



**REPUBLIC OF KENYA**

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

**JR NO. 8 OF 2017**

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

REPUBLIC OF KENYA.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MIGORI.....1<sup>ST</sup> RESPONDENT

MIGORI COUNTY EXECUTIVE COMMITTEE.....2<sup>ND</sup> RESPONDENT

MIGORI COUNTY SECRETARY.....3<sup>RD</sup> RESPONDENT

AND

COUNTY ASSEMBLY OF MIGORI.....INTERESTED PARTY

**Ex-parte applicants:**

- 1. PETERLIS NYATUGA**
- 2. ROBI MABANGA**
- 3. MARTINE DIMA OGOLA**
- 4. MICHAEL FRANCIS MWAKIO**
- 5. MERCY SAU MWAKIO**
- 6. JABEZ BUNDE**

**JUDGMENT**

1. The ex-parte applicants seek for an order of judicial review in the nature of a certiorari to remove into the Employment and Labour Relations Court and quash the decision of the Migori County Executive Committee contained in the letter dated 21<sup>st</sup> December 2017, by the Migori County Secretary to send the applicants on a ninety (90) days compulsory leave with effect from 21<sup>st</sup> September 2017.

2. Leave was granted to the ex-parte applicants to commence the application which leave acted as stay of the intended action by the respondents.

**Facts**

3. The applicants were duly appointed to serve in the Migori County Public Service Board on 25<sup>th</sup> July 2013 for a period of six years. The six year period is due to expire on 25<sup>th</sup> July 2019.

4. In terms of *Section 58 (5) of the County government Act*, the applicants may only be removed from office:

- (a) On grounds set out for the removal of members of a constitutional commission under *Article 251 (1) of the constitution* and

(b) By a vote of not less than seventy five percent of all the members of the county assembly.

5. It is submitted for the applicants that the Migori County Executive Committee in a letter dated 21<sup>st</sup> December 2012 through the County Secretary has acted *ultra vires* the statute by purporting to send the Board members on compulsory leave.

6. That the Migori County Public Service Board is an independent body created under *Article 248 of the constitution of Kenya and Section 57 of the County Governments Act*. The Board is only answerable under *Section 59(5) of the Act and Article 185 of the constitution to the County Assembly of Migori*. The Board is not answerable to the Executive committee whatsoever.

7. That the action by the executive Committee is unlawful, null and void and it be quashed as prayed.

### **Response**

8. The respondents depose that the Governor who is the Chief Executive of Migori County was directly elected by the people and enjoy executive authority under *Articles 1, 179 and 180 of the constitution* and therefore he has the wider public interest to ensure that the County is running with a fully constituted public service Board to drive the overall agenda of his government on matters affecting public service delivery.

9. That the Governor executes his function vide public servants and offices established as contemplated under *Article 235 of the constitution and Section 5(2) (f) of the County governments Act*.

10. That to the extent the functions of the County Public Service Board affect the mandate of the governor and his government, the executive committee has the power to ensure that the Body functions above board and it not take legitimate steps to discipline and even remove the County Public Service board.

11. That under Article 183 (3), the constitution only provides oversight role to the County Assembly over the County Public Service Board and this does not derogate from the fact that the County Public Service Board are agents of the County Executive Committee and when the image of the board is tainted so is the image of the executive.

12. For the aforesaid reasons, the respondents submit that the intended action against the Exparte applicants is legitimate and lawful and thus the application lacks merit and it be dismissed with costs.

### **Determination**

13. The issues for determination are:

(i) Whether the respondents have acted *ultravires* the statute and constitution in purporting to remove the County Public Service Board.

(ii) Whether the exparte applicants are entitled to the reliefs sought.

### **Issue I**

14. Reliance is placed by the Exparte applicants on an advisory opinion from the office of the Authority General to the Chairperson of the Transition Authority dated 12<sup>th</sup> October 2015 in which Hon. Githu Muigai, EGH, SC opined as follows:

*“It is therefore the considered opinion that the Governor’s relationship with the County Public Service Board as regards general supervision of function is limited. The Governor, if unsatisfied with CPSB member’s performance may not initiate any other administrative disciplinary measure, but instead seek the CPSB member’s removal on the grounds and in the manner set out in Section 58(5) of the County Governments Act”*

15. This position was buttressed by **Byram Ongaye J. in Hussein Roba Boni vs The County Government of Isiolo and 3 others.**

**ELRC at Nyeri petition no. 2 of 2016 and by Jorum Abuodha J. in Mundia Njeru Gateria vs Embu County government and 5 others (2015) eKLR.**

Ongaye J. said

*“Thus, the court finds that in the present case, the 2<sup>nd</sup> respondent erroneously acted in the misconceived believe that the petitioner was his servant. The court finds that the petitioner was not the 2<sup>nd</sup> respondent’s servant.”*

The judge said further

*“In the present case, the court finds that the 2<sup>nd</sup> respondent did not enjoy inherent disciplinary powers to impose the disciplinary sanction of interdiction against the petitioner as there was no constitutional or legislative authority or power for the 2<sup>nd</sup> respondent to act as he proceeded in the case”.*

16. The petitioner in the Isiolo case was the Chairman of Isiolo County Public Service Board whereas the 2<sup>nd</sup> respondent was the Governor of the County government of Isiolo. In the Embu case, the dispute was between the Chairperson of the Embu County Public Service board and the Governor of the Embu County government. In both cases, ELRC court granted prohibitory and injunctive relief to the chairpersons of the Public Service Boards against the *ultravires* conduct by the Governors.

17. It is therefore beyond Par adventure that the Executive Committee and the Governor lack authority to discipline or remove members of the County Public Service Board and the purported action by the respondents in the letter dated 21/12/2017 is unlawful null and void

18. Accordingly, and in answer to issue (ii) above the court grants the reliefs sought by the Exparte Applicants as follows:

(a) An order of certiorari to remove into the ELRC and quash the decision of the Migori County Executive Committee contained in the letter dated 21<sup>st</sup> December 2017 by the Migori County Secretary to send the Exparte applicants on a ninety (90) days compulsory leave with effect from 21<sup>st</sup> September 2017 is issued.

(b) The respondent to pay the costs of the suit.

**Judgment Dated, Signed and delivered this 7<sup>th</sup> day of May, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Odeny for Exparte Applicants.

Mr. Ombolo for Respondents

Chrispo – Court Clerk