



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 72 OF 2018

(Before Hon. Justice Mathews N. Nduma)

FRANCIS ANGUEYAH OMINDE.....PETITIONER

VERSUS

H.E. DR. WILBER KHASILWA OTICHILO.....1ST RESPONDENT

VIHIGA COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

COUNTY GOVERNMENT OF VIHIGA.....3RD RESPONDENT

AND

PHILIP GAVUNA.....1ST INTERESTED PARTY

THE COUNTY ASSEMBLY OF VIHIGA.....2ND INTERESTED PARTY

RULING

1. In the application dated 26th November 2018, the applicant prays for conservatory orders suspending the implementation of the interdiction of the applicant from his office of County Secretary and to constitute a team to investigate the applicant and the directive to hand over office to Philip Gavuna is stayed pending the hearing of the petition.
2. The application is based on grounds set out in the notice of motion and the supporting affidavit of the applicant that may be summarized as follows:
3. The applicant was interdicted on 22nd November 2018 by a letter dated 14th November 2018 without prior notice and without being given opportunity to explain himself against the allegations leveled against him.
4. The letter of interdiction accused the applicant of misconduct in that he was dishonest and failed to make material disclosure in the application letter for the position of County Secretary in response to an advert in the daily nation of 29th August 2017 in that the applicant indicated that he was working then as the County Secretary for Nandi County when as a matter of fact his services had been terminated on 11th July 2017 for gross misconduct and the matter was pending in court being Kisumu ELRC No. 27 of 2017.
5. Secondly, the applicant failed to co-operate with EACC on corruption related investigations between January to July 2018 when the commission made several requests to the office held by the applicant to provide documents to facilitate investigations amongst other charges (iii) to (viii) set out in the letter all touching on the integrity of the applicant.
6. The applicant was placed on half salary, full house allowance and medical allowance. The letter requested the County Public Service Board to constitute a committee to investigate the allegations made against the applicant and submit their findings to the governor within six (6) months from the date of the letter.
7. The applicant was requested to hand over to Mr. Philip Gavuna Chief Officer, Trade, Industrialization and Entrepreneurship with immediate effect.

8. Justice Maureen Onyango sitting at Nairobi, granted interim orders on 5th December 2018 in which the court ordered:

“That order of status quo be and is hereby granted pending interpartes hearing of the application dated 26th November 2018.”

9. The file was then transferred to Kisumu and fixed for interpartes hearing on 13th December 2018 and Mr. Musiega appeared for the petitioner/applicant whereas Mr. Sore appeared for the 1st respondent. The court gave directions for the disposal of the application and granted further orders to the effect:

“Meanwhile the disciplinary proceedings against the petitioner are stayed pending hearing and determination of the application”

10. The hearing and determination has delayed due to the filing of other applications by the parties while the applicant continues to enjoy the interim orders.

11. The applicant alleges that he was unlikely to get justice since the process of removal was commenced by the 1st respondent who is also in control of the investigations and that the application would be defeated by handing over to one Philip Gavuna. That the said Philip Gavuna does not meet the minimum requirements to hold the office of the County Secretary wherefore the applicant prays for the conservatory orders pending determination of the petition.

12. The application was responded to vide a replying affidavit of the 1st respondent in which he outlines the reasons for the steps taken against the applicant in terms of *Section 44(2) (c) of the County Governments’ Act*. That the 1st respondent interdicted the applicant on half pay and directed handing over of the office pending investigations of misconduct by the applicant by the 2nd respondent which body has the mandate and ability to give the applicant a fair hearing and administrative action before a final decision is taken on the matter.

13. That the complaints against the applicant are serious and if proved to be true would lead to the dismissal of the applicant from his position.

14. That the 1st respondent has also noted various matters of concern regarding the applicant which require him to be taken through a disciplinary process. That these matters touch on the national values and principles of governance set out under *Article 10 of the constitution* as well as values and principles of public service as per *Article 232 of the constitution*.

15. That the 1st respondent notified the 2nd respondent of the complaints against the applicant in a letter dated 31st October 2018. That the application is premature and is meant to evade due process and same therefore lacks merit and it be dismissed.

16. The 2nd respondent filed a replying affidavit of Carolynne Rebecca Aliel Enane sworn on 14th January 2019 in which the deponent supports the material averments by the 1st respondent. In addition the 2nd respondent asserts that the applicant has abused court process by rushing to the court prematurely before the 2nd respondent has exercised its mandate on the allegations made against the applicant. That it is essential that the interdiction is maintained to facilitate fact findings by the 2nd respondent in the conduct of investigations and disciplinary process that may follow. That the 1st applicant has been treated fairly by being placed on half salary pending investigations.

Determination

17. The parties filed written submissions and the issues for determination are:

(a) Whether the applicant has satisfied the requirements for grant of a conservatory order pending the hearing and determination of the petition.

Section 59(1) of the County government Act, 2012 provides:

“(1) The functions of the County Public Service board shall be on behalf of the County government to:

Exercise disciplinary control over, and remove persons holding or acting in those offices as provided for under this part”

18. Section 59(4) also provides that the County Public Service Board shall have powers to:

“Investigate on its own initiative or upon a complaint made by any person or group of persons, the violation of any values and principles by any person or public body”

19. Section 44(2) (b) provides:

The County Secretary:

“shall be nominated from persons competitively sourced under paragraph (a) by the governor and with the approval of the County Assembly appointed by the Governor and may subject to the conditions and terms of the appointment be dismissed by the governor”.

20. It is clear that the 1st respondent is the appointing authority of the applicant and that the 1st respondent may remove the applicant from office subject to the terms and conditions of service of the applicant.

21. In the present case, the 1st respondent exercised his powers of removal under *Section 44(2) (c)* by suspending the applicant on half pay and initiated a statutory process of investigations and discipline by requesting the 2nd respondent, the County Public Service Board, to investigate allegations made against the applicant and make recommendations to the 1st respondent.

22. For the applicant to be granted a conservatory order not to be suspended, investigated and possibly removed from office he must establish

(i) A prima facie case with a probability of success that the 1st respondent has no lawful mandate to initiate the process that the 1st respondent has initiated against the Applicant.

(ii) That the Applicant is likely to suffer irreparable harm not remediable by way of damages.

(iii) That if the court is in doubt, the balance of convenience favouring the grant of the orders sought. *See Giella vs Cassman Brown Limited. Boss Sholei vs Judicial Service Commission and another.*

23. Furthermore, the position held by the applicant being a very senior public position which has serious impact on the operations of the County government, the applicant must establish that public interest in the circumstances of the case, dictate that the conservatory orders be granted. See Supreme Court decision in the Munya case.

24. It is important for the court to warn itself of the danger of delving into the merits of the case at the interlocutory stage. The disputes of fact must be left to the final determination of the petition.

25. The interested party filed a notice of objection in this matter alleging lack of any interest in the dispute. The court only observes that at this stage of the matter the issue that need to be dealt with is whether the applicant has satisfied the requirements of grant of a conservatory order in a public institution dispute. The merits or otherwise of who is appointed to act in the position whilst this dispute is being resolved is a matter for another day.

26. The court has reviewed the authorities submitted by the parties including *County Assembly of Kisumu and 2 others vs Kisumu County Assembly Service Board and 6 others (2015) eKLR* and *Kisumu County Public Service Board and another vs Samuel Okuo and 7 others (2018) eKLR*.

27. Having considered all the above stated matters, the court is satisfied that the applicant has not satisfied the requirements for grant of a conservatory order pending the hearing and determination of the petition.

28. Accordingly, the application lacks merit and is dismissed with costs.

Ruling Dated, Signed and delivered this 19th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Musiega for the Applicant.

Mr. Sore for 1st respondent.

Mr. Ananda for 2nd respondent.

Mr. Lakewa for 2nd interested party.

Chrispo – Court Clerk