



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 13 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 25th April, 2019)

IN THE MATTER OF: ARTICLES 10(2c), 22(1) & (2)(a)(c), 23(1),41(1)(2b), 48, 47(1) (2), 50(1), 165, 236,179(6), 183, 236(a) (b), AND 258 (1) & (2) (c) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS PARTICULARLY ARTICLES 27(1) & 41(1) (2b) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF THE DECISION BY THE 1ST RESPONDENT OF INDERDICTING THE PETITIONER WITHOUT GIVING A FAIR HEARING IN TOTAL VIOLATION OF ARTICLE 47 (1) AND (2) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE EMPLOYMENT ACT 2007, LAWS OF KENYA

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

IN THE MATTER OF: STATUTORY INSTRUMENTS ACT NO 23 OF 2013

-BETWEEN-

JUNE MAWIA MUNYAO.....APPLICANT/PETITIONER

-VERSUS-

1. THE SECRETARY- COUNTY PUBLIC SERVICE BOARD-KITUI

2. THE ACTING COUNTY SECRETARY COUNTY GOVERNMENT OF KITUI

3. THE COUNTY EXECUTIVE COMMITTEE- FINANCE & PLANNING

4. THE COUNTY GOVERNMENT OF KITUI.....RESPONDENTS

RULING

1. The Petitioner/Applicant filed an Amended Notice of Motion on 6th December 2018 pursuant to the leave granted by Makau J on 29th November 2018. The Petitioner/Applicant seeks the following Orders.

1. THAT this application be certified as urgent and the same be heard ex-parte and interim orders be granted in the first instance.

2. THAT pending hearing and determination of the application inter-partes, conservatory orders do issue:-

- a) *Restraining the Respondents from constituting a committee to investigate the Applicant.*
- b) *Staying action on the 2nd Respondent's interdiction letter Ref No. CG/KTI/Staff Matters/172 of 2nd February 2018 and staying arbitrary constitution of a committee to investigate the Petitioner.*
- c) *Restraining the 1st Respondent from recruiting or filling the advertised public offices of the Accountant General, Director-Revenue and Director Economic Planning and Budgeting in Kitui County and;*
- d) *Restraining the Respondents either by themselves, their agents, servants, or any other person acting under their instructions from blocking the petitioner's access to her office to perform her public duties as the County Chief Finance Officer or howsoever discriminating, victimising, harassing the Petitioner or removing her from office and or the office identification label or demoting her in rank or transferring the Applicant.*

3. *THAT pending hearing and determination of the Petition, conservatory orders do issue restraining the Respondents:*

- a) *From constituting a committee to investigate the Petitioner.*
- b) *From recruiting or filling the advertised positions of the Accountant General, Director- Revenue and Director – Economic Planning and Budgeting in the Ministry of Finance and Economic Planning.*
- c) *Staying the 2nd Respondent's interdiction letter Ref No. CG/KTI/Staff Matters/172 of 2nd February 2018 and*
- d) *Restraining the Respondents either by themselves, their agents, servants, or any other person acting under their instructions from blocking the Petitioner's access to her office or howsoever discriminating, harassing the Petitioner or removing her from office, or demoting her in rank or transferring the Applicant.*

4. *THAT pending the hearing and determination of the Petition the Honourable Court be pleased to make an order compelling the 4th Respondent to pay the Petitioner:-*

- a) *Acting allowance for the position of County Chief Officer from December 2015 to February 2018 totalling to Kshs. 1,051,050.*
- b) *Non-practice allowance of Kshs. 5,000 per month from February 2018 to date.*
- c) *Commuter allowance of Kshs. 16,000 per month from February 2018 to date.*
- d) *Full salary from February 2018 to date.*

5. *THAT the Honourable Court be pleased to make any other orders within its inherent jurisdiction.*

6. *THAT the Respondents bear the Petitioner's costs of this application.*

2. The application is supported by the Petitioner's Affidavit sworn on 5th December 2018 and is premised on the following grounds that:-

- 1. *The Petitioner has been working as the County Chief Finance Officer of the 4th Respondent since 1st April 2014 and would report back to work upon the lapse of her annual leave.*
- 2. *On 23rd November 2017 the Petitioner proceeded on her usual annual leave for the year 2017 and thereafter reported back to work on 1st February 2018 and on the same day she notified her immediate supervisors, the 2nd and 3rd Respondents about her reporting back on duty.*
- 3. *On 2nd February 2018 the Petitioner, as usual, reported on duty only to find her office locks changed and her office identification label removed by the 2nd and 3rd Respondents without any prior notice.*
- 4. *The Petitioner, on the very day, wrote a protest letter to the 2nd and 3rd Respondents demanding reasons as to why an administrative action, of locking her office, removing her office identification label and denying her access to her office, was taken without giving her a prior notice.*
- 5. *Upon receipt of the protest letter, the 2nd Respondent on 2nd February 2018 and without any legal powers to do so wrote an interdiction letter reference No. CG/KTI/Staff Matters/172, which was received by the Petitioner on 6th February 2018. The Petitioner thereafter wrote an objection letter giving the 2nd Respondent 7 days to withdraw the letter because it was illegal and unprocedural.*
- 6. *3 days after the Petitioner's interdiction, the 1st Respondent unlawfully advertised in the Standard and Star Newspapers of 9th February 2018 positions of the Accountant General, Director-Revenue and Director- Economic Planning and Budgeting*

ascribing the same duties and responsibilities as those of the Petitioner's office, Deputy Chief Finance Officer and Assistant Accountant General thus duplicating duties of already existing position in the establishment which was contrary to the "Kitui County Government Finance and Economic Planning Job Descriptions Manual of October 2016" and the duties outlined in the newspaper advertisement of August 2013.

7. On 9th February 2018 the Petitioner wrote an objection letter to the 1st Respondent pointing out the conflict and irregularity of the said advertisement and demanded the withdrawal of the advertisement within 7 days failure to which she was going to take legal action.

8. Section 59(1) (c) of the County Government Act 2012 gives the 1st Respondent exclusive mandate of exercising disciplinary control over all its employees and therefore the action of the 2nd Respondent of usurping the statutory powers of the 1st Respondent and interdicting the Petitioner is unlawful and without power to do so.

9. Section 62 (3) of the county Government Act 2012 demands that the 1st Respondent to give the Chief Officer of the department an opportunity to make representation in respect of any action to be taken before establishing new positions in the department. The actions of the 1st Respondent of establishing and unlawfully advertising the positions of the Accountant General, Director Revenue and Director –Economic Planning and Budgeting without seeking the professional input of the Petitioner as the head of the department is illegal and contrary to the provisions of the County Governments Act. No. 17 of 2012.

10. The unlawful interdiction by the 2nd Respondent and the subsequent advertisement by the 1st Respondent of the position of the Accountant General , Director Revenue and Director Economic Planning and Budgeting and placing them at job group "R" same with the Petitioner is designed at creating several centers of power and ultimately destroying the outlined chain of command, accountability, transparency and reporting procedures detailed in the "Finance and Economic Planning Department Job Description Manual of the County Government of Kitui".

11. The Respondents have refused to withdraw the advertisement and the interdiction letters despite the Petitioner issuing two demand letters, which expired on Friday 16th February 2018. The closing date of the application for the advertised of Accountant General, Director-Revenue and Director Economic Planning and Budgeting us on Friday 23rd February 2018 and that the Petitioner is reliably informed that the investigation committee arbitrary constituted by the 2nd Respondent was scheduled to meet on 26th February 2018 and unless the Petitioner's Notice of Motion for conservatory orders is certified urgent for orders or direction deemed fit, the application will be rendered nugatory an the Petitioner's protection by due process guaranteed by Articles 27 (1) and 47 of the Constitution and other relevant provisions of the law will be contravened to the prejudice of the Petitioner and irreparable loss of her employment and damage.

3. The 1st Respondent did not file a reply to the Amended Notice of Motion but had filed a Replying Affidavit to the initial Notice of Motion filed on 21st February 2018. The 2nd, 3rd and 4th Respondents filed a joint Replying Affidavit on 4th March 2019 sworn by Alexander Kimanzi, the 2nd Respondent's acting County Secretary in response to both the Notice of Motion and the Petition.

4. The 2nd, 3rd and 4th Respondents aver that the Petitioner proceeded for her annual leave and while she was on leave some keys to some offices in the Finance and Economic Planning Department were lost and there was need to put in fiscal controls by changing locks. They state that the 4th Respondent faced challenges of office space for its key staff as the main office block is still under construction and often the changes regarding office locations and relocations affect the County Department of Finance and economic Planning.

5. The 2nd, 3rd and 4th Respondents state that there had been complaints on the Petitioner's performance in her department which is a crucial department to the 4th Respondent's discharge of its constitutional duties. Further, that one of the complaints was expressed in the opinion of the office of the Auditor General on the evaluation of tender bids amounting to approximately Kshs. 1,400,000 where the office of the Auditor General recommended the investigation of the Petitioner amongst other officers. They state that the department raised concerns of the loss of County assets during the Petitioner's tenure and that these issues warranted further investigations internally and indeed there were separate investigations undertaken by other state agencies.

6. They state that the Petitioner was interdicted awaiting the preliminary investigations and further disciplinary proceedings where the Petitioner would be accorded an opportunity to make presentations on the charges. They aver that the ultimate decision to remove, censor or retain the Petitioner after the disciplinary proceedings rests with the County Public Service Board, which exercises control over the disciplinary proceedings, which it has not commenced. They aver that the Petitioner suffers no prejudice should the disciplinary proceedings continue to conclusion since if she is acquitted, she be entitled to her full benefits for the time she was on interdiction.

7. They state that there are already structures and established offices under the County's Department of Finance and Economic Planning and that the positions of Director (ate) of Budget and Economic Planning, Director(ate) of Revenue and Accountant General are positions that have been in existence but were never fully filled. Further, that on 30th January 2018 the 3rd Respondent requested that the filling of vacant positions be forwarded to the 1st Respondent and that the request to the 1st Respondent was duly approved by the County Public Service Board which proceeded to advertise the positions. They aver that there was substantive consultation with the Finance and Economic Planning Department on the need to have the offices filled completely with the County Assembly, which approved the budget.

8. They aver that the 4th Respondent shall suffer hardship should it be denied the opportunity to have competent Director of Budget and Economic Planning, Accountant General and director of Planning to undertake the budget process.

9. They state that the conduct of the Respondents jointly and severally complied with the Constitution, the County Governments Act and best labour practices. Further, that the Application and Petition are intended to cripple the operations of the 4th Respondent and that the Petitioner

has previously filed a similar Petition by Samuel Musau Wilson, a political dispute which was disguised as an employment dispute but was later withdrawn.

10. During the hearing of the Application Counsel Wamalwa for the Petitioner stated that prayers 1 and 2 of the application had been spent and that an order had been issued on prayer 2 to maintain the status quo. He stated that what was pending were prayers 3 and 4 of the Application but he withdrew prayer 4.

11. He stated that prayer 3 was challenging the interdiction and subsequent processes that followed. He argued that the provisions cited for the Petitioner's interdiction were section 147 of the Finance Act but these provisions do not apply to a Chief Officer. He argued that it was not clear who resolved to interdict the Petitioner since the 2nd Respondent's letter only state that it had been resolved. In addition, the Minutes of the meeting which should be the County Public Service Board were not annexed and the and that Section 67 of the County Public Service Act require the delegation of the County Public Service Board be given in writing. He cited the decision in **Dr. Evans Mumo Mwangangi v Kitui County Public Service Board and another [2016] eKLR**. He argued that one senior officer cannot interdict another senior officer and he therefore urged the Court to allow the Petitioner's application.

12. Counsel Cheboi holding brief for Chelanga for the Respondents argued that there is no prima facie case to warrant the issuance of the orders sought by the Petitioner. He stated that though the Petitioner was interdicted she is still an employee of the County. He argue that the Petitioner was interdicted by her immediate supervisor who was duly authorised to do so and that the reasons for her interdiction was the Auditor's report that indicate there was embezzlement if funds.

13. He urged the Court to find that the Petitioner has not demonstrated any reason to warrant the stay of her interdiction and that should she not be found culpable she will enjoy her full benefits.

14. Counsel Wamalwa in response stated that it was not clear who the immediate supervisor was and that the Petitioner was the Acting Chief Officer hence her supervisor could only be the County Government.

15. I have examined all the submissions and averments of the parties herein. I note that prayer 1, 2 and 4 is spend and what remains is prayer No.3 whereas the Claimant seeks to stop any disciplinary action against her and also to stop recruitment and filling up of the advertised posts of Accountant General, Director – Revenue and Director Economic Planning and Budgeting in the Ministry of Finance and Economic Planning.

16. From the Supporting Affidavit filed by the Claimant in support of this application, she is the Chief Finance Officer and Ag. Chief Officer in Finance and Economic Planning Department in the County Government of Kitui and was employed as such from 1st April 2014 on permanent and pensionable terms. She was given duties of Interim Assignment as Ag. Chief Officer on 10th December 2015.

17. The Claimant was interdicted from duty on 2/2/2018. The letter of interdiction was written by the office of the County Secretary, County Government of Kitui. Upon receipt of this interdiction letter the Claimant wrote back protesting about it and averring that the County Secretary is not her employer and hence had no power to interdict her and was usurping the power of the County Public Board.

18. No further communication was served upon Claimant except the advertisement of various posts by the County Public Service Board.

19. In determining whether this Court can grant orders suspending the interdiction of the Claimant, it is true as indicated that the employer of the Claimant is the County Public Service Board of Kitui County. Section 57 of the County Government Act 2012 established the County Public Service Board. Under Section 59 functions of the County Public Service Board are listed as follows:-

1) "The functions of the County Public Service Board shall be, on behalf of the county government, to:-

(a) establish and abolish offices in the county public service;

(b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

(c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;

(d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;

(e) promote in the county public service the values and principles referred to in Articles 10 and 232;

(f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;

(g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;

(h) advise the county government on human resource management and development;

(i) advise county government on implementation and monitoring of the national performance management system in

counties;

(j) Make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.

20. These functions include hiring staff of the County Government and also disciplining of such staff.

21. Under Section 86(1) of the County Government Act, the County Public Service Board may delegate in writing any of the functions to one or more of its members and the County Secretarybut “this has to be in writing”.

22. The County Secretary has not shown to this Court that the functions to interdict have been delegated to him. He did not interdict the Claimant as part of the County Public Service Board but as the County Government of Kitui Secretary.

23. This was done without authority and is therefore null and void. It is for this reason that I agree with the Applicant that the interdiction upon her was carried out by an unauthorized person without authority and is therefore null and void.

24. I therefore lift the interdiction against the Claimant immediately and order she be paid all her dues withheld if any and to continue serving in her official capacity as Chief Finance Officer pending the hearing and determination of this claim.

25. As to the advertised posts, which she seeks not to be filled, the posts are not currently held by the Claimant and there will be no impact on her if the posts are filled. I will lift the orders stopping the filing of the advertised posts as the case may be.

26. The upshot is that the interdiction of the Claimant is henceforth lifted and she should be paid all her withheld dues and be assumed to proceed with her normal duties pending hearing and determination of this Petition.

27. Costs of this Application be borne by the Respondents.

Dated and delivered in open Court this 25th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njenga holding brief for Wamalwa for Petitioner – Present

Respondents – Absent