal exists only as an option.

28. The Petitioners submit that this Honourable Court has the jurisdiction to interpret the constitution and determine applications for enforcement of rights and fundamental freedoms in relation to matters within its jurisdiction. The Petitioners rely on the case of **United States International University vs. the Attorney General and Others [2012] eKLR** for further emphasis.

29. The Petitioners submit that their rights have been violated since the County Secretary and the Governor lack the *locus standi* to give directives to have the Petitioners sent on compulsory leave which lies within the mandate of the County Public Service Board. The Respondents have infringed on the Petitioners' rights to fair labour practices, fair administrative action, fair hearing and have also contravened the values and principles enshrined under articles 10 and 236 of the Constitution. The Petitioners rely on the case of **Kenya Human Rights Commission & Another vs. Non-Governmental Organizations Co-ordination Board & Another [2018] eKLR, Pet No. 404 of 2017** where the Court was of the opinion that the failure to observe the provisions of Article 47 undermines the rule of law and the value of Article 19 (1) of the Constitution. For further emphasis, the Petitioners have also relied on the cases of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, Judicial Service Commission vs. Mbalu Mutava & Another [2014] eKLR, Dry Associates Limited vs. Capital Markets Authority and Another [2012] eKLR**.

30. The Petitioners posit that it is important to safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. Those taking administrative actions are bound to adhere to the provisions of Article 47 failure of which renders their actions unconstitutional, null and void. They rely on the case of **Attorney General vs. Kituo Cha Sheria & 7 Others [2017] eKLR** for further emphasis.

31. The Petitioners submit that it is appropriate for the Court to issue a declaration to declare the statements made by the 2<sup>nd</sup> Respondent against the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners to be defamatory in nature and damaging to their reputation. They rely on the case of **Joseph Njogu Kamunge vs. Charles Muriuki Gachari [2016] eKLR Civil Appeal No. 42 of 2014** and **John Edward vs. Standard Limited**, which lay down the ingredients for defamation.

32. The Petitioners submit that the Court should issue an order for damages to the 2<sup>nd</sup> to the 13<sup>th</sup> Petitioners considering the grievous harm occasioned on their reputation. To reinforce this position, they rely on the cases of **Tanganyika Transport Company Limited vs. Ebrahim Nooray** and **Johnson Evan Gicheru vs. Andrew Morton & Another**.

33. The Petitioners submit that they have made an arguable case proving that their legal rights have been infringed or is about to be infringed upon by the Respondents as is the requirement in the case of **Court of Appeal in C.A.C.A. No. 51 of 1972 Giella vs. Cassman Brown [1975] E.A. 358** and should therefore be granted the order for injunction.

34. The Petitioners submit that the Court should find that the procedure followed by the Respondents to send them on compulsory leave was illegal and quash the decision to send the 2<sup>nd</sup> to 13<sup>th</sup> Petitioner on leave. The Petitioners also submit that they have proved that their rights have been violated and pray that the Court invokes Article 23 to declare that the Petitioner's right to fair administration has been infringed upon.

35. The Petitioners submit that Section 49 (3) of the Employment Act 2007 empowers this Court to make an order for reinstatement where the circumstances permit and pray that the court awards the same. They further submit that no evidence has been adduced to prevent them from being reinstated. To reinforce this argument, the Petitioners rely on the case of **National Union of Water and Sewerage Employees vs. Meru Water and Sewerage Services Industrial Cause No. 44 of 2012; [2012] LLR 264 (ICK), Boardman Brothers (Natal) (Pty) Limited vs. Chemical Workers Industrial Union** and **Jabari vs. Telkom SA (Pty) Limited**.

36. The Petitioners submit that Courts have held in many cases that a Petitioner who succeeds in a Petition for violation of human rights as enshrined under the bill of rights is entitled to compensation in the form of general damages. They rely on the case of **C.O.M. vs. The Standard Group Limited & Another [2013] eKLR, Dr. Samson Gwer & 5 Others vs. Kenya Medical Research Institute (KEMRI) & 3 Others [2014] eKLR** and **Michael Meegesh Sangiriaki vs. Narok County Government, Petition No. 17 of 2014 (Unreported)**.

37. The Respondents in their submissions dated 23<sup>rd</sup> October 2018 and filed on 24<sup>th</sup> October 2018 isolate the following as the issues for determination: whether the Petitioners have established the necessary ingredients to prove the tort of defamation, whether the alleged statements if at all they were made amount to defamation, whether the Petitioners' constitutional rights were violated and whether the action of sending the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners on compulsory leave was illegal.

38. The Respondents submit that for a defamation suit to be sustained, there are well laid down elements, which ought to be proved which

elements the Petitioners have failed miserably to attain. Further, the omission to disclose the exact impugned words, statements and/or phrases was prejudicial to the Respondents and made the claim for defamation fatally defective. They rely on the cases of Samuel Ndung'u Mukunya vs. Nation Media Group Limited & Another [2015] eKLR, Nkalubo vs. Kibirige [1973 EA 102] and Dr. Lucas Ndungu Munyua vs. Royal Media Services Limited & Another [2014] eKLR.

39. The Respondents further submit that the alleged statement or publications are not defamatory as they represent a true representation of facts which are matters of public interest and that the defences of justification, fair comment and privilege suffice. They rely on the case of Joseph Njogu Kamunge vs. Charles Muriuki Gachari [2016] eKLR, Fraser vs. Evans & Another [1969] 1 ALL ER 8, Wilradeolia vs. Simpson 2008] SCC 40 and Harakas & Others vs. Baltic Mercantile & Shipping Exchange Limited & Another (1982) 2 ALL ER 701 to buttress this assertion.

40. The Respondents submit that the party alleging the violation of their constitutional rights should set the specifications with precision the specific rights that have been violated, the manner in which they have been violated and the persons against whom the complaint of violation has been made. They rely on the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance Civil Appeal 290 of 2012 [2013] eKLR and Anarita Karimi Njeru vs. Attorney General [1979] KLR 154. The Respondents posit that the Petitioners have not disclosed any constitutional violations against them to warrant the remedies sought. As such they are not entitled to them.

41. The Respondents submit that sending the Petitioners on compulsory leave was necessary and was only for the purpose of paving way for proper investigations owing to the Petitioners' actions and their positions.

42. They further submit that it would be unfair for this Honourable Court to interfere with the disciplinary process. They rely on the cases Judith Mbayah Tsisiga vs. Teachers Service Commission [2017] eKLR and Rose W. Kiragu vs. Teachers Service Commission [2016] eKLR. Consequently, they submit that the decision to send the Petitioners on compulsory leave was not illegal and was within the authority of the Respondents to do so.

43. The 11<sup>th</sup> Petitioner in his written submissions dated 3<sup>rd</sup> December 2018 and filed on 4<sup>th</sup> December 2018, sought to associate himself with the submissions for the Petitioners and urged the Court to find that the Petitioners have proved their case on a balance of probabilities.

44. I have considered the averments and submissions of all the parties herein. The issues for this Court's determination are as follows:-

**1. Whether this Court has jurisdiction to determine this Petition.**

**2. Whether the Respondents' decision to send the 2<sup>nd</sup> to 13<sup>th</sup> Petitioners on compulsory leave offends the rule of law and violates their rights under the Constitution.**

**3. Whether the Petitioners are entitled to the remedies sought.**

45. On the first issue, the Respondent had argued that this Court lacks jurisdiction to handle this Petition as it relates to defamation. Indeed this Court lacks jurisdiction to deal with purely defamation cases, as the Court with jurisdiction on this is the High Court.

46. However, what is before me is a claim for defamation emanating from an employment relationship. Indeed, what is in issue are employee rights under the Constitution together with a claim for defamation.

47. The issue of this Court's jurisdiction was settled in the United States International University (USIU) vs the A.G and Others (2012) eKLR where Majanja J held as follows:-

***“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the provision of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act, 2011 or to (so) interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court ..... to accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters of its competence would undermine the status of the Court”.***

48. This position was upheld in Daniel N. Mugendi vs Kenyatta University & 3 Others (2013) eKLR where the Hon. Court indicated that this Court has jurisdiction to deal with not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.

49. That said and done, I find I have jurisdiction to handle this matter and proceed to do so.

50. On the 2<sup>nd</sup> issue, the issue at stake is the Respondent's decision to send the Petitioners on compulsory leave. I have already determined this issue in my ruling dated 6.6.2018 where I indicated that the disciplinary process was flawed as it had not been initiated by the County Public Service Board and was therefore halted.

51. I however also determined that the Respondents were free to initiate proper disciplinary processes pending hearing and determination of this Petition.

52. It is not in this Court's knowledge whether proper disciplinary processes were ever initiated. The position therefore remains that the disciplinary processes that was initiated against the Petitioners by sending them on compulsory leave was flawed.

53. In the same vein then it follows that the Petitioners labour rights under Article 41 of the Constitution were flawed. Article 41 states that **“every person has the right to fair labour practices”**.

54. Other rights of the Petitioners under Article 47 of the Constitution or fair administrative process was also flouted. I do not wish to belabor this issue at all, as I already made a determination on the same.

55. Having found as above, the last issue is on what remedies to award. The Petitioner sought various remedies including award of damages for defamation.

56. The Respondent submitted and rightly so that for a Petitioner to succeed in a defamation suit, the words, statements and/or phrases prejudicial to them made by Respondents must be expressly disclosed. This was the holdings in **Samuel Ndungu Mukunya case (supra) and Dr. Lucas Ndungu Munyua vs Royal Media Services Limited** (supra).

57. In the instant Petition, the Petitioners have averred that the Respondents indicated that the Petitioners were involved in illegal transaction targeting sale of public land.

58. The Respondent have even pleaded fair comment on this issue. It is however, the duty of the Respondent to prove their allegations, which the Petitioners denied.

59. The Respondents did not submit before this Court any evidence to prove these serious allegations made against the Petitioners and which remain mere statements without proof.

60. It is therefore true that the allegations as against the Petitioners are serious and defamatory in nature if not proved. In the circumstances, the claim for defamation succeeds.

61. In terms of remedies, I will therefore find for the Petitioners and award each one of them 2 million Kshs in damages plus costs of this Petition.

Dated and delivered in open Court this **6<sup>th</sup> day of February, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ochieng for Respondents – Present

Misati for 11<sup>th</sup> Petitioner – Present

Oketch for other Petitioners – Present