



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**JUDICIAL REVIEW NO. 11 OF 2018**

*(Consolidated with Petition No. 63 of 2018)*

*(Before Hon. Justice Mathews N. Nduma)*

**SAMUEL OTIENO OMUGA.....APPLICANT**

**VERSUS**

**PUBLIC SERVICE BOARD, MIGORI COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, MIGORI COUNTY.....2<sup>ND</sup> RESPONDENT**

**FREDRICK WAUDI JULLU.....INTERESTED PARTY**

**JUDGMENT**

1. The Exparte Applicant seeks to injunct the respondents from interdicting the applicant and refusing the applicant to go back to his work station as the Chief Officer Finance and Economic Planning.
2. The application is on the bases set out in the Application that the Respondents have no powers under the law to interdict the Applicant.
3. That the Applicant is an appointee of the office of the Governor with the approval of the County Assembly pursuant to Provisions of *Article 179 of the constitution as read together with Section 30 of the County Governments Act*.
4. That the Applicant being a member of County Executive Committee can only be removed from service by the Governor and/or by a member of County Assembly in a procedure prescribed in *Section 40 of County government Act*.
5. That the Selecting Committee constituted under *Section 40(d) of the County government Act* has never discussed the conduct of the applicant, issued show cause and or given the /applicant opportunity to be heard on any allegation touching on his discharge of duties and responsibilities.
6. That the applicant stand to suffer great harm and prejudice if this application is not allowed. The application is buttressed by an affidavit of the Exparte Applicant asserting the aforesaid grounds.
7. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent's being the Public Service Board, Migori County and County Secretary Migori by a replying affidavit of Peterlis Nyatuga, the Chairman of the Board.
8. The respondent deposes that they were served on 1<sup>st</sup> October 2018 with an order granted by the court granting leave to the Exparte Applicant herein to challenge the board's decision to interdict the Exparte Applicant who was currently facing disciplinary action.
9. That the Exparte Applicant did not file the substantive judicial Review Application within 21 days from date the leave was granted. The 21 days terminated on 30<sup>th</sup> October 2018. The Exparte applicant filed the main motion on 1<sup>st</sup> November 2018 and serve it upon the respondents on 6<sup>th</sup> November 2018.
10. The respondents states that the motion application was filed out of time and without leave of the court and is thus defective.
11. On the merits, the respondents state that the application is premature because *Section 77 of the County Government Act* provides that any person aggrieved by a decision of the County Public Service Board may appeal to the Public Service Commission. The Exparte Applicant

did not exhaust internal remedies.

12. That disciplinary proceedings are ongoing and the Exparte Applicant has no basis of injuncting the process.

13. The Exparte Applicant was interdicted on 4<sup>th</sup> October 2018 for failure to respond to a show cause letter dated 12<sup>th</sup> September 2018. That this was insubordination under the Employment Act. The Applicant failed to attend a consultative meeting with the Board and instead came to court. That there are good grounds for the Exparte applicant to face disciplinary hearing set out in the show cause letter. That the application be dismissed with costs.

14. The application is further opposed by a replying affidavit by the interested party Fredrick Waudi Julu filed on 17<sup>th</sup> December 2018. In the main the interested party deposes that the Exparte applicant was recruited by the Governor Arbitrarily and unlawfully because he had not applied for the position advertised and was not shortlisted for appointment by the Migori County Public Service Board. The interested party states that the Exparte Applicant is in office illegally, lacks clean hands and his application be dismissed.

### **Determination**

15. The court has carefully considered the papers filed by the parties including the written submissions and has come to the following conclusions of law and fact.

(a) The Migori County Public Service Board has the mandate to commence disciplinary proceedings against the Exparte Applicant. The allegations by the Exparte applicant that only the Governor may discipline or remove him is misplaced.

(b) The Migori County Public Service Board, commenced the disciplinary process against the Exparte Applicant lawfully and the interdiction of the Exparte Applicant pending the disciplinary process is lawful.

(c) The Exparte Applicant came to court prematurely and did not appeal to the public service board in terms of *Section 77 of the County Governments Act*.

(d) The Exparte Applicant filed the substantive motion after 21 days had lapsed upon being granted leave by the court to file the motion. The Exparte Applicant did not seek leave to file the substantive Motion out of time before filing the same. Consequently the same was unlawfully filed out of time and therefore defective.

(e) The manner in which the Exparte Applicant was appointed is not for determination in the Exparte Application and the court makes no specific findings on the issue.

16. Accordingly, the Judicial Review application lacks merit and is dismissed with costs.

**Judgment Dated, Signed and delivered this 16<sup>th</sup> day of May, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Kisie for Applicant

Mr. Odeny for Respondents

Ngala Awino for interested party

Chrispo – Court Clerk