



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO. 17 OF 2018

HALIMA GABABA ABDULAHI PETITIONER

VERSUS

HE LEE KINYANJUI 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

JUDGEMENT

The petitioner is seeking for orders that;

1. Spent.

2. A declaration that the action of the respondents in relieving the petitioner of her duties is a breach of the petitioner's constitutional rights under Articles 27(1), (2), (3), 208, 41, 47, 50, 200 and 236 of the constitution and that her removal is null and void for all intents and purposes.

3. An order of certiorari to remove into this court and quash the decision of the respondents, communicated through the letter dated 1st November, 2018 relieving the petitioner of her duties as member of the county executive committee in charge of gender, youth, culture, sports and social services.

4. An order of prohibition barring the respondents from appointing any fresh nominee for the position of Nakuru County Executive member in charge of gender, youth, culture, sports and social services.

5. A declaration that the petitioner is entitled to remain in service of the respondents as the Nakuru County Executive member in charge of gender, youth, culture, sports and social services and to perform the attached duties in accordance with the relevant provisions of the constitution and statutes or as lawfully assigned, unless the petitioner otherwise lawfully ceases to hold office.

6. In the alternative and without prejudice to the foregoing, the petitioner prays for an order of payment of all dues to her in the period she would have served up to the end of her term.

7. The petitioner asks that the respondents bear the costs of the petition.

The petition

The petitioner has since November, 2017 been the 2nd respondents County Executive Committee Member in the department of Youth, Gender, Culture, Sports and Social Services while the 1st respondent is that Governor and the 2nd respondent the County Government established under devolution.

The petitioner served in her position with the respondents until 7th June, 2018 when she was issued with notice to show cause over alleged mismanagement in the department of Youth, Gender, Culture, Sports and Social Services with five (5) concerns;

That on divers dates she used abusive language towards the chief officer for youth and sports;

That she belittled the chief officers and staff under her by indicating that they did not know their roles/duties;

That she created animosity between chief officers and that on 21st May, 2018 she directed the chief officer for gender, culture and social

services not to work with chief officer for youth and sports;

That she chose not to work with chief officers but to work with their juniors; and

That she failed to attend a meeting on 28th May, 2018 convened by the county secretary to deliberate on service delivery in the petitioner's department.

To these allegations, the petitioner responded on 12th June, 2018 and denied the allegations made against her. The petitioner noted that she had met with the chief officer for youth and sports on two occasions on 3rd May, 2018 for orientation and on 21st May, 2018 when he was moving offices and present were other members of staff present and could have heard any use of abusive language. The petitioner only met the chief officer for gender on 28th May, 2018 during a stakeholders meeting on female genital mutilation and gender based violence. The members of the department worked collectively and the chief officers and junior staff as part of the team and the petitioner promoted the same contrary to the allegations that she created different centres of power and conflicts. There were concerns raised with the office of the county secretary and head of public service and the county secretary had promised to act and the petitioner had explained that she did not know that her concerns would form part of the agenda for the meeting held on 28th May, 2018 and the notice for such meeting was not clear on the date and failure to attend was not deliberate.

Following her responses, on 23rd August, 2018 the petitioner received letter of equal date suspending her for 60 days pending investigations and to return to work on 24th October, 2018 to which the petitioner complied. On 19th November, 2018 the petitioner was issued with letter dated 1st November, 2018 for removal from office as member of the county executive committee with immediate effect.

There was no hearing before summary action taken by the respondents against the petitioner. Following the suspension, the petitioner was never called with regard to the investigations directed and the summary action taken is arbitrary and in violation of her constitutional rights.

The petition is also that the petitioner was employed by the National Government in the year 1998 as Public Health Officer and posted to Bungoma and then transferred to Nakuru from the year 2002 in the same capacity. Upon appointment by the respondents, the petitioner was still serving the County.

The failure to give the petitioner a hearing before removal from office is in violation of the right to fair labour practices, fair administrative action, and which should be redressed by the court as prayed for in the petition.

Reply to petition

The respondents replied to the petition through the affidavit of Benjamin Njoroge, County Secretary and head of County Public Service Board and who avers that the petitioner was appointed as County Executive Member of Gender and Social Services on 15th November, 2016 and took oath undertaking to observe all laws of the county, honour and respect all persons she was to serve irrespective of their status.

In April, 2017 as County Secretary he received complaints from the chief officers in the petitioner's department that she was using abusive and foul language against officers in the department. He took up the matter with the petitioner especially the issue of her telling the officers to 'toe the line' and also informed the 1st respondent who called the petitioner over the same matter and use of abusive language towards her juniors. The petitioner failed to take heed and change.

Mr Njoroge also avers that On 28th May, 2018 the 1st respondent advised him to hold a meeting for the department of Youth, Gender, Culture, Sports and Social Services to resolve the various pertinent issues including the conflicts within the department. The petitioner was invited by letter to attend the meeting and he also called her when she failed to attend but arrogantly dismissed him saying she could only attend a meeting chaired by the 1st respondent. The disrespectful conduct went on until 7th June, 2018 when the 1st respondent instructed him to issue a show cause notice to the petitioner which he did.

The petitioner replied to the show cause notice on 12th July, 2018, the 1st respondent considered the same and found no sufficient cause established as to why the petitioner should not be removed from office. The 1st respondent decided to have the petitioner suspended vide letter dated 23rd August, 2018.

On 1st November, 2018 upon the 1st respondent considering all complaints made against the petitioner decided to remove her from office. There was due process in taking such decision as the petitioner was aware of the complaints made against her, there was a fair hearing and the petitioner made her written responses and based on which a decision was taken.

Mr Njoroge also avers that from 1st to 8th November, 2018 the petitioner did not report to work. She was aware of the letter removing her from office and was evading service. She was finally served on 18th November, 2018. The action of removing the petitioner from office was lawful, constitutional and based on justified grounds. The allegations made in the petition fail to meet the constitutional threshold set out in the case of **Kiambu County Tenants Welfare Association versus Attorney General [2017] eKLR** and the same should be dismissed with costs.

The parties made written and oral submissions with regard to the petition.

The petitioner submitted that there was violation of the right to equal protection of the law upon removal from office without due process and contrary to what other similarly situated members of county executive committee facing similar removal process. The right to fair

administrative action was not complied with leading to unreasonable action by the 1st respondent as held in the case of **The County Government of Nyeri & Another versus Cecilia Wangechi Ndung'u, Civil Appeal No.2 of 2015**. There was no procedural fairness in addressing the petitioner's case as upon suspension and alleged investigations, she was not invited to a hearing was held in the case of **Republic versus Evans Odhiambo Kidero (Governor Nairobi County) & another ex-parte Evans Ondiki, JR No.4 of 2016**.

The violations committed against the petitioner led to unreasonable removal from office and is entitled to the reliefs sought.

The respondents submitted that the petitioner was given a fair hearing before removal from office when she was invited to make a written and oral hearing by the respondents. Such written and oral hearing is allowed in disciplinary cases and cannot be faulted on the basis that other officers of the respondents similarly situated were treated differently as this was not the case. The petitioner failed to discharge the burden of prove to the required standard and removal from office was reasonable and based on justified grounds as held in the case of **Kiambu County Tenants Welfare Association versus AG & another [2017] eKLR**. the removal from office was done in accordance with the contract issued between the parties and pursuant to sections 30 and 40 of the County Government Act and article 41 of the constitution, 2010 as held in the case of **The County Government of Nyeri & Another versus Cecilia Wangechi Ndung'u, Civil Appeal No.2 of 2015** that a County Executive Committee member can be removed from office upon a resolution by the County Assembly of under section 31(a) where a Governor considers appropriate and reasonable to do so.

The respondents also submitted that the petitioner is not entitled to the order of certiorari and prohibition against the respondent as held in the case of **Kiscoba Association (acting through John Maina versus Chairman James Ndiba – Organising Secretary versus Nairobi City County Government) [2018]eKLR**

where private law proceedings seeking the enforcement of individual rights should not be addressed through judicial review proceedings. Such proceedings involve the supervisor of public authorities in terms of validity and procedure of decision making. The remedies thus sought by the petitioner cannot issue and the alternative prayers are addressed as she was deployed from the position previously held under the County, Public Health Officer and should revert to the same.

Determination

From the petition, the submissions and case law before the court, the issues which emerge for determination can be summarised as follows; whether there is breach of constitutional rights;

whether an order of certiorari and prohibition should issue to quash decision of the respondents vide letter dated 1st November, 2018 and appointment of any officer in charge of gender, youth, culture and social service;

whether in the alternative the petitioner should be paid for the remainder of the contract term; and

who should pay costs.

On whether the orders of certiorari and prohibition should issue, these are orders which ordinarily issue in judicial review proceedings and for employment and labour relations, such proceedings should abide the provisions of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 read together with Law Reform Act and Order 53 of the Civil Procedure Rules.

The Court of Appeal in giving emphasis on taking appropriate judicial proceedings in the case of **Gabriel Mutava & 2 others versus Managing Director Kenya Ports Authority & another [2016] eKLR**;

*Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of **Harrikissoon v Attorney General [1980] AC 265**, the Privy Council held that:-*

...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action...

...

*the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, where this Court again emphasized:-*

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

It is therefore imperative where orders which ordinarily issue in judicial review be appropriately addressed to give the other parties necessary and before court a fair chance to respond as apposite. To fail to follow the necessary procedures would be to deny the other parties a fair chance to articulate the defence.

This is captured aptly in **Maurice Adongo Anyango versus Kenyatta International Convention Centre [2018] eKLR** as follows;

.....once an employee comes through the gate of Judicial Review, the Court misses the opportunity to interrogate not only their employment record but also the reason and circumstances of the termination. ...

In so far as the appellant's claim was employment claim governed by the Employment Act, the court best suited to interpret the provisions thereof was the Employment & Labour Relations Court in a claim instituted in the normal manner as opposed to judicial review proceedings. This is especially since the appellant was also seeking other reliefs such as salary arrears which transcend the reliefs available in judicial review proceedings. Whether the circumstances in a case allow reinstatement would also be best determined by the same court taking into account the provisions of the Employment Act, viva voce evidence to test the veracity of competing claims as opposed to affidavit evidence which is synonymous or associated with judicial review proceedings. ...

Judicial review, on the other hand, is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.

On the substance of the petitioner's petition and the orders of judicial review for certiorari and prohibition should and failure to abide the necessary procedure so as to allow the respondents a fair chance to a response therefrom, borne in mind that judicial review reliefs are discretionary and given the circumstances of this case that the judicial review orders sought were the most efficacious remedies.

On whether there were constitutional rights breach, the right to fair hearing is sacrosanct under in employment and labour relations under Article 41 of the constitution read together with article 10, 27, 28 and 50 of the Constitution, 2010. The right to be given a hearing for a decision is taken and which is advice to the petitioner was imperative.

In this case, the petitioner was issued with a show cause notice on 7th June, 2018 to which she responded to on 12th June, 2018. On the responses given the respondent's case is that she as invited to an oral hearing by the 1st respondent and matters set out in components against her were addressed.

On the responses given, the petitioner's responses were found not sufficient and was sent on suspension vide letter dated 23rd August, 2018 for 60 days to allow for investigations.

By letter dated 1st November, 2018 the respondents in removing the petitioner from office stated as follows;

.....please refer to the notice to show cause ... dated 7th June, 2018, your unreferenced letter dated 12th June, 2018 and the suspension letter ... dated 23rd August 2018.

Upon considering all the pertinent issues raised regarding your conduct you have been found liable for gross misconduct as per the notice to show cause. Consequently and in accordance with section 40(1) (c) of the County Governments Act you are hereby discharged as a member of the executive committee with immediate effect. ...

Section 40(1)(c) of the County Governments Act provides as follows;

40. Removal of member of executive committee

(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;

[emphasis added].

Did the petitioner grossly misconduct herself? was the decision of removal justified?

In the show cause notice dated 7th June, 2018 there were 5 allegations made against the petitioner for which she was required to show cause why these should not be used to remove her from office. The first and allegations were that she used abusive language towards the chief officer Youth and Sports calling him 'kimbelembele' and 'kiherehere' and her response was that she only met the officer twice and each time there were other members of staff who should have heard the abusive words. The third allegation was that she created animosity between chief officer by terming him as corrupt and disrespectful to which she replied that she had never met the chief officer until 28th May, 2018. The fourth allegation was that the petitioner chose not to work with the chief officer and instead worked with the juniors to which she replied that she likely working in a team all the officers in the department were taken as part of the team. On the fifth allegation the petitioner was alleged to have failed to attend meeting on 28th May, 2018 with the County Secretary and where pertinent issues were to be addressed but refused to attend on the grounds that she could only engage with the 1st respondent and to which she replied that she had raised concerns on some issues with the County Secretary and was promised action and was not informed that such issues would be part of the agenda for the meeting and also the notice given was not clear on the date and there was confusion.

In the court assessment of the allegations made, the responses thereto, no sufficient cause was shown.

The petitioner was faced with serious allegation which if no good cause was shown had the potential of a finding of gross misconduct and removal from office but she chose to floss over the responses. No sufficient was shown as to why disciplinary action could not be taken.

The reason is, use of abusive language at the work place is prohibited under section 44(4)(a) of the Employment Act, 2007 read together with section 40(1) of the County Government Act. once there is failure to give a satisfactory response as to why abusive language is used, summary action for dismissal or removal from office should follow. In this regard, the petitioner only stated she had only met the officers but did not deny her use of abusive language on them.

On the alleged failure to attend a meeting with the Chief Secretary, the allegation is that;

On 28th May, 2018, you were requested vide letter NCG/S/MTS/VOL.XII(100) by the County Secretary to attend a meeting that was to deliberate some pertinent issues affecting service delivery in the department. You blatantly refused to attend and categorically stated that you can only engage H.E. the Governor, not forgetting that the County Secretary was acting with express instructions from him

The petitioner replied as follows;

.....I wish to point out that I'd raised some issues with your office and you promised to act and get back to me on them. I didn't [I did not know those issues would form part of the agenda for the day but most importantly the notice wasn't [was not] clear on the date and hence the confusion.

From the notice by the respondents this was for the meeting *On 28th May, 2018, you were requested vide letter NCG/S/MTS/VOL.XII(100)*. The date and written notice is apparent.

The petitioner did not attend. The reasons given were that she had raised some issues with the County Secretary and did not expect to have the issues as part of the meeting agenda on 28th May, 2018.

Work non-attendance and failure to abide lawful instructions from an employer are matters subject to summary dismissal or removal from office under the provisions of section 44(4)(a) and (e) of the Employment Act, 2007 read together with section 40(1) of the County Government Act. For these reasons, the petitioner failed to show good cause why disciplinary action should not be taken against her by the respondents.

The petitioner has relied on Article 47 of the constitution, 2010. Under article 47(2) it provides as follows;

(2) 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 the action.

In this regard, the reasons leading to removal from office were given in writing after the petitioner failed to show cause why disciplinary action should not be taken against her.

The right to a hearing is enumerated in various cases. an opportunity to be heard and hearing does not in all cases entail oral submission or oral hearing. see **Immanuel Masinde Okutoyi & Others versus National Police Service Commission & Another [2014] eKLR, Kenya Revenue Authority versus Menginya Salim Murgani Civil Appeal No. 108 of 2009** and **Russel versus Duke of Norfolk (1949) all ER 118**.

The right to be afforded an opportunity of being heard must have be distinguished from the necessity to have an oral hearing especially in disciplinary matters. The procedure in such matters is aptly dealt with by **Michael Fordham** in **Judicial Review Handbook**; 4th Edn. at page 1007 as follows:

procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case.

The court finds the petitioner was as at the time of her suspension aware of the allegations she faced, show cause notice had been issued and a response made thereto. The suspension was to allow for investigations and decision by the respondents, which was communicated with written reasons as to why removal from office was necessary. Unlike the case of **The County Government of Nyeri & Another versus Cecilia Wangechi Ndung'u** where the officer was found to have been removed from office without due process and for failure to be given a hearing at all, the petitioner herein was required to show cause and which she failed to do. The decision thus taken by the respondents met the requisite threshold under articles 41, 47 and 50 of the Constitution, 2010. There was good cause to support the decision taken by the respondents for the removal of the petitioner from office. Such is found reasonable and justified.

Without any good cause to quash the decision taken or prohibit the respondents from appointing any fresh nominee for the position of Nakuru County Executive member in charge of gender, youth, culture, sports and social services as the court is not properly moved in judicial review proceedings, the decision taken stands. On the finding that removal from office of the petitioner was justified, the petition must fail.

Accordingly, the remedies sought cannot issue. The petition is hereby found without merit. Petition is hereby dismissed with costs to the respondents.

Delivered in open court at Nakuru this 29th day of April, 2019.

M. MBARU

JUDGE

In the presence of: