



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT BUNGOMA

ELRC PETITION NO. 45 OF 2017

THE BUNGOMA COUNTY PUBLIC SERVICE

BOARD AND 6 OTHERS.....CLAIMANTS

VERSUS

THE GOVERNOR, COUNTY GOVERNMENT OF

BUNGOMA & 3 OTHERS.....RESPONDENT

JUDGMENT

The Petition was filed on 11.12.2017 seeking various reliefs that may be summarized as follows:-

- a) A declaration that the findings and recommendations of the 2nd Respondent's Committee on Public Service and ICT dated 6.12.2017 and as supersessionally adopted and or passed by the said 2nd Respondent on 7.12.2017 technically, substantively and legally amounted to usurping the exclusive powers of the National Assembly and in contravention of the Constitution, the County Government Act and the Employment Act and in the premises unconstitutional, illegal, null and void and of no legal consequence at all.
- b) A declaration that the Resolution by the County Assembly of the 2nd Respondent made on 7.12.2017 or any other date pursuant to the findings of the select committee dated 6.12.2017 were in contravention of the Constitution, the County Governments Act and the Employment Act and therefore unconstitutional, illegal, null and void and of no legal consequence at all.
- c) A declaration that the Respondents are jointly and or severally in violation of the principles of natural justice and in violation of the Petitioner's rights as guaranteed under Articles 27,28,35,41,47 and 50 of the Constitution.

The Petition is grounded on the following facts:

The Petitioners were appointed as chairman and members of the Bungoma County Public Board on a six (6) year contract renewable with effect from 16.7.2013

On 24.10.2017, the Interested Party made a Petition addressed to the 1st Petitioner seeking the removal of the 2nd to 7th Petitioners as the chairman, vice chairperson, secretary and members of the 1st Petitioner, the Board.

The Petition and summons required the 1st Petitioner to appear before the 2nd Respondent's committee on Public Service and ICT to inquire into allegations against them.

The Petitioners filed substantive responses to the said allegations. At the hearing two witnesses introduced as John Wekesa Khaoya and Mercy Nekesa Wanyonyi were introduced as witnesses to the Petition.

The said witnesses testified despite that they had not made prior statements available to the Petitioners for their consideration and responses.

Meanwhile, 1st Respondent had made public attacks against the Board members through the media alleging their culpability and intent to remove them from office.

At the hearing on 27.11.2017 before the committee no tangible evidence was adduced at all against the Petitioners.

The Petitioners ably rebutted allegations made despite the relatively short time given to them.

The Petitioners were then asked to respond to random allegations from members which had not been notified to them prior.

The Petitioners allege violation of Article 27, 28, 41, 47, 50 and 236 of the Constitution of Kenya.

The committee made a report recommending removal of the Petitioners to the County Assembly and was tabled on 7.12.2017.

The report was debated and adopted unanimously by the Assembly as per Hansard report marked 'CAB 10'.

The resolution of the Assembly to summarily remove the Petitioners was communicated to its Governor who proceeded to remove the Petitioners from office.

The Petitioners state that the proceedings before the assembly were orchestrated and a charade geared to adopt a report based on hearsay, innuendo and without any factual basis. The petitioners pray that the reliefs sought be granted with costs.

Response:

The Respondents filed replying affidavit of Ignatius Wekesa Wangila, Principal Legal Counsel of the Assembly, the 2nd Respondent.

He deposes that the Petition for the removal of the Petitioners by one Moses Wanjala Lukoye was received by the Clerk to the Assembly on 31.8.2017.

The report was committed by the Assembly through the speaker to the committee of Public Administration and ICT on 11.10.2017.

That the Petitioners, appeared before the committee on 6.11.2017. That the Petitioners requested for more time and committee sittings were adjourned to 13th .11.2017.

The hearings were conducted on the 27th and 29th.11.2017 at KIE Hall where all the parties were represented by Legal Counsel.

The report of the committee was tabled before the County Assembly of Bungoma on 7.12.2017. The Hansard Report was produced and marked 'CAB 10'.

That the report was debated and adopted by the House unanimously where all members present voted for the removal of the Petitioners from the office.

The resolution was communicated to the Governor for immediate implementation.

That no rights of the Petitioners were violated as alleged or at all.

Due process as set out in the Constitution and Section 58 (5) County Governments Act 2012 were followed to the letter.

That the Petition lacks merit and it be dismissed with costs.

Determination.

The issues for determination are:

- i. Whether the Respondents have the constitutional and legal authority to remove Bungoma County Public Service Board from office.
- ii. If the answer to (i) is in the affirmative, whether substantive and procedural legal requirements were followed in the removal of the Petitioners.
- iii. Whether the Petitioners are entitled to the reliefs sought.

Issues (I) and (ii)

The court will deal with issues (I) and (ii) together.

Article 251 (1) of the Constitution provides:

“ A member of a commission (other than an ex official member), or the holder of an independent office, may be removed from office for:-

a) A serious violation of the constitution or any other law, including a contravention of Chapter Six;

b) Gross misconduct, whether in the performance of the members or office holder's functions or otherwise;

c) Physical or mental incapacity to perform the function of office;

d) Incompetence; or

e) bankruptcy.

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a Petition to the National Assembly setting out the alleged facts constituting that ground."

In specific respect to members of County Public Service Board, Section 58 (4) of the County Governments Act provides;

"(4) A member of the Board shall-

(a) Hold office for a non-renewable term of six years;

(5) The members of the Board may only be removed from office -

(a) on ground set out in the removal of members of a constitutional commission – under Article 251 (1) of the Constitution, and

(b) by a vote of not less than seventy five percent of all the members of the County Assembly."

From the Hansard official report of the County Assembly of Bungoma for Thursday 7th December, 2017, Hon. Joan Kutukai tabled Report of the committee on Public Administration and ICT which report had recommended thus :

" This committee from the foregoing recommends the removal of the Bungoma County Public Service Board".

At page 13 and 14 of the Hansard, after lengthy debate of the house by members of the Bungoma County Assembly the speaker said interalia.

"...This committee did make recommendations for the removal of Bungoma County Service Board and the mover of the motion seeks that this House proceeds to remove the Bungoma County Public Service Board."

The speaker then guided the house that in terms of Section 58 (5) (b) of the County Governments Act, 75% threshold of members of the house voting in favour of the motion for removal was required.

The speaker proceeded to move the house for division and counting the members for and against the motion for removal and the speaker confirmed at page 15.

" Before we proceed, we can confirm that the motion was carried by 55 Honourable members in support of the removal of Bungoma Public Service Board."

It is clear that the motion to " remove the Bungoma County Public Service Board" was carried unanimously by 55 honourable members constituting more than 75% of the members of the County Assembly. That notwithstanding, the legal question to be answered is whether the Assembly has authority to "remove the Bungoma County Public Service Board" from office. This question is asked in contradiction to removal of specific members of the Bungoma County Public Service Board.

It is beyond peradventure that Article 51 (1) and (2) of the Constitution as read with Section 58 (5) of the County Governments Act 2012 do not provide for the removal of a County Public Service Board. The provisions only provide the criteria for removal of an individual member of the County Public Service Board and not the Board itself.

Furthermore, a removal of a specific member of the County Public Service Board in terms of Article 51(1) & (2) as read with Section 58 (5) must be communicated by a Petition at the Assembly for the removal of a member(s) specified in that petition.

The petition presented to County Assembly of Bungoma named six (6) members for removal.

The Petition was considered by the Assembly, business committee and forwarded by the speaker to the relevant committee to conduct investigations.

The committee on Public Administration and ICT considered the petition upon summoning members of the Board and named witnesses and prepared a report that recommended the removal of the Bungoma County Public Service Board. The report was tabled before the whole house of the County Assembly of Bungoma and it was adopted.

The Court of Appeal decision in the **County Assembly of Kisumu and 2 others -vs- Kisumu County Assembly Service Board and 6 Others [2015 eKLR]** stated as follows:-

“We agree with counsel for the Respondents that County Service Boards do not exist at the pleasure of County Assemblies or any other state organ.... They are not subordinate to County Assemblies, or any other state organ. County Assemblies have no constitutional or statutory authority to disband, dissolve or even suspend the operations of County Service Boards.”

What was succinctly stated by the Court of Appeal is exactly what the Respondents herein purported to do.

The conduct by the Respondents is unfair, unconstitutional, unlawful and in excess of their constitutional and statutory mandate.

There was a Petition naming specific members of the Bungoma County Public Service Board for removal by the County Assembly.

The Petition was considered by the relevant committee of the Assembly and the committee prepared a report for consideration by the whole house in which was recommended the “removal of the Bungoma County Public Service Board.”

The whole house debated the report and passed a resolution for the “removal of Bungoma County Service Board” by the required threshold of not less than 75% of the members of the County Assembly. The house failed to deal with specific cases of the named members of the Public Service Board and consider each one of them, case by case and on their own merits for removal. Consequently the Assembly did not make specific resolutions in respect of each named member upon considering the merit of each case. Instead a blanket resolution for the removal of the Board was made contrary to the Letter and spirit of Article 251 (1) & (2) and Section 58 (5) of the County Governments Act.

The resolution by the County Assembly of Bungoma and subsequent action by the Governor to remove the Bungoma County Public Service Board was unlawful, null and void.

Accordingly the court makes the following orders:-

- a) The resolution by the County Assembly of the 2nd Respondent made on 7.12.2017 or any other date pursuant to the findings of the Select Committee dated 6.12.2017 is unlawful, null and void and in violation of Article 251, (1) and (2) of the Constitution of Kenya 2010 as read with Section 58 (5) of the County Governments Act 2012.
- b) The Respondents are permanently enjoined from removing the Bungoma County Public Service Board from office.
- c) The Respondents to jointly and severally pay the costs of the Petition.

DATED, SIGNED and DELIVERED at BUNGOMA this 1st day of FEBRUARY, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:-

Nyukuli, Shifwoka & Co. Advocates for the Petitioners

Simiyu Makokha & Co. Advocates for the 1st and 3rd Respondents

Onjiri & Co. Advocates for 2nd Respondents.

Interested Parties in person.

Chrispo: Court Assistant.