



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 79 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 27th May, 2019)

IN THE MATTER OF: IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 73, 75, 232, 235, 258, AND 259 OF THE
 CONSTITUTION KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
 27, 28, 41, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF: OF THE COUNTY GOVERNMENT ACT, 2012 (ACT NO.17 OF 2012)

AND

IN THE MATTER OF: OF THE PURPORTED REVOCATION OF THE ENGAGEMENT OF THE PETITIONER TO AND/OR
 REMOVAL OF THE PETITIONERS FROM THE OFFICE OF THE MEMBERS OF MACHAKOS COUNTY PUBLIC SERVICE
 BOARD

BETWEEN

DOROTHY MWANZIA NG'ANG'A.....1ST PETITIONER
 ANDREW KITUKU METHO.....2ND PETITIONER
 FREDRICK MULI KASOA.....3RD PETITIONER
 SCHOLARSTICAH MUENI MBOI.....4TH PETITIONER
 PHILIP MULWA NZIOKA5TH PETITIONER

AND

MACHAKOS COUNTY GOVERNMENT.....1ST RESPONDENT
 THE GOVERNOR, MACHAKOS COUNTY2ND RESPONDENT
 THE COUNTY ASSEMBLY, MACHAKOS COUNTY3RD RESPONDENT
 FRANCIS MWAKA.....PROPOSED 4TH RESPONDENT
 THE HON. ATTORNEY GENERAL5TH RESPONDENT

JUDGEMENT

1. The Petitioners filed a Re-Amended Petition on 12th December 2018 supported by the Affidavit of the 1st Petitioner herein sworn on 14th December 2018. The Petitioners aver that vide Gazette Notice No. 11577 dated 12th August 2013 they were appointed as Members of the Machakos County Public Service Board with the 1st Petitioner being elected as the Vice-Chair of the Board.

2. The Petitioners aver that the 1st and 2nd Respondents in the Sunday Nation of 8th May 2016 advertised several posts seeking qualified persons to fill the position of the Chairman, Members and Secretary in the Machakos County Public Service Board (CPSB).

3. They aver that the 1st and 2nd Respondent's action was an unlawful and malicious scheme on the part of the 1st and 2nd Respondents to disband the CPSB through their removal as serving members. They therefore seek the following reliefs:-

a) THAT a declaration be issued to declare that the Respondents herein have no power to remove or otherwise terminate the appointment of the Petitioners as Members of the Machakos County Public Service Board unless in accordance with section 58 of the County Governments Act, 2012.

b) THAT a declaration be issued to declare that the decision of the 1st and 2nd Respondents to terminate the appointment of the Petitioners as Members of the Machakos County Public Service Board expressed through an advertisement of vacancies published in the Sunday Nation newspaper of 8th May 2016 violates Section 58 of the County Governments Act, 2012 read with Article 251 of the Constitution.

c) THAT a declaration be issued to declare that under section 58 of the County Governments Act read with Article 251 of the Constitution the Petitioners remains the lawful holders of the positions of the Members of Machakos County Public Service Board.

d) THAT an order of certiorari be issued to bring into this Honourable Court and quash the decision of the 1st and 2nd Respondents to terminate the appointment of the Petitioners as members of the Machakos County Public Service Board expressed through an advertisement of vacancies published in the Sunday Nation newspaper of 8th May 2016.

e) THAT a declaration be issued to declare that the purported termination of the appointment of the Petitioners as members of the Machakos County Service Board constitutes usurpation by the 1st and 2nd Respondents of the functions of the County Assembly of Machakos in contravention of Articles 50,174,251 of the Constitution and Section 58 of the County Governments Act.

f) THAT a declaration be issued to declare by dint of article 41 of the Constitution that the 1st Petitioner is entitled to be paid remuneration as chairperson of the Machakos CPSB for the period she has served as Chairperson of the Machakos CPSB for the period she has served as chairperson since June, 2014.

g) THAT a declaration be issued that the decisions, actions and omissions of the 1st, 2nd and 3rd Respondents in respect if the removal of the Petitioners as members if the Machakos County Public Service Board have violated the Petitioner's human rights and fundamental freedoms secured and guaranteed under Articles 27,28,41,47 and 50 of the Constitution.

h) An order of compensation of the Petitioners for violation of their rights under Articles 27,28,41,47 and 50 of the constitution.

i) THAT the Honourable Court be pleased to issue an order of permanent injunction to restrain the 1st,2nd and 3rd Respondents from interfering with the Petitioners' exercise of their functions as the members of the Machakos County Public Service Board their statutory term of office.

j) THAT the Honourable Court be pleased to find and hold that the decisions, actions and omissions of the 2nd respondent in respect of the revocation of the Petitioners' appointment constitute conduct that violates Articles 10.73 and 75 of the Constitution.

k) THAT a declaration be issued to declare that the Respondent has no power to change the appointment of a member of the County Service Board recruited, nominated and appointed with the approval of the County Assembly from full-time basis to part-time basis.

l) THAT a declaration be issued to declare that the act of the 2nd and 4th Respondents in purporting to review the contractual terms of the petitioners contracts of employment is both illegal and unconstitutional as it violates the Petitioners' rights to fair labour practices and fair administrative action and reasonable working conditions protected under Articles 41 and 47 of the Constitution of Kenya, 2010.

m) THAT a declaration that the suspension and the intended dismissal of the 1st and 2nd Petitioner from the position of Member of the Machakos county Public Service Board as communicated in the 4th Respondent's letter dated 20th March 2018 is unconstitutional and unlawful on account of violation of Articles 10, 41,47 and 236 of the Constitution of Kenya and section 41 of the Employment Act.

n) THAT an order of certiorari be issued to quash the decision of the 1st and 2nd Respondents contained in the letter dated 22nd

December 2017 converting the appointment of the Petitioners from full-time to part-time member of the Machakos County Public Service Board.

o) THAT an order of certiorari to issue to bring into this Honourable court the decision of the 4th Respondent dated 20th March 2018 suspending the 1st and 2nd Petitioners from the position of Member of the Machakos County Public Service Board, for purposes of being in contravention of Articles 10,41,47 and 236 of the Constitution of Kenya and section 41 of the Employment Act.

p) THAT a declaration be issued to declare that the 1st Respondent's County Secretary and the 2nd Respondent Governor Alfred Mutua have jointly and severally contravened the sub judice rule on account of their decisions contained in the letters dated 22nd December 2017 and 20th March 2018.

q) THAT an order consequential to the above declarations be issued quantifying the amount of damages in respect of each and every declaration and orders granted.

r) THAT the costs of this Petition be borne jointly and severally by the 1st and 2nd Respondents.

4. In response to the Re-Petition the 1st,2nd and 4th Respondents filed a Replying Affidavit sworn by James M. Kathili , the Chief Legal Officer of the 1st and 2nd Respondents , on 29th January 2019.The 3rd Respondent only filed a Notice of Appointment but did not file a reply to the Re-Amended Petition. The Petition was heard by way of written submissions and on 27th March 2019 Counsel highlighted their respective submissions.

Petitioners' case

5. They aver that they obtained injunctive orders, issued by Justice Nzioki wa Makau, restraining the 1st and 2nd Respondent from conducting interviews of applicants and appointing any person as a member of the Machakos CPSB. However, on 22nd December 2017 the Petitioners received a notice from the 4th Respondent informing them that effective 1st February 2018 their terms of engagement would change from full-time to part-time due to the reducing work load at the board after the 2017 general elections. They aver that the 4th Respondent and the 2nd Respondent have no power to change their appointment from full time to part time.

6. They aver that the decisions by the Respondent to abruptly review their terms of service without notice was a violation of their inherent dignity under Article 28 of the Constitution, their right to lawful, reasonable and procedurally fair administrative action under Article 47 and their right to fair hearing under Article 50 of the Constitution.

7. They further that aver the Respondents' action violates the principles of good governance, undermines the autonomy and independence of the Board in contravention of Articles 10,73,174,175 and 232 of the Constitution.

8. The Petitioners aver that on 30th January 2018 they obtained a stay of the notice of the 1st Respondent issued on 22nd December 2017 and the orders are still in force. However, the Petitioners aver that the 4th Respondent on 14th February 2018 repossessed all the vehicles attached to the CPSB members with the exception of one member, and in a letter dated 20th March 2018 from the 4th respondent suspended the 1st and 2nd Petitioners on allegations of gross misconduct.

9. The Petitioners aver that the 1st and 2nd Petitioners were suspended contrary to section 62 of the anti-Corruption and Economic Act. Further, the Respondents' actions neither complied with the Discipline Manual for the Public Service issued by the Public Service Commission of Kenya in May 2016 nor the Human resource Policies and Procedures Manual for the Public Service.

10. They aver that their attempted removal and suspensions of the 1st and 2nd Respondent has been actuated by malice and ill will against them on the part of the 2nd Respondent. This being due to the Petitioners unwillingness to ratify and sanction the appointment of county employees hired without the board's authority and disregard procedure coupled with the Board's insistence that due procedure has to be complied with in recruitment of staff and their unwillingness to abdicate their constitutional and statutory functions to the Governor.

11. It is the Petitioners case that by dint of Section 58 (4) (a) of the County governments Act , upon being appointed as the Members of the Machakos County Public Service Board they are entitled to hold office for a non-renewable term of 6 years.

12. In her supporting Affidavit, the 1st Respondent reiterates the averments in the Re-Amended Petition and urged the Court to award them compensation for the violations of their statutory and Constitutional rights.

1st,2nd and 4th Respondents' Case

13. In the Replying Affidavit sworn on behalf of the 1st,2nd and 4th Respondent by James K. Kithili he avers that the orders sought in the Re-amended Petition are already spent following an application dated 11t May 2018 which sought for contempt against the Court Orders which has already been determined.

14. He avers that the Petitioners are still in office and there has been no process initiated by either the 1st or 2nd Respondent to remove them from office and there are also no proceedings in the County Assembly, the 3rd Respondent to remove the members from office in accordance

with the law.

15. He avers that the Order issued by Justice Nzioki wa Makau only restrained the Respondents from conducting interviews and appointing persons to the CPSB thus the Notice served on 22nd December 2017 changing the terms of service did not contradict the orders issued by Justice Nzioki wa Makau.

16. He avers that this notice was pursuant to section 58 (4) (b) of the County Governments Act and that by dint of Section 58 (4) (a) of the County governments Act, upon being appointed as the Members of the Machakos County Public Service Board they are entitled to hold office for a non-renewable term of 6 years which provides that Board members may serve on a part-time basis. He avers that the decision to change the Petitioners' terms of contract was aimed at reducing the wage bill.

17. He avers that the Petitioners were requested to step aside which did not amount to suspension. They aver that there were accusations against the 1st and 2nd Respondents of soliciting and receiving bribes from the public to get employed at the County Government contrary to Article 76 (2) (b) of the Constitution.

18. He avers that the 1st and 2nd Respondents are engaging in acts of abuse of office by employing their relatives, receiving allowances from public funds when their employment is not connected to the events attended such as the LSK Forum in Kwale County and taking political sides. Thus, the 1st and 2nd Petitioners are in contravention of Section 12 and 23 of the Leadership and Integrity Act and Section 16 of the Public Officer Ethics Act.

19. He stated that the CPSB does not sit daily to warrant the members to be categorised as full time employees and the CPSB will still perform its functions should the members work part-time as the County is now stable.

20. He avers that the Petitioners acknowledge that the position of the Chairperson is vacant and section 58 of the County Governments Act gives the 1st and 2nd Respondents power to recruit the chairperson through a competitive process. Consequently, the County Secretary, 4th Respondent, invited applications from qualified candidates in accordance with the law. However, the advert of 8th May 2016 did not mention that the positions or offices are vacant. It further did not state that the successful applicants will fill the vacant positions in the CPSB.

21. He contends that no termination letters were ever issued to the Petitioners and the Petitioners are aware of the procedure of their removal. Therefore, the Respondents aver that they have not interfered with the functions of the Board but there have been wrangles amongst the members comprising the CPSB. Further, the 1st Respondent was elected as the Vice-Chairperson and can only be remunerated as such but not as the chair of the CPSB.

22. He states that the Petitioners have failed to demonstrate the injuries suffered and that the Petition is premature and speculative hence the orders sought should not be granted.

Petitioner's Submissions

23. They Petitioners filed Supplementary Submissions to the Re-Amended Petition and also relied on their submissions filed on 31st January 2018. The Petitioners submitted that the actions of the 2nd Respondent in advertising the positions of members of the CPSB amounts to a threat of termination of the Petitioners.

24. They aver that the 1st Petitioner has acted as Chairperson of the County Public Service Board since June 2014 thus it is only fair that she is compensated as such. They relied on the decision in **Daniel Musili Nyeki v Kenya wildlife Services [2015] eKLR and Titus Wamalwa Khaemba v Transport Workers Union & another [2016] eKLR**. They submitted that the infringement of their rights and fundamental freedoms should result to an award of general damages.

25. In their Supplementary Submissions, the Petitioners submitted that the Respondents' actions and omissions have necessitated several amendments to the Petition and that this Court on 27th September 2018 did find the Respondents had disobeyed Court Orders and ordered summons to issue against the 2nd and 4th Respondents.

26. The Petitioners submitted that the Respondents have argued that section 58 (4) (b) of the County Governments Act provides that a member may work on a part-time basis but this was a unilateral decision by the Respondents for the reason that the Petitioners had already accepted a contract for a 6 year period term which had already been agreed upon by the parties. The Petitioners therefore had a legitimate expectation that warrants both parties to adhere to the terms of the 6 year contract that can only be interfered with as per the provisions of Section 58 (5) of the County Government Act.

27. It is the Petitioners' submission that the Respondents vide the suspension letters dated 20th March 2018 did not adhere to the provision of section 58 (5) of the County Government Act as read with Article 251 of the Constitution. They relied on the decision in **Cecilia Wangechi Ndungu v County Government of Nyeri & another [2014] eKLR** where the Court held:-

“The Court therefore holds that any public authority must be exercised in accordance with the Constitutional tests including the power to remove a public or state officer from office like it was anticipated and legitimately expected by the petitioner in the present case. In making that holding, the court further holds that statutes or other written laws and policies need not repeat the cited constitutional tests whenever authority or power is vested or conferred upon a person or body. The cited constitutional provisions are of universal application and not mere flowers in the constitutional text that readily wither in our constitutional practices; in the opinion of the court, they are provisions that must bloom into seeds of vitality that enhance our constitutional

practices and lifestyle.”

28. The Petitioners submitted that they were not afforded a fair hearing or administrative action by the Respondents’ action suspending them and that the suspension letter dated 20th March 2018 contravened Articles 41, 47, 50 and 236 of the Constitution. They relied on the case of **Rachel Carol Atamba v Masinde Muliro university of Science & Technology [2015] eKLR.**

29. The Petitioners submitted that their rights have been infringed upon by the Respondents thus they are therefore entitled to damages. They further urged the Court to grant the prayers sought.

1st, 2nd & 4th Respondents’ submissions

30. The 1st, 2nd and 4th Respondents in their written submissions argued that the Re-Amended Petition falls short of the principle that a person alleging contravention of his/her constitutional right should disclose the contraventions and the mere citing of sections is not sufficient to enable a Petitioner have a case worth the Court’s attention. They relied on the decision in **Anarita Karimi Njeru v Republic [1979]eKLR.**

31. They further submitted that the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2012] eKLR** made vital pronouncements on the issue of what is required of a constitutional petition.

32. They submitted that Section 58 the County Government Act provides for the procedure for appointment and removal of members of the CPSB. In addition, this section provides for the members and the CPSB ought to vacate office after 6 years and the section does not bar the 1st, 2nd and 4th Respondents from advertising the positions for persons to take upon the expiry of the term of the Petitioners.

33. They submitted that none of the Petitioners have been served with a termination letter which is a mandatory requirement for termination. However, they were only requested to step aside to allow investigative agencies to look into the alleged misconduct.

34. They submitted that the Petitioner’s employment has neither been terminated nor threatened since the 1st, 2nd and 4th Respondents have not initiated any procedure for removal of any of the Petitioners. They relied on the case of **Dr. Alfred N. Mutua v Ethics & Anti-Corruption Commission & 3 Others [2016] eKLR** where Lenaola J, held:-

“In addition, to submit that one’s rights will be violated through employment of a fairly predictable procedure that he has not yet even been subject to is indeed merely speculative and premature. In fact, I find that the premature nature of this claim is the very reason why the Petitioner is unable to clearly demonstrate, with the specificity required, how his rights are at threat of being violated.”

35. They argued that Section 58(4) (b) of the County Governments Act Members of the CPSB can work on a part-time basis hence any argument to the contrary is bad in law. They submitted that the Petitioners seek an order of certiorari and it is a settled principle of law that the Court is not under any obligation to delve into the merits of the administrative decision but on the process. In addition, the merits of this decision cannot be subject for a judicial review or a judicial review order. They relied on the decision in **Republic v Public Procurement Administrative Review & 2 Others Ex-parte Pelt Security Services Limited [2018]eKLR.**

36. They submitted that the 1st and 2nd Petitioners would be in clear breach of the provision of the Section 12 of the Leadership and Integrity Act in respect of the accusations of soliciting and receiving bribes, should they be found guilty.

37. They submitted that the 1st and 2nd Petitioners through their joint admission have been taking political sides contrary to section 16 of the Public Officer Ethics Act which requires neutrality and that the Petitioners knowing their malpractices have decided to use this Honourable Court to cushion themselves.

38. They submitted that the 1st Respondent has never been promoted to position of chairperson and it is common practice that a person in acting capacity is paid acting allowances and benefits to reflect their new duties as may be governed by the employment contract between the parties.

39. They submitted that the county government is an independent body and the decisions of the County Government regarding the running of that Government can only be interfered with where there are clear issues of illegality or procedural impropriety and not speculations. They argued that the Petitioners have not demonstrated any infringement of their constitutional rights or any tangible injuries suffered. They therefore urged the Court to dismiss this Petition.

40. I have examined all the averments and submissions of the parties. The issues for this Court’s determination are as follows:-

1) Whether the act of advertising for position of Chairman and Members of the Machakos County Public Service Board by the Respondent on 8/5/2016 amounted to removal in office of the Petitioners and therefore a breach of their employment rights.

2) Whether the Respondents have a right to change the terms of service of the Petitioners midstream from permanent to part-time.

3) Whether the act of suspending the 1st and 2nd Petitioners from office by the Respondent was proper or not.

4) *Whether the Respondents actions against the Petitioners violated the Constitution and the law and whether the Petitioners meets the threshold in the law.*

5) *What remedies this Court should award in the circumstances.*

1st issue

41. The Petitioners were appointed as Chairman and Members of the Machakos County Public Service Board vide Gazette Notice No.11577 dated 12/8/2013 and were to serve for a non-renewable term of six years as per Section 58(4) of the County Government Act 2012.

42. The Members of the County Public Service Board were to be appointed through a competitive process. Under Section 58(5) of the County Government Act 2012 **“the Members of the Board may only be removed from office:-**

a) On grounds set out for removal of members of a constitutional commission under Article 25(1) of the constitution and

b) By a role of not less than seventy five percent of all the members of the County Assembly”.

43. It is clear that in the case of the Petitioners herein, they had not been removed from office as provided above and neither had they served for 6 years having been appointed on 12th August 2013.

44. The act of the Respondent therefore of advertising for positions of Chairman and Members of the Machaoks County Public Service Board was therefore an act of declaring the Petitioners terminated or their offices vacant which amounted to breach of their employment rights and is therefore unconstitutional and null and void.

2nd issue

45. On the 2nd issue, the Respondents have submitted that they were not desirous of removing the Petitioner from office but only intended to change their terms of service from full time to part time.

46. Section 58(4(b) of the County Government Act f2012 envisages that Members of the Board may serve on a part-time basis. This does not however imply that Members appointed on full time may have their terms reviewed midstream from full time to part time.

47. Section 10(5) of the Employment Act 2007 provides as follows:-

“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing”.

48. Indeed the Respondents cannot purport to change any terms of the Petitioners’ terms of contract without consultation with them. There is no indication that this was done and therefore any attempt if at all to change the terms of the Petitioners’ contract from permanent to part-time without consultation was illegal and null and void.

Issue No. 3

49. The Petitioners have also averred that the Respondent purported to suspend them from office after a certain audit. The Petitioners submit that the audit showed how some illegalities had been committed by the 1st and 2nd Petitioners. That it is after this that the Respondents purported to suspend the Petitioners from office pending investigations.

50. The Petitioners aver that no investigations have been carried out todate and neither have they been changed in Court. The 1st and 2nd Petitioners sought to have the suspension letters quashed by this Court.

51. The Respondents in reply to this admitted that they acted on the investigations conducted and issued suspension letters. The suspension in question was done vide a letter dated 20th March 2018. To

52. The Respondents did not indicate the extend of the investigations and findings made which would warrant the 1st and 2nd Petitioners remaining on suspension. The 1st and 2nd Petitioners have been on suspension and no charges have since been preferred against them despite the alleged investigations having been concluded.

53. I therefore find the continued holding the 1st and 2nd Petitioners on suspension cannot hold. I lift the said suspensions and direct that he 1st and 2nd Petitioners continue to serve as Members of the Board unless otherwise lawfully removed or unless their term expires whichever is earlier.

4th issue

54. I have considered the manner in which the Respondents have acted against the Petitioners. The action indicates breach of the Petitioners’ rights of fair labour rights under Article 41 of the Constitution. The rights to fair hearing under Article 47 has also been

infringed upon by the Respondents who decided to advertise the Petitioners' posts and thereby purporting to terminate their services without any hearing.

55. The Petitioners set out the manner in which these rights have been alienated in their Petition. I therefore find that indeed the rights of the Petitioners' were infringed upon.

Remedies

56. In addition to the orders granted above, I find that the rights of the Petitioners have been infringed upon and I award each one of them damages of 500,000/= for the breach.

57. The Respondents will pay costs of this suit accordingly.

Dated and delivered in open Court this **27th day of May, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Benjamin Musau for the 1st, 2nd and 4th Respondents – Present

Miano for Kinoti Kibe for 1st and 2nd Petitioners