



Naburi & 9 others v County Assembly Service Board, Busia County & another (Petition 23 & 42 of 2017 (Consolidated)) [2019] KEELRC 1508 (KLR) (23 May 2019) (Judgment)

Daniel Namenya Naburi & 9 others v County Assembly Service Board, Busia County & another [2019] eKLR

Neutral citation: [2019] KEELRC 1508 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION 23 & 42 OF 2017 (CONSOLIDATED)

MA ONYANGO, J

MAY 23, 2019

IN THE MATTER OF: ARTICLES 10, 19, 20, 22, 23, 27, 28, 36, 37, 41, 47, 162(2)(A), 176 AND 232 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF: THE EMPLOYMENT ACT

AND

IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS ACT AND THE RULES MADE THEREUNDER

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10, 19, 20, 22, 23, 27, 28, 36, 37, 41, 47, 162(2)(A), 176 AND 232 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

DANIEL NAMENYA NABURI 1ST PETITIONER
SIATTA OPIYO GERALD 2ND PETITIONER
JOACKIM OPANDA ATENYA 3RD PETITIONER
MICK SANDRA WAKULOBA 4TH PETITIONER
BELINDA NAMUMA BULUMA 5TH PETITIONER
ERIC OCHIENO OUMA 6TH PETITIONER



JENTRIX SUSAN KHASENYE 7TH PETITIONER
LYDIAH MATISI NAFULA 8TH PETITIONER
LILIAN WANDERA 9TH PETITIONER
HUMPHREY OUMA ONYANGO 10TH PETITIONER

AND

COUNTY ASSEMBLY SERVICE BOARD, BUSIA COUNTY .. 1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD, BUSIA COUNTY 2ND RESPONDENT

JUDGMENT

1. The Petitioners are employees of the County Assembly Service Board (CASB) of Busia County who instituted the instant action seeking redress for violation of their constitutional rights. The 1st Respondent is a body established under the County Governments Act whose role among other roles is to determine and review the terms and conditions of service of persons holding or acting in the offices of the Service while the 2nd Respondent is a body established under Article 235 of the Constitution whose role includes establishing and abolishing offices in its public service, appointing persons to hold or act in those offices, and confirming appointment and exercising disciplinary control over and removing persons holding or acting in those offices.
2. The gist of the Notice of Motion Application dated 8th May 2017 and the Petition of even date is that the Petitioners are challenging the constitutionality and legality of their secondment by the 1st Respondent to the 2nd Respondent. They contend that the procedure followed in effecting the secondment was flawed and violated their constitutional rights such as discrimination under Article 27, human dignity under Article 28, freedom of association under Article 36, right to picket under Article 37, separation of powers under article 176 and right to fair administrative practices under Article 41.
3. That the 1st Respondent in an advertisement in the Daily Nation Newspaper on 23rd September, 2013, advertised for 51 vacancies in the County Assembly Service Board, Busia County, but ended up unprocedurally and irregularly employing 161 members of staff, in flagrant violation of Article 2(2) and Article 10 of the Constitution of Kenya, 2010, in total abuse of public office, motivated purely by nepotism and cronyism, and in total disregard to minimum advertised academic qualification, experience, professionalism, competence and technical skills required for the various positions.
4. That the dispute leading to this Petition arose from overemployment by the 1st Respondent who were forced to reduce personnel in a procedure which the Petitioners purport did not demonstrate fairness. They contend that they were not heard and reasons were not given to them as to why they were selected for secondment and 87 persons left in the employ of the 1st Respondent.
5. The Petitioners contend that The Busia County Assembly Labour and Social Welfare Committee, Legal and Justice Committee and Budget and Appropriation Committee on several occasions, including on 24th July 2014 deliberated and developed reports which were tabled on the floor of the House on County Assembly Staff Establishment on discrimination of workers, but the findings have never been implemented.
6. That the Busia County Assembly Ad-hoc Subcommittee of the Liaison Committee on the County Assembly Staff Rationalization Exercise developed a report dated 10th August 2015 in which they



- discussed and proposed rationalization of CASB members of staff. The said ad-hoc committee, acted beyond its powers and developed a list of 81 members of staff to be retained in the CASB, and recommended that the rest of staff members should be seconded. The report was never tabled and discussed and adopted by the County Assembly.
7. They contend that the County Government of Busia has since gone ahead and on its own developed a Staff Rationalization Policy, dated December, 2015, that is only applicable to the County Public Service Board, and not the County Assembly Service Board. In total breach of the principle of separation of powers under Article 176(1) of *the Constitution* of Kenya, 2010 as read together with Sections 12, 56, 57 and 60-76 of the *County Governments Act*, it has gone ahead and purported to adopt and implement the policy. They contend that the said County Executive Staff Rationalization Policy has no binding effect to the County Service Board and hence of no legal force.
 8. The Petitioners aver that the County Government of Busia Staff Rationalization Policy, dated December 2015, does not single out specific members of staff to be seconded to the County Public Service Board or to be retained at the County Assembly Service Board of Busia.
 9. Further that the Busia County Assembly Committee on Labour and Social Welfare, prepared a report titled “Report on the Busia County Staff Rationalization Policy”, dated January 2016. In the said report at page 6, that the secretary to the Busia County Service Board, states that the Busia County Public Service Board and the Busia County Assembly Service Board had never sat together to address the challenges of surplus staff at the County Assembly. He also stated that there was no provision in the law allowing direct transfer of staff from one arm of government to another. Further, he stated that they had consulted the Public Service Commission on the issue and Parliamentary Service Commission and that he had been advised that direct transfer between the two arms of County Government were not legally permitted, and thus impossible.
 10. Consequent to the Report of the Busia County Assembly Liaison Committee Report on Staff Establishment, the Busia County Assembly employees payroll was segmented into two payrolls; Payroll A and Payroll B. Payroll A being for purported Permanent members of the staff who were designated to retain their jobs with the CASB, Busia County, whereas Payroll B for those designated for secondment to the County Executive without their consent.
 11. That the Petitioners are designated as Payroll B members of staff, and have since June 2015 to date been discriminated against since they are in most cases left out whenever it comes to allocation of work related to the 1st Respondent’s engagements and thus being denied equal opportunities to work, earn salaries, allowances and other emoluments like other members of staff on the Assembly’s Payroll A. They contend that salaries of staff in Payroll B is normally delayed while that of Payroll A is paid on time. The failure by the 1st Respondent to remit the Petitioners statutory deduction to respective government agencies in a timely manner, has exposed them to loss of job opportunities elsewhere, since they cannot meet the mandatory clearance certificates required for most job adverts in the public service, thus breaching their rights under Articles 27, 28 and 41 of *the Constitution* of Kenya, 2010. Furthermore, the Petitioners who are on Payroll B do not have access to mortgages and car loans.
 12. The Petitioners aver that the names have been placed on Payroll B, and they are slated for either secondment to the County Executive or redundancy without their consent, regard to procedural fairness and justifiable cause, without being afforded a chance to be heard, without written reasons and in a discriminatory manner.
 13. It is the Petitioners position that the intended secondment from the County Assembly Service Board to the County Public Service Board is not supported in any law, and in fact it violates Article 176 of



the Constitution of Kenya, 2010, as read together with Sections 12, 56, 57, and 60-76 of the County Government *Act, No. 17 of 2012* and thus ultra vires and illegal ab initio.

14. That the letter of secondment does not disclose the duration of their secondment to 2nd Respondent contrary to the tenets of secondment, since deployment by way of secondment is a temporary measure for a fixed period of time and not a permanent measure.
15. The Petitioners state that the Chairman of the CASB, Busia County, Mr. Bernard M. Wamalwa and the Secretary, who is also the Clerk to the County Assembly, Mr. Allan W. Mabuka, summoned the Petitioners into a meeting on 30th March 2017 and in flagrant abuse of office, threatened them with dire consequences, including dismissal, demanding written apology and threat of physical assault if they did not immediately accede to the secondment process and report to the County Executive.
16. That the Clerk of the Busia County Assembly, vide the letters dated 31st March, 2017 suspended the 1st, 2nd, 3rd and 4th Petitioners for a period of 60 days without pay and for no justifiable reason, in total breach of their constitutional right to fair labour practices and fair administrative action, enshrined under Articles 47 and 49 of *the Constitution* of Kenya, 2010 respectively, Section 4 of the *Fair Administrative Action Act* and Section 45 of the *Employment Act*. That they were not served with a charge sheet informing them of charges they are accused of, particulars of the charges, the list and copies of the evidence or documents that they would rely on in the disciplinary process, in total contravention of the rules of Natural Justice and section 46 of the *Employment Act*, 2007.
17. In further contravention of their rights the Petitioners contend that they are members of the County Government Workers Union but the 1st Respondent has refused to deduct and remit their dues contrary to Article 36(1) of *the Constitution* of Kenya on Freedom of Association.
18. The Petitioners contend that the following provisions of *the Constitution* have been violated: Articles 10, 19 (1)(2), 20, 22(1), 22(2)(b), 23, 27(1), (2), 28, 36, 37, 41, 47, 48, 162(2), 176, 231(1), (2).
19. In the Petition dated 8th May 2017, they pray for:
 1. A declaration that the 1st Respondent violated the Petitioners rights under Articles 27, 28, 33, 36, 37, 41 and 47 of *the Constitution* of Kenya, 2010.
 2. A declaration that the action by the 1st Respondent to develop and segment two sets of payrolls; Payroll A and Payroll B, Payroll A being for purported Permanent members of the staff who were designated to retain their jobs with the CASB, Busia County, and Payroll B for the Petitioners who have been designated for secondment to the Busia County Public Service Board, without the Petitioners' consent and adherence to the law, and consequently used as a basis to openly discriminate against the Petitioners, was discriminatory, and violated the Petitioners constitutional right under Article 27 of *the Constitution* of Kenya, 2010.
 3. A declaration that the 1st Respondent breached Article 232(2) of *the Constitution* by over employing members of staff of the Busia County Assembly on the basis of nepotism, favouritism and cronyism, instead of adhering to the constitutional requirement for merit and professionalism under Article 232 of *the Constitution* of Kenya 2010, amounted to abuse of public office under Article 75 of *the Constitution* of Kenya, 2010.
 4. A declaration that the process of secondment of the Petitioners and members of staff from the County Assembly Service Board to the County Executive or County Public Service Board, the 1st Respondent is unconstitutional since it violated the principle of separation of powers and Article 176 of *the Constitution* of Kenya, 2010, as read together with Sections 12, 56, 57, and 60-76 of the County Government *Act, No. 17 of 2012*.



5. A declaration that the process of secondment of the Petitioners and members of staff by the 1st Respondent from the County Assembly Service Board to the County Executive or County Public Service Board, by the 1st Respondent, without the consent of the Petitioners is unconstitutional and illegal.
6. A declaration that the process of secondment of the Petitioners and members of staff from the County Assembly Service Board to the County Executive or County Public Service Board, by the 1st Respondent is illegal, since it is not provided for under the County Government Act, or any other written law.
7. A declaration that the Joint Taskforce of County Staff Rationalization that developed the Staff Rationalization Report was illegally constituted contrary to Kenyan Gazette, Vol. CXVIII-No. 81 of 22nd July 2016, at pages 2836 and 2837 and consequently their report dated was null and void and incapable of implementation.
8. A declaration that the 1st Respondent abdicated their constitutional and public duty under Articles 47 and 232 of *the Constitution* of Kenya, 2010, and Section 4 of the *Fair Administrative Action Act*, without just cause or excuse.
9. A declaration that the wilful withholding of the 1st to 10th Petitioners' salaries and other emoluments for March and April, 2017, by the 1st Respondent without any lawful justification was an upfront and blatant infringement of their constitutional right to fair labour practice as enshrined under Article 41(1) of *the Constitution* of Kenya, 2010.
10. A declaration that the refusal by the 1st Respondent without any lawful justification, to approve the 1st to 10th Petitioners leave days and leave allowances was an upfront and blatant infringement of their constitutional right to fair labour practice as enshrined under Article 41(1) of *the Constitution* of Kenya, 2010.
11. A declaration that the suspension of the 1st, 2nd, 3rd, and 4th Petitioners for 60 days, without pay and without valid reasons was illegal, improper and in total breach of Article 47 of the right to fair administrative action and section 4 of the Fair Administrative Action, Act, 2015.
12. A declaration that the decision by the 1st Respondent to issue Show Cause letters and suspended the 1st, 2nd, 3rd and 4th Petitioners for 60 days without pay, without serving them with a charge sheet informing them of charges, particulars of the charges they are charging them against, and the list and copies of the evidence or documents that they will be seeking to relying on, contravenes the rules of Natural Justice, and violates the Petitioners constitutional rights enshrined under Article 41(1) and 47 of *the Constitution* of Kenya 2010, and contravenes section 46 of the *Employment Act*, 2007.
13. A declaration that the actions of the officers of the 1st Respondent, namely Mr. Bernard M. Wamalwa, who is the Speaker of the County Assembly and the Chair of the 1st Respondent, Mr. Allan W. Mabuka, who is also the Clerk to the County Assembly and the 1st Respondent Secretary, and the Sergeants at Arms Mr. James Lwanyonyi to intimidate, threaten, harass, assault and threaten the petitioners with dire consequences, disciplinary actions and physical assault on Monday, 31st October, 2016, for resisting the secondment process, was illegal and amounted to abuse of office contrary to Articles 75 of *the Constitution* of Kenya, 2010.
14. A declaration that the wilful withholding of the Petitioners' salaries and emoluments by the 1st Respondent without any lawful justification amounted to an offence and to abuse of office by virtue of section 17(10)(a) and (b) of the *Employment Act*, 2007.



15. An order by the court stopping the intended illegal and discriminatory disciplinary process against the Petitioners by the 1st Respondent.
16. An order by the court compelling the 1st Respondent remit to the relevant statutory bodies the Petitioners' monthly statutory deductions including the National Health Insurance Fund (NHIF), the Higher Education Loans Board (HELB), National Social Security Fund (NSSF) and Pay As You Earn (PAYE) tax as required by the law.
17. An order by the court compelling the 1st Respondent remit to pay all penalties levied to the Petitioners for its failure to deduct and remit the Petitioners' monthly statutory payments, including the National Health Insurance Fund (NHIF), the Higher Education Loans Board (HELB), National Social Security Fund (NSSF) and Pay as You Earn (PAYE) tax, and take compensate and take full responsibility for fines and penal consequences accruing therefrom.
18. An order by the court compelling the 1st Respondent to immediately pay the Petitioners their withheld March and April, 2017, salaries and other emoluments.
19. An order by the court compelling the 1st Respondent to immediately approve the Petitioners leave applications and leave allowances before the end of the current financial year (2016/2017), in order to ensure that they don't lose or forfeit their leave days.
20. An order of Certiorari to remove into the Court and quash the Show Cause letters, dated 7th November 2016 issued by the 1st Respondent to the 1st, 2nd, 3rd, and 4th Respondents.
21. An order by the court compelling the 1st Respondent to immediately issue the Petitioners with medical cover under the CASB, Busia County, medical scheme.
22. An order by the court compelling the 1st Respondent to immediately include the 1st to 10th Petitioners in the mortgage and car loans benefits, scheme.
23. An order by the court compelling the 1st Respondent to immediately rationalize the petitioners salary scale to comparable CASB scales, based on merit, competencies, qualifications, as set by the Public Service Commission and Salaries and Remuneration Commission guidelines.
24. An order by the Court compelling the 1st Respondent to immediately review the salary scales upwards for the 2nd, 3rd, 4th, 6th, and 10th Petitioners to meet the minimum entry scale for graduates as required by law and Salaries and Remuneration guidelines on staff salaries and emoluments.
25. An order by the court compelling the 1st Respondent to immediately pay responsibility or acting allowances to the 2nd, 3rd, and 6th petitioners since January 2015 to date when the three were redeployed as 2nd Clerk Assistants for the 2nd and 3rd petitioner, 3rd Clerk Assistant for the 6th Petitioner.
26. An order by the Court compelling the 1st Respondent to pay the 8th Petitioner's withheld per diem and allowances amounting to Kshs.68,200/- for attending the 1st Respondent's duly approved official functions, to wit; EALSCA games in Kisumu, between 27th November and 3rd December, 2016.
27. An order of Certiorari to remove into the Court and quash the suspension letters, dated 31st March 2017 issued by the 1st Respondent to the 1st, 2nd, 3rd, and 4th Petitioners.



28. An order of Certiorari to remove into the Court and quash the Reports of the Joint Taskforce on County Staff Rationalization.
 29. Exemplary and punitive damages for breach of the 1st to 10th Petitioners' right to fair labour practice.
 30. Exemplary and punitive damages for breach of the Petitioners' right to have their human dignity respected and protected.
 31. Exemplary and punitive damages for breach of the Petitioners' right to fair administrative action.
 32. Exemplary and punitive damages for withholding the Petitioners' salaries by the 1st respondent.
 33. Payment of withheld March 2017 and April 2017 salaries for the 1st to 10th Petitioners, amounting to Kshs.523,996/-
 34. Payment equivalent to the Petitioners' 12 months' salary, as compensation for violation of the Petitioners constitutional right to fair labour practices and their rights under the Employment Act, 2007, amounting to Kshs.6,287,952/-.
 35. General damages for breach of their Petitioners' constitutional rights.
 36. Interest on the above amounts at Court rates from date of filing suit until payment in full.
 37. Costs of the suit.
 38. Any such further orders as it deems just and fit in accordance with Article 23(3) of the Constitution.
20. The Petition is supported by the Petitioners Affidavits wherein they confirm and reiterate the contents of the petition.
 21. The Petition is opposed by the respondents. The 1st Respondent has filed a Replying Affidavit sworn by Allan W. Mabuka, the Clerk to the County Assembly of Busia wherein he avers that the Petition is frivolous, baseless and an abuse of the process of the Court, the Petitioners herein having previously lodged before the Employment and Labour Relations Court at Kisumu Petition No. 35 of 2016 which Petition raised similar issues as in the instant Petition.
 22. He avers that that the Petitioners are employees of the 1st Respondent who are subject to disciplinary proceedings within the meaning of the Employment Act and the Court cannot fetter with the employer's right to discipline employees.
 23. That the 1st Respondent is a creature of Section 12 of The County Government Act, 2012 whose responsibilities, inter alia include:-
 - a) Ensuring efficient and effective and functioning of the County Assembly.
 - b) Constituting legal offices in the County Assembly and appointing and supervising office holders.
 24. The 1st Respondent allege that pursuant to its mandate, it sought to recruit staff sometime in the year 2013 which recruitment exercise resulted in the employment of a total of 159 employees to render services to the 1st Respondent in various capacities.



25. That in the Financial Year 2014/15 The Commission on Revenue Allocation made recommendations capping the ceilings for the Recurrent Budget for the 1st Respondent and recommending a Staff Rationalization exercise which place the cap at 88 staff.
26. He avers that the Staff Rationalization exercise was conducted legally, in an open and transparent manner, and above all with consultation amongst all the concerned Parties and majority of the seconded staff reported to their new stations.
27. Further that the current budget has restricted the 1st Respondent to accommodate and pay salaries for only 88 employees while a total of Kshs.42 Million has been factored into the budget for County Executive to cater for the salaries of all the seconded staff in accordance with the recommendations of the Staff Rationalization Policy.
28. With regard to the disciplinary proceedings against the Petitioners, he states that all due procedure and law has been followed. That the Petitioners who were subject to disciplinary proceedings were served with Show-cause Letters detailing all the accusations against them and requiring them to respond to the accusations in writing within seven (7) days. The Petitioners allegedly responded to the Show Cause letters by requesting for further documentation to enable them respond. He further avers that the disciplinary process is still ongoing and that the Court should not interfere with the same.
29. In response to the averments in the affidavit of the 1st Petitioner Mr. Daniel Namenya Naburi he avers that the 1st Respondent were never informed of the Petitioner's membership to the County Governments Workers' Union. Furthermore, that there does not exist a recognition agreement between the 1st Respondent and any Union that would obligate it to deduct and remit any union dues as alleged by the Petitioners.
30. The 1st Respondent avers that the Petitioners have at all times been treated fairly and equally with all other employees of the 1st Respondent in terms of accessing training opportunities at the workplace. That for one to qualify for training one has to first apply which in the case of the Petitioners they never did.
31. That the Respondent has endeavoured to implement the report of all committees on staff rationalisation and any one alleged to not have been implemented has not been provided before the Court.
32. They admit to have administratively created separate payrolls designated as A and B within a single payroll for easier accounting pursuant to the Resolution on the Budget estimates for the Year 2016/2017 to define the two pay points codes bearing in mind that the budget for seconded staff had been provided for within the County Executive.
33. The 1st Respondent states that salaries to all employees is paid timeously except in cases where delays are occasioned by factors beyond the 1st Respondent's control. Similarly, that statutory deductions are also remitted within time unless the National Government delays in remitting funds or the IFMIS system fails.
34. It is the 1st Respondent's position that the Petitioners have not been denied mortgages and car loans as their applications are pending approval subject to availability of funds and fulfilment of terms and conditions. That the Petitioners also continue to enjoy the medical benefits like other staff of the 1st respondent.
35. That the Petitioners having accepted their secondment letters were required to perform their duties to the County Executive and not at the County Assembly premises as at 8th December, 2016, by



- which time their access to the County Assembly premises had been restricted lawfully in the interest of security.
36. It is the 1st Respondent's position that the members of staff identified for Secondment were duly consulted and their consent obtained before being seconded to the County Executive to take up positions/designations which had been clearly identified in consultation with the Executive. The 1st Respondent avers that the Secondment letters indicated the departments to which the Petitioners were to report and availability of vacancies in those departments had already been confirmed by the Executive. Further that the period of secondment is also expressly stated in the County Assembly Human Resource Manual which is a public document available to all employees of the 1st Respondent.
 37. They aver that 26 members of staff out of the total of 34 who had already been seconded have actually reported, been received and accepted and assigned work at their new work stations. The remaining 8 being the 1st, 2nd and 5th -10th Petitioners are the only ones objecting to Secondment but have actually collected their Secondment letters and even reported to their work stations. The 3rd and 4th Petitioners are yet to receive Secondment letters and are still in the clock-in - clock-out system.
 38. That in blatant disregard of lawful instructions, the Petitioners habitually insisted on forcefully gaining entry into the Assembly premises, holding unauthorized meetings and press conferences within the precincts of the Assembly and generally engaging in unruly conduct, a fact which led to the commencement of disciplinary proceedings against them.
 39. The 1st Respondent denies that the Petitioners were physically manhandled, threatened or intimidated by the Sergeant-at-Arms. On the contrary, it is the Petitioners who manhandled the Sergeant-at-Arms in an attempt to forcefully gain access to the County Assembly premises.
 40. That the allegation of breach of Article 28 of the Constitution is unfounded as the Petitioners to the extent that they had already been seconded and did not expect to be assigned duties at the County Assembly. They further deny that disciplinary proceedings against the 1st Petitioner commenced after the withdrawal of Petition No. 35 of 2016.
 41. That following the issue of the Show-Cause Letters to the 1st Petitioner and the other concerned Co-petitioners and their failure to sufficiently show-cause as required they were issued with suspension letters in accordance with the law and established labour practice. Salaries of staff not on suspension for the months of March and April 2017 were paid.
 42. The 1st Respondent maintains the position that the entire disciplinary process initiated against the Petitioners is lawful, procedural, justified and sanctioned by both the Employment Act, the Constitution and established labour practices. That the allegation that the 1st Respondent intends to summarily dismiss the Petitioners is unfounded as the disciplinary process has commenced and is ongoing.
 43. Further that the allegations regarding employment of persons who do not possess the requisite qualifications and their placement on higher salary scales than the petitioners are not true. No evidence of the said allegation has been provided. Rather the 2nd Petitioner was offered a job commensurate with his qualifications designated as Clerical Officer but at a lower cadre which job he accepted.
 44. The 1st Respondent admits that the 2nd Petitioner was assigned more duties and responsibilities and any Acting and Special Duty Allowance payable to him would have to be approved by the Salaries and Remuneration Commission. However, SRC is yet to issue guidelines and scales for such allowance and as such; the 1st Respondent is unable to compensate the 2nd Petitioner in that regard.



45. The respondent contends that the 3rd Petitioner was granted leave for the period between 24th June 2016 until 9th July 2016 and was expected to be on duty on 5th August 2016 but was inexplicably absent from duty hence the issuance of the Show-Cause Letter dated 10th August 2016. The 1st Respondent holds the position that the 3rd Petitioner has deliberately misled the Court with a view to obtain the Court's favour.

2nd Respondent's response to the Petition and Notice of Motion dated 8th May 2017

46. The 2nd Respondent filed an Affidavit sworn by one Charles Victor Orodia the Secretary to the 2nd Respondent wherein he deposes that the Petitioners had filed a similar Petition founded on the same issues and facts in the ELRC Kisumu being Petition No. 35 of 2016 which they withdrew while the same was at an advanced stage. That this is a clear intention by the Petitioners to cheat, mislead and or ridicule the Court and the process of justice to achieve undisclosed but non-legal desires.
47. He deposes that the Kisumu Court issued an Orders dated 31st October, 2016 which orders were extended on 3rd November, 2016 whose import was to allow the seconded employees who had reported to their new stations by then to continue working. In adherence to the said orders the 2nd Respondent deposes that it allowed the integration of the affected employees in the respective new stations, and they have since been assigned various duties and this has been factored in the County Government's programming, skills gaps assessments and manpower requisitions.
48. That if the Respondent was to adhere with the orders of 10th May 2017, issued ex parte in the instant petition, it would amount to disengaging the affected seconded employees from their current stations.
49. That the Busia County Government in a consultative and all-inclusive process developed a staff rationalisation policy in response to human resources challenges the County was facing in light of the inherited staff from the defunct local authorities. That the report was duly presented to the County Assembly of Busia and at its 13th sitting in the Fourth Session held on 25th February 2016, adopted the same at which point the report assumed the force of law.
50. That the Petitioners have not pointed out in the instant Petition where the 2nd Respondent has departed from the framework of the said policy, what constitutes an illegality, nor have they initiated any process to void the said policy/report. On these grounds the 2nd Respondent prays for the Orders of 10th May, 2017, to be discharged.

Submissions

51. It is submitted on behalf of the Petitioners that the secondment is illegal and unconstitutional for the reasons that Article 176(1) of *the Constitution* espouses and affirms the principle of separation of powers between the County Assembly and the County Executive and does not envisage secondment of members of staff, between the two Respondents herein. That the secondment is in overt violation of the *County Governments act*, 2012. In their view the role of staffing and related purposes at the County Executive is vested in the 2nd Respondent and not specific county government officials.
52. Counsel for the Petitioners submits that the staff Rationalisation policy has no legal effect since it was made in contravention of the Gazette Vol CXVI-No. 56 of 2nd May, 2014 at pages 1103 and 1104 and Kenya Gazette Vol. CXVIII-No. 81 of 22nd July 2016 at pages 2846 and 2837. That these Gazette Notices recommended the establishment of the County Rationalisation steering committee and County rationalisation which technical teams to deal with staffing issues facing county governments have not been constituted or have never been properly constituted and thus their recommendations have no legal force.



53. On the issue of breach of fundamental human rights being breached it is submitted that Articles 10, 19 (1)(2), 20, 22(1), 22(2)(b), 23, 27(1), (2), 28, 36, 37, 41, 47, 48, 162(2), 176, 231(1), (2) were violated as set out in the pleadings and urge the Court to award each of the Petitioners not less than Kshs.300,000/ = as reparation.
54. It is also submitted that the on-going disciplinary process by the 1st Respondent against the Petitioners is unfair, illegal and should be stopped forthwith. That the said process has taken very long in addition to the same being unwarranted. The disciplinary process in their view has also been discriminatory and should be annulled. Furthermore that the 1st Respondent is acting ultra vires by conducting the disciplinary process as such powers are in the ambit of the 2nd Respondent.
55. Counsel further submits that the petition is not an abuse of Court process for the reason that the issues raised in the instant petition are substantially different from those in ELRC Kisumu Petition No. 35 of 2016, and the Petitioners are fundamentally different.
56. On the orders of 10th May 2017, it is submitted that it is not equitable that the 1st Respondent's Clerk is in office by virtue of the said orders and now they want to turn around and oppose the application and Petition by the Petitioners.
57. Counsel urges the Court that in light of the aforesaid submissions the entire petition and notice of motion dated 8th May, 2017, be dismissed with costs.

1st Respondent's Submissions

58. It is submitted on behalf of the 1st Respondent that County Governments are now part and parcel of the governance system in Kenya tasked with making crucial decisions for the people of Kenya. The formation of the Boards such as the 1st Respondent is one such structure of ensuring that services to the people are made a reality in line with Article 176 of *the Constitution* of Kenya (2010), Section 15 (2) (a) of the 6th Schedule to *the Constitution* of Kenya (2010) and Section 12 of the *County Governments Act* (2012).
59. That pursuant to the 1st Respondent's mandate, it sought to recruit staff without any recommendations of the SRC or CRA due to the fact that the two Commissions had not been formed and were also not functioning. The recruitment exercise resulted in the employment of a total of 159 employees to render services to the 1st Respondent in various capacities. That the 1st Respondent came to realize that there was over recruitment of employees of the Assembly as a result of which it had to come up with a staff rationalisation policy.
60. Some of the various steps that were to be undertaken in the process of Rationalization included Secondment, Redundancy or Voluntary Separation. That the 1st Respondent recommended secondment as the best option for rationalization. This is because redundancy and voluntary separation would deny the employees an opportunity to earn a living which is contrary to the social conscience that the Government should strive to create jobs for its people.
61. On the legality of the disciplinary process it is submitted that the same was done in tandem with Article 235(1)(c) and that it was well within their rights to discipline its employees. Counsel cites the decision of Warsame J in *Miguna Miguna Vs Permanent Secretary, Office of the prime Minister and the Attorney General* (2011) eKLR where it was held:

“The employer was entitled to commence disciplinary proceedings against the employee and it was the duty of the employee to justify in the administrative disciplinary process the



continuation of his employment. The Court further stated that its duty would be to stop a process started with ulterior motive or one based on outright illegality or one which is defective ab initio.”

62. That the orders sought to stop the disciplinary process are pre-emptive as they seek to stop the 1st Respondent from investigating its employees. They cite the Supreme Court decision in *Communications Commission of Kenya & 4 Others versus Royal Media Services Limited and 7 Others* (2014) eKLR where it was held:

“An application which is premised upon mere apprehension and speculation that rights not yet crystallised will be violated, is not meritorious and should not be brought before a Court of law in the first place.”

63. Counsel for the 1st Respondent submits that the Petition and Application are an abuse of the Court process there having been a similar suit before the Court between the same parties. They cite the Court of Appeal decision in *Jetlink Express Safaris Air Express Limited Nairobi Civil Appeal No. 281 of 2009* citing with approval the decision in the South African case of *Benois Vs Wivley* (1973) S.A 721 (SCA) where it was held:

“What does constitute an abuse of court process is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuance of truth are used for purposes extraneous to that objective.”

64. It is also the Respondent’s position that the Orders of 10th May 2017 should be discharged for the reason that it has not been proved that the process of secondment was irregular and discriminatory. That the orders sought were conservatory in nature and the principles of granting such orders set out in the *Board of Management of Uhuru Secondary School Vs City County Director of Education & 2 Others* (2015) eKLR were not met. That the Petition and Notice of Motion dated 8th May 2017 be dismissed with costs.

2nd Respondent’s Submissions

65. The 2nd respondent submits that the word staff secondment in the context of the circumstances of this case is a linguistic anomaly because provisions under Section 72 and 73 of the [County Governments Act 2012](#), presupposes that staff secondment can only be by national government to county government or vice versa. That the law does not foresee a scenario other than by deployment whereby members of staff are moved from one department to another within the county governments. They therefore submit that any movement of staff within the various departments of the county governments such as in the instant case cannot be and is not a secondment.
66. As to the prayers in the petition, the 2nd respondent submits that the issue of overemployment of staff is an issue that the court has no jurisdiction over. It is a political process and this petition is an attempt to drag the court into politics.
67. On the issue of statutory deductions, it is submitted that there are competent institutions in place that the petitioners should pursue this issue with. That there is no evidence that the petitioners have pursued these avenues and hence the court should not step in.
68. The 2nd respondent prays that the petition be dismissed with costs.



Determination

69. I have considered the pleadings and submissions. I have further considered the authorities cited.
70. It is common ground that the 1st respondent over employed staff and was faced with the challenge of reducing the staff following recommendations by the Salaries and Remuneration Commission and the capping of ceilings for Recurrent Budget under which payments for salaries and other emoluments are drawn. According to the 1st respondent it prepared a Staff Rationalisation Policy which was tabled before the County Assembly and was approved first by the County Assembly Committee on Labour and Social Welfare and then by the County Assembly which adopted the report and policy. It is further the 1st respondent's case that a joint committee of the 1st and 2nd respondent's constituted a Technical Team to review the policy and assess available options between secondment, redundancy and voluntary separation. The committee recommended secondment as this was least disruptive to the staff to be affected. The 2nd respondent then requested all department to identify skills gaps against the 61 staff of the County Assembly to be considered for secondment by the County Assembly Service Board. The identified staff reported to the new stations with the exception of the petitioners.
71. It is my finding that the process of seconding the petitioners to the 2nd respondent did not infringe any constitutional or statutory provision. The petitioners did not have to consent to the secondment as this was an administrative function to be handled administratively in accordance with the policy approved by the County Assembly. The petitioners have further not demonstrated that the secondment was not done on the basis of skills gaps as recommended. The petitioners averments that the process was not consultative is not in consonance with the evidence in court which demonstrated the consultative process followed before the secondment was carried out.
72. On the disciplinary process against the 1st, 2nd, 3rd and 4th petitioners, the petitioners did into adduce any evidence to support the contention that it was a gimmick to silence the petitioners. In any event, both respondents have statutory authority to discipline their staff and should there be any violation of statutory or constitutional provisions as set out in *the constitution* and the various legislation governing the same, they are free to approach the court with specific particulars of the same for redress.
73. I find no basis on the evidence and material currently before the court to warrant interference with the disciplinary process against the said petitioners.

Conclusion

74. Having not found either the secondment or the disciplinary process unconstitutional or unlawful, I find no basis to interfere. The result is that the petition fails and is accordingly dismissed and the orders in force discharged.
75. In view of the nature of the prayers sought in the petition and the relationship between the parties, each party shall bear its costs.

DATED AND SIGNED AT NAIROBI ON THIS 16TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 23RD DAY OF MAY 2019

MATHEWS NDERI NDUMA

JUDGE

