



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 12 OF 2019**

*(Formerly Mombasa ELRC Petition No. 4 of 2019)*

**Before Hon. Lady Justice Maureen Onyango**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLES 10, 27, 43, 47, 48, 50, 174 AND 236**

**AND**

**IN THE MATTER OF THE COUNTY ASSEMBLY SERVICE ACT NO. 24 OF 2017**

**AND**

**IN THE MATTER OF BARINGO COUNTY ASSEMBLY**

**AND**

**IN THE MATTER OF UNPROCEDURAL UNFAIR AND ILLEGAL DISMISSAL OF THE CLERK TO THE COUNTY ASSEMBLY**

*BETWEEN*

**JOSEPH C. KOECH.....PETITIONER**

*VERSUS*

**BARINGO COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**THE SELECT COMMITTEE OF THE ASSEMBLY OF**

**COUNTY OF BARINGO.....2<sup>ND</sup> RESPONDENT**

**BARINGO COUNTY ASSEMBLY SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The Petitioner, Joseph C. Koech, filed a Petition dated 7<sup>th</sup> May 2019 against the Respondents, The Baringo County Assembly, The Select Committee of the Assembly of County of Baringo and the Baringo County Assembly Service Board. The Petition is brought under Articles 10, 27, 41, 47, 48, 50, 174 and 236 of the Constitution of Kenya and County Assembly Service Act No. 24 of 2017. The petitioner also filed on the same date a List of Documents and a Statement stating that he adopts his supporting affidavit to the Notice of Motion dated 7<sup>th</sup> May 2019 as his statement.

In the petition, the Petitioner avers that he was employed as a Clerk in the 1<sup>st</sup> Respondent and also serves as the Secretary to the 3<sup>rd</sup> Respondent. That he is the Chief Operating Officer and accounting officer to both the 1<sup>st</sup> and 3<sup>rd</sup> respondents pursuant to the Public Finance Management Act. That on 26<sup>th</sup> April 2019, an officer from the 1<sup>st</sup> Respondent served process upon his advocates at 5 pm requiring his attendance in person before a special committee at Kabarnet but he informed his advocates that he was indisposed and unable to attend. That he was on compulsory leave at the time when he was asked to appear before the said committee and only had a weekend to prepare and

instruct his lawyers. That this act, and his subsequent suspension by the 1<sup>st</sup> Respondent amount to unfair labour practice and unfair administrative action.

He continues to aver that he has challenged the 1<sup>st</sup> Respondent's decision to continue with proceedings conducted by the 3<sup>rd</sup> Respondent in the pending **Eldoret High Court Petition No. 5 of 2019** and that there is already a determination in **ELRC Cause No. 30/2014, Silas Kipruto & Another V. The County Government of Baringo & Another** over the same subject matter. That the constitution demands that every act of the Respondent be subjected to public participation and the input factored in the decision making process in administration or service delivery. He contends that the decision to remove him because he hails from the Nandi community is discriminatory and that the people of Baringo have been denied the chance to participate and evaluate the performance of the 1<sup>st</sup> Respondent contrary to **Articles 10 and 27 of the Constitution**. That his request to access and to obtain documents in support of his defence has been denied and that his 90 days' compulsory leave was extended by another 45 days without the concurrence of the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent has never placed and passed a motion on the issue of compulsory leave. He lists the particulars of the 1<sup>st</sup> Respondent's breach as follows:

- a. Purporting to terminate the Petitioner without invoking the due process.
- b. Purporting to remove the Petitioner without any justifiable cause.
- c. Purporting to discipline/remove the Petitioner by preaching rules of fair play.

The Petitioner avers that the 1<sup>st</sup> Respondent breached the provisions of **Section 76 of the County Government Act** and that the allegation as to performance management would be applicable if the assembly had ratified the County Assembly Human Resource Policies and Procedure Manual whose draft was developed by the Society of Clerks at the Table of Kenya (Soccat). That *Part (IV)* of the said draft document provides for performance management as envisaged by **Section 47 of the County Government Act and Part (VI) Disciplinary Control of Staff**. That the compulsory leave was pegged upon allegations which were occasioned by failure of the county executive committee to develop tools for evaluation and performance management. He contends that the 1<sup>st</sup> Respondent as established lacks the independence and objectivity of investigating and recommending for removal of the Clerk as it is an interested body.

The Petitioner prays for judgment against the Respondents jointly and severally for:-

- a) A declaration that the acts of the Respondents amounts to unfair employment practice contrary to Article 41 of the Constitution of Kenya 2010.
- b) A declaration that the acts of the Respondents amounts to unfair administrative action contrary to Article 47 of the Constitution of Kenya 2010.
- c) An Order of Prohibition restraining the Respondents from discriminating against the Petitioner contrary to Article 27 of the Constitution of Kenya 2010.
- d) An Order of Certiorari to remove into court and quash the letter dated 26<sup>th</sup> April 2019 and consequential proceedings as infringing on the Petitioner's right to fair hearing contrary to Article 50 of the Constitution of Kenya.
- e) An Order reinstating the Petitioner as the Clerk of the County Assembly of Baringo.
- f) The 3<sup>rd</sup> Respondent to pay the Petitioner all allowances, privileges, benefits and any other dues lost during the period of termination/suspension as soon as possible or as per the court's directions.
- g) Damages for unlawful suspension from time of compulsory leave to date of Judgment.
- h) Costs of the Petition from the time of compulsory leave letter to the date of Judgment.
- i) Any other order the court may deem fit to grant.

### **Respondents' Case**

The Respondent filed a Replying Affidavit dated 21<sup>st</sup> May 2019 sworn by David Kipkorir Kiplagat, the Speaker of the 1<sup>st</sup> Respondent and the Chairman of the 3<sup>rd</sup> Respondent who avers that the Petitioner was properly served within time after evading service for some time. That the issues raised in the Notice of Motion dated 9<sup>th</sup> May 2019 are issues the Petitioner raised at the hearing in **Eldoret High Court Petition No. 5 of 2019** which was due for direction on Ruling on 21<sup>st</sup> May 2019. That the grounds upon which the said application was made are untenable because the Petitioner was served with a complaint or charge and has even admitted on oath to having been supplied with evidence. That there was ample evidence confirming the grave nature of the offences committed by the petitioner. That the 3<sup>rd</sup> Respondent acted according to the requirements of **Section 23 of the County Assemblies Service Act** which sets out the procedure for removal of the clerk as follows: consideration by the board; framing of charges against the clerk; invitation of the clerk to respond; personal appearance directly with an advocate; and submission of a Notice of Motion to the County Assembly upon hearing the clerk. Further and finally, that the Applicant/Petitioner was given opportunities to be heard but chose not to appear after seeking two adjournments.

Mr. Kiplagat continues to aver that the Petitioner is no longer a clerk of the 1<sup>st</sup> Respondent and no longer the secretary of the 3<sup>rd</sup> Respondent as he was removed pursuant to the decision of the 1<sup>st</sup> Respondent after proper hearings conducted by all the respondents. That the issue of the Petitioner coming from the Nandi community has never been a factor. That the issues surrounding **ELRC 30 of 2014** were procedural technicalities unrelated to the current issue and having been determined by the court, cannot arise herein. That the fact that the petitioner is a non-local does not mean he is immune to disciplinary action like other employees.

That when the respondents received complaints against the Finance Officer, the same were investigated and the Petitioner was summoned as a witness. That the petitioner admitted to some of the breaches to the extent of incompetence and abuse of office, failure to respond to many internal queries, neglect and gross violation of the Constitution among others. That when the matter was deliberated upon, there was reason to believe that the Petitioner had committed several offences warranting his removal and in order to protect the witnesses who were his juniors, he was sent on compulsory leave for 60 working days with full pay.

That the Petitioner was invited for a hearing on 3<sup>rd</sup> April 2019 but asked to be heard on 5<sup>th</sup> April 2019 instead and the adjournment was allowed by the 3<sup>rd</sup> Respondent after deliberations. That when the Petitioner attended with his advocate on the 5<sup>th</sup> April 2019, they asked for another adjournment to 11<sup>th</sup> April 2019. That their request was again granted but marked as the last adjournment. That on the said 11<sup>th</sup> April 2019, the board sat from morning until 5.00 pm when they received a letter from the Petitioner's advocate stating they would not attend as they were going to court. That the board proceeded with the hearing and considered the defence the Petitioner had filed and recommended his removal through a motion filed in the assembly. That the Board also suspended him. That the Board informed him of the next process. That the board was properly convened and all the processes followed.

Further, that after a meeting held by the 1<sup>st</sup> Respondent on 25<sup>th</sup> April 2019, the 2<sup>nd</sup> Respondent was formed in accordance with **Section 23(2), (3), (4) and (5) of the County Assemblies Service Act** to conduct independent investigations on the charges levelled against the Petitioner. The Petitioner was invited to appear before the 2<sup>nd</sup> Respondent to exonerate himself but he did not attend for reasons known to him. That the said select committee then filed its report with all its deliberations having been captured in the Hansard. That the Petitioner was terminated through a resolution of the 1<sup>st</sup> Respondent. That the termination letter was served on him on 7<sup>th</sup> May 2019 and he is guilty of not disclosing that he had already been terminated when he was filing the application dated 9<sup>th</sup> May 2019.

He avers that the Petitioner is challenging the same process through a multiplicity of proceedings being **Eldoret High Court Petition No. 5 of 2019; Eldoret ELRC Petition No. 3 of 2019;** and the Petition herein. That the only complaint the Petitioner raised was on documents which were outside the respondent's domain. That matters regarding Section 47 of the County Government Act are matters within the competence of the county executive committee and the governor and cannot be demanded from the 3<sup>rd</sup> Respondent. That the Respondents are not expected to produce the public documents not in their domain. That this Petition is untenable in law. Further, that there is no basis laid for issuance of orders sought and that there are no substantive orders.

The Petitioner thereafter filed a Further Affidavit dated 29<sup>th</sup> May 2019 in which he avers that his earlier advocates, Angu Kitigin and Company Advocates had informed him that they would withdraw **Eldoret ELRC Petition No. 3/2019** and **Eldoret High Court Petition No. 5/2019** to pave way for the filing of the Petition herein. That the said advocates inadvertently delayed to withdraw the said petitions but which withdrawal has now been effected. He insists that he was not aware that his employment had been terminated by the 1<sup>st</sup> Respondent until he saw his position advertised in the daily newspapers on the morning of 9<sup>th</sup> May 2019 and that he was thereafter served with the termination letter on the same date at 12.53 pm. That all these were happening on the same day when his application was in the process of being heard in Mombasa where all Judges of the ELRC had convened for a meeting. That the Respondent's behaviour was meant to frustrate the court process he had initiated and was actuated with malice.

## Oral Submissions

When the matter came up for hearing, the Petitioner's counsel submitted that **JCK2 of the Petitioner's bundle** is the letter dated 14<sup>th</sup> January 2019 sending the Petitioner on compulsory leave based on allegations of gross misconduct. That a day after receiving the said letter, the Petitioner was ejected from his office by some officers. That the petitioner was feeling unwell when he was summoned to appear before the 2<sup>nd</sup> Respondent. That when the matter was placed before the County Assembly, there was no quorum when the Assembly resolved to terminate the Petitioner. That taking into account the manner in which the whole process was conducted there was no room for any appeal. It was submitted that the main issue is whether the dismissal was fair as per **Section 41 of the Employment Act** on fair hearing and **Section 43 of the Act** which requires the employer to prove reasons for any dismissal. That **Section 45(2)** provides that where both section 41 and 43 are not complied with, the whole exercise is unfair and that in the case of **Walter Ogal Anuro -V- TSC [2013] eKLR**, the court held that for a termination of employment to pass the fairness test, there must be both substantive and procedural fairness.

Counsel relied on **Civil Appeal 336 of 2014, County Assembly of Bungoma & 2 Others -V- Stephen Mandela and 2 Others** where the court of appeal observed that Mandela's request was not unreasonable and that the position taken by the chair of the select committee denying his request not to attend all sessions in person was denying his right to appear. The Petitioner's Counsel submitted the two days' notice given to the Petitioner was not sufficient. He cited the case of **Ondima Kabese -v- Trojan International Ltd [2017] eKLR** where the court observed that the employer is expected at all times to observe the rules of natural justice while giving notice to an employee pending hearing so as to enable the employee prepare for the hearing appropriately. He stated that in the instant case, the petitioner has annexed documents at *page 62 and 63 of the Petitioner's bundle* to demonstrate that the Petitioner was on bed rest.

The Petitioner's Counsel further submitted that the right to fair administrative action was disregarded by the decisions made against the Petitioner and further, that the Petitioner was not given access to the requisite files and all the evidence being relied on. That whatever happened at the 1<sup>st</sup> Respondent assembly is pure vendetta and amounts to impunity of the highest order and that he has annexed **JK1** and **JK2** as proof that the other suits have been withdrawn. He prayed that the Petitioner's status quo be reinstated. He urged the court to revoke the advertisement and the recruitment process and that the Petitioner be given his benefits as a result of the unlawful dismissal.

The Respondents' counsel submitted that as the Select Committee was proceeding and adjourning to wait for the Petitioner, he was busy in court looking for orders yet he alleges he was on bed rest on 29<sup>th</sup> April 2019, the same day he appeared before a Commissioner of Oaths for filing of Eldoret ELRC Petition No. 3 of 2019. That the Petitioner was given an opportunity to be heard before the Service Board, was served with the charges to which he comprehensively responded, and when he was given an opportunity to appear before the Select Committee, he sent his advocate seeking for adjournment for a process which was time bound. That the issue of time to appear is statutory and not a creation of the Respondent and that **Section 23(5) of the County Assemblies Service Act** provides that the Select Committee shall within 10 days report to the assembly.

He submitted that the orders sought are discretionary, that whoever comes to equity must come with clean hands and with full disclosure. That the Petitioner only disclosed that he had withdrawn the other cases after the Respondents filed their response. That the Petitioner being a state officer, the Employment Act does not apply to him. Counsel referred the court to the cases of **Cecilia Wangechi Ndungu –v- County Assembly of Nyeri** and **Birir v County Government of Narok**. Counsel submitted that the Respondents complied with the County Government Act and the County Assemblies Service Act. That there were eight charges against the Petitioner with charge number four being that he was issuing two separate letters to some employees with different pay grades. That the Petitioner admitted the same in his response. Counsel submitted that it would cause the Respondent great financial loss if the employees were to use the said letters to ask for the higher pay. That the Petitioner also employed a driver who worked for 2 days and was paid for 7 months and who is known by the other drivers in the pool. That after investigations the driver was found to be a ghost driver.

Counsel submitted that the Petitioner did not raise any issues on the Speaker chairing the County Public Service Board while the Select Committee is not chaired by the Speaker whose Chairman is Joseph Ole Parsach as shown in **DKK 16**. He submitted that there is no allegation that the members of the assembly had issues with the Petitioner. He avers that the orders sought are not prayed for in the Petition and prays that the Court dismissed the Petition with costs. He relied on the decision of **Munawar Shuttle –V- County Government of Kilifi** where the court stated that a party who files multiple suits should not be heard. He also prayed that the court adopts the affidavit filed in response to the Notice of Motion as a reply to the Petition *mutatis mutandis*.

The Petitioner's Counsel responded by stating that the clerk does not deal with issues of employment which is the mandate of the County Public Service Board and that in summary, the exercise was flawed and done in haste. He relied on the affidavit filed in court and the Petition and prayed that the court grants the orders sought.

### **Determination**

The first issue for determination is whether the termination of the petitioner's employment was in breach of the Constitution and Fair Administrative Actions Act. The second issue for determination is whether the Petitioner is entitled to the reliefs and orders sought in his Petition.

The Petitioner has argued that the Respondents had no justifiable cause to terminate his employment, that he was given short notice in terms of the disciplinary hearing. Further, that he was not furnished with documents and evidence relied upon by the Respondents. The Respondents in response have submitted that they complied with due procedure as per **Section 23 of the County Assemblies Service Act**.

As submitted by the petitioner, he was issued with a letter sending him on compulsory leave on 15<sup>th</sup> January 2019. On 22<sup>nd</sup> March 2019, he received a letter summoning him to appear before a disciplinary committee to answer to the charges that were levelled against him. He responded to the allegations but requested that the date of the disciplinary hearing be moved from 3<sup>rd</sup> to 5<sup>th</sup> April 2019 on grounds that his advocate had a matter at Eldoret High Court.

The 2<sup>nd</sup> respondent agreed to accommodate him as requested by its letter dated 2<sup>nd</sup> April 2019. On 5<sup>th</sup> April 2019, the petitioner, accompanied by his advocate, asked for a further adjournment of the disciplinary hearing to 11<sup>th</sup> April 2019 to enable them consider documents he had demanded to be supplied with, and which were supplied. The adjournment was granted and marked as the final adjournment.

On the 11<sup>th</sup> April 2019, the Committee waited for the petitioner until 5 pm when the Committee received a letter from the Petitioner's Counsel stating he would not attend the hearing. Upon his failure to attend the meeting, the committee which had waited for him from morning, proceeded to hear his case and recommended that a motion be filed in the County Assembly with a view to remove the petitioner. The Committee further decided to suspend the petitioner.

While all this was going on, the petitioner was busy in the court corridors. He filed Eldoret High Court Constitutional Petition No. 5 of 2019 but the Court declined to grant him ex parte orders to stay the disciplinary proceedings. This was on 19<sup>th</sup> April 2019. When the orders were declined, he filed another application in Employment and Labour Relations Court, ELRC Petition No. 3 of 2019 seeking to stop the Baringo County Assembly from continuing with proceedings to remove him from office. The present petition, filed on 21<sup>st</sup> May 2019 was thus the third petition he filed in a bid to stop proceeding for his removal from office. This is a classic case of abuse of court process.

On 25<sup>th</sup> April 2019, the Baringo County Assembly formed a Select Committee to conduct investigations into the conduct of the petitioner. The Select Committee invited him to appear before it on 29<sup>th</sup> April 2019. The Petitioner failed to attend the meeting of the Select Committee.

From the foregoing, I find that the petitioner was given every opportunity to attend the disciplinary hearing both before the disciplinary committee of the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> respondent but squandered the same.

From the evidence on record, which is not contested, I find that the disciplinary process in relation to the Petitioner indeed met the test for legality, rationality, procedural propriety and observance of rules of natural justice in accordance with **Articles 41, 47 and 50 of the**

**Constitution, and the Fair Administrative Action Act.**

As held by the South African Labour Appeal Court in *Nampak Corrugated Wandeville -V- Khoza (JA14/98) [1998] ZALAC 24*:

*“A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”*

Having found no breach of the petitioner’s constitutional rights and having found further that the petitioner is guilty of not only forum shopping but also abuse of court process, I find that he is undeserving of the orders sought.

I accordingly dismiss the petition with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**