



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISC. APPLICATION NO. 64 OF 2018

(Before Hon. Justice Mathews N. Nduma)

HON. AMOS NYARIBO.....APPLICANT

VERSUS

HON. JOHN NYANGARAMA.....RESPONDENT

RULING

1. This is a miscellaneous application without a substantive suit seeking for orders that a conservatory order be issued restraining the Respondent from committing a breach of the Coalition Agreement and Respondent further be restrained from appointing and/or maintaining the appointment of Mr. Eric Onchana Aori as County Secretary, Nyamira County.

2. It is important to report that the injunction sought is final there being no pending suit to be determined thereafter.

3. The application is premised on grounds that a political dispute has arisen between the parties to a Coalition Agreement entered into between them on 29th May 2017 in which it was agreed that the respondent would contest the position of Governor nominated by the Amani National Party (ANC) and the petitioner to be his running mate and be the Deputy Governor for the term 2017-2022.

4. It was agreed that the relationship between the parties would be governed by the agreement and the agreement would be lodged with the Registrar of Political Parties.

5. Under clause 3, thereof it was provided:

“The appointment of the County Secretary shall be made after consultation and agreement by the parties herein.”

6. The dispute is that the respondent was in the process and/or had appointed the County Secretary without consultation and agreement with the petitioner. The petitioner alleges that this appointment is in violation on the agreement and that the court injuncts the process permanently to allow a consultative process to take place.

7. The application is opposed vide a replying affidavit of the respondent in which it is deposed in the main that:

(i) That under clause 7 of the Agreement any dispute shall be settled by reference to Emmanuel. Arbitrator from Nyamira County but appointed by the Chairman for the time being of the chartered institute of Arbitrators.

(ii) That the coalition Agreement was never registered with the Registrar of Political Parties and is therefore not valid.

(iii) That the respondent was nominated and elected on ODM party ticket and not by way of a coalition party (NASA) thus the said coalition agreement is not enforceable.

(iv) The position of County Secretary has not fallen vacant as by law stipulated and when it becomes vacant it will be filled in terms of the County Government’s Act.

(v) That the matter or removal of the County Secretary was determined in Kisumu High Court petition No. ELRC No. 33 of 2017 Vincent Omas vs County Government of Nyamira and 4 others and therefore the same is resjudicata and the respondent has no powers to remove the County Secretary of Nyamira unless as by law established.

Determination

8. The first issue for determination is whether the applicant has satisfied the requirements for grant of a mandatory injunction with the effect of removing a public officer from office and replacing him with another with no substantive suit filed.
9. The second issue for determination is whether the court lacks jurisdiction to determine this matter by fact of the Arbitration Clause in the parties Agreement.
10. *In Giella vs Cassman Brown and Company Limited (1973) eKLR E.A 358 at 360* it was stated:

“First an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A Industries vs Trufoods (1972) E.A 420”

11. It is the court’s considered finding following the aforesaid case that an application for grant of an order of injunction or conservatory orders must be premised on a substantive suit. The orders sought cannot be an end by themselves. The same must be temporary in nature pending the determination of a pending suit. This position does not change whether the orders sought are preventative or mandatory in nature.

12. It should be remembered however, where special circumstances appertain, such as where the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the plaintiff a mandatory injunction may be granted on an interlocutory application *“see volume 24 Halsbury Laws of England 4th Edition paragraph 948 and Kenya Breweries Limited and another vs Washington O. Okeyo Civil Appeal No. 332 of 2000, 1EA 109.*

13. The Key word here is the injunction will be granted on an interlocutory application. This means that there must be a pending substantive suit even where special circumstances arise.

14. On this score alone, the applicants by failing to file a substantive suit have failed the first preliquitice in granting an injunction or conservatory order.

15. Secondly, appointment of a county secretary is governed by *Section 44(2) of the County Government Act* which provides *inter alia* that the County Secretary shall be competitively sourced from amongst persons who are university graduates with at least ten years of experience in administration and management. Furthermore, no private agreement may oust express provisions of a statute and more so the applicable constitutional principles *under chapter 6 of the constitution of Kenya 2010.*

16. This court has exclusive jurisdiction to hear and determine all matters of employment nature and the jurisdiction of the court may not be ousted by an arbitration clause in a private agreement. It is the court’s further finding that the agreement by the parties was breached by the parties’ failure to register it with the registrar of political parties. To this extent, the agreement cannot be said to be binding on the parties. Even if it was, the same is null and void to the extent that it purports to disregard or oust express provisions of the constitution and/or statute.

17. Accordingly, the Miscellaneous Application lacks merit and is dismissed with costs.

Ruling Dated, Signed and delivered this 2nd day of May, 2019

Mathews N. Nduma

Judge

Appearances

M/S Anyoka for Applicant

M/S Nyachiro for Respondent

Chrispo – Court Clerk