



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT BUNGOMA**

**CAUSE NO. 2 OF 2017**

**NAMALWA MUTEKHELE KHALAGAL.....1<sup>ST</sup> PETITIONER**

**PATRICK NABISWA KOYL.....2<sup>ND</sup> PETITIONER**

**STEPHEN MUSUNGU KOKONYA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF BUNGOMA.....RESPONDENT**

**AND**

**LAURIAN KOLIKHO.....1<sup>ST</sup> INTERESTED PARTY**

**GRACE KHAOYA.....2<sup>ND</sup> INTERESTED PARTY**

**STEPHEN NENDELA.....3<sup>RD</sup> INTERESTED PARTY**

**PAUL MASINDE.....4<sup>TH</sup> INTERESTED PARTY**

**MOKIN ARAP P'TANGUNY.....5<sup>TH</sup> INTERESTED PARTY**

**JOHN BARASA MUNYASIA.....6<sup>TH</sup> INTERESTED PARTY**

**J U D G M E N T**

Petition was filed on 10.11.2017 and amended on 28.2.2018 seeking the court to nullify termination of services of the Petitioners as County Executive Committee Members. The Petitioners allege the Respondent violated Articles 10, 47, 73 and 259 of the Constitution 2010 and Section 42 of the County Governments Act. They seek damages for violation of their rights. The Petition is grounded on the following facts:

The County Government appointed the Petitioners under Article 183 (c) (d) of the constitution and Sections 30 and 31 of the County Government Act 2012 on 23<sup>rd</sup> July, 2013.

Section 42 (1) of the County Government Act provides. “ **where general election is held for a County Government, the outgoing government executive committee shall remain in office until a new county executive committee is constituted after the election.**”

The Petitioners were informed by the out going governor Mr. Keneth Lusaka, by a Letter dated 21<sup>st</sup> June, 2017 that their contract had come to an end and that their contract was extended to 31<sup>st</sup> August, 2017 while awaiting the formation of a new cabinet.

Meanwhile the County Secretary Mr. Murumba S. Chirulu wrote a letter dated 3.8.2017 to the Petitioners pursuant to Article 179 (7) of the Constitution to cease providing services as CEC Members to enable new administration to take the next action. The Letter was said to come to effect immediately.

As at the 21<sup>st</sup> August 2017, the Government had not nominated persons for consideration, vetting and appointment to the Executive Committee. The nomination actually took place on 1.11.2017 and as late as 28<sup>th</sup> September, 2017 the new Governor called the Petitioners to attend County Executive Committee meetings despite the wrongful termination of their tenure.

The Petitioner earned Kshs 3000.000 per month and state that they are owed that amount until the new Executive Committee members took over.

That the Respondent violently evicted the Petitioners from their office and way laid them in public places and took away their official motor-vehicles by force in violation of Article 10 and 259 (1) of the Constitution as at the time the new Executive Committee had not taken office and therefore Section 42 (1) of the County Government Act was violated.

The Petitioners pray that the Petition be allowed as prayed.

### **Response.**

Respondent filed a response to the Petition on 1.1.2018 in which the Respondents deny that the termination of the services of the Petitioners was unconstitutional since their contract period had come to an end.

That the provisions of Section 42(1) of the County Government Act is not absolute but is qualified by Section 42(2) of the Act and Article 179 (7) of the Constitution of Kenya 2010 where the said members can only serve for 21 days after the swearing in the members of the County Assembly.

That the Petition has no merit and it be dismissed with costs.

### **Determination.**

The Petitioners were appointed as Executive Committee members on 23/7/2013. The appointment was for a five (5) year period. The new Executive Committee members were appointed on 1.11.2017 but the contracts of service of the Petitioners were terminated by the County Secretary on 21.8.2017.

The question for determination is whether the Executive Committee members may be removed from office before the new Executive Committee Members have been appointed following general elections and change of government.

We recap Section 42 (1) as follows:-

“When a general election is held for a County Government the outgoing government executive committee shall remain in office until a new County Executive Committee is constituted after the election.”

Subsection 42 (2) provides

“ The Constitution of a new Executive Committee after an election under sub section (1) shall be finalized within twenty -one days of the swearing in of the members of County Assembly”.

The new Governor did not constitute a new Executive Committee within twenty one days of the swearing in of the members of the County Assembly. The Respondent then purported to rely on this derogation by the Governor to end the term of the Petitioners before the new executive committee had been constituted. It is not in dispute that the Respondent used force to evict the Petitioners from their office and forcefully dispossessed them of their official cars by waylaying them on the road and forcefully taking the cars.

Section 42(1) is clear and unequivocal that the Executive Committee Members shall remain in office until a new County Executive Committee is established after the election.

This provision is not qualified by subsection 42(2) as alleged by the Respondents or at all. This subsection oblige the Governor to ensure the new government is constituted within 21 days after the swearing in of the Members of County Assembly.

If the Governor is in default and delays in putting in place the new Executive Committee, the Governor cannot rely on his default or inaction in violation of the law, to further violate mandatory provisions of Section 42(1) of the County Governments Act No. 17 of 2012. This in itself is adding insult to injury.

The provisions of Section 42(1) were not enacted by chance. The provision is in line with an ancient and well tested constitutional principle that a Government shall not have a vacuum between an outgoing Government and an incoming Government.

The logic of this principle is clear and easily understood in the context of opportunities that are created for others to do wrong when there is a lacuna in government or governance.

This is indeed is a principle founded in common sense and one shudders why an incoming government would not want an orderly hand-over by the out-going government in the highest level of the County cabinet so called County Executive Committee.

It is the court’s considered view and finding that the Respondents violated Section 42 of the County Government Act and also violated Article 10, 47 and 259 of the constitution of Kenya by removing the Petitioners from office prematurely in a disorderly and violent manner in which they kicked out the outgoing Executive Committee Members.

Their conduct did not bring honour and decorum to the office they hold and to the office of the Executive Committee Members held. Indeed, this conduct may be described as shameful and unwarranted and a violation of the dignity of the Petitioners contrary to Article 10 (2) (b) as read with Article 28 of the Constitution of Kenya 2010.

Accordingly and in answer to issue (i) above, the Petition succeeds and the court makes the following orders:-

- a) The premature removal of the Executive Committee Members before the appointment of the incoming Executive Committee Members was in violation of Section 42(1) and Articles 10, 47 and 259 of the Constitution of Kenya 2010 and therefore unlawful.
- b) The violent manner the Petitioners were removed from office violated their rights under Articles 10, 28 and 259 of the Constitution of Kenya 2010.
- c) The Petitioners are entitled to their monthly salary up to the date of appointment of the new Executive Committee on 1.11.2017. Accordingly, the County Government to compute and pay salary to each of the Petitioners from the period 21.8.2017 to 1.11.2017
- d) The court does not make an award in respect of General damages, but instead admonishes the Respondents for the indignity they brought to their respective office and that of the Executive Committee Members.
- e) Respondent to pay costs of the suit.

**DATED, SIGNED and DELIVERED at BUNGOMA this 29<sup>TH</sup> day of MARCH, 2019.**

**HON. M. N. NDUMA, JUDGE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA**

**Appearances:**

Mr. Wamalwa for Petitioners

Mr. Makokha for Respondent.

Chrispo: Court Assistant.