



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 9 OF 2019

JANE NDEGI MUGAMBI.....CLAIMANT/APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF EMBU.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

THE COUNTY SECRETARY EMBU COUNTY GOVERNMENT...3RD RESPONDENT

RULING

1. The Application before me is the Claimant/Applicant's motion dated 21st January 2019 and filed on 22nd January 2019 in which the Claimant sought orders in the main:-

1. spent

2. THAT pending the *inter partes* hearing of this Application herein, the report by the 1st Respondent's Sectoral Committee on Gender, Culture, Children and Social Services titled *Report on Aborted Benchmarking Tour to Mombasa, Kwale and Kilifi Counties* dated 30th November 2018 recommending, among others, that the Applicant steps aside from her docket as Chief Officer in charge of Gender, Children and Social Services to give room for investigations into allegations of incompetence and violation of the Constitution and Public Officers Ethics Act, 2003 be stayed.

3. THAT pending the *inter partes* hearing of this Application and the Cause the Respondents be restrained from acting on or implementing the Sectoral Committee Report dated 30th November 2018 or undertaking any actions pursuant to the above report including the formation of Ad Hoc Committee to investigate the Applicant, recommending removal by the County Public Service Board of the Applicant from her position, replacement or appointment of any other person to the position of Chief Officer in charge of Gender, Culture, Children and Social Services or in any other way interfering with the Applicant's duties as Chief Officer in charge of Gender, Culture, Children and Social Services.

The motion was supported by the Claimant/Applicant's affidavit and the grounds on the face of the motion.

2. The 3rd Respondent filed grounds of opposition on 11th June 2019 which were to the effect that the claim and the application are a non-starter, lacks merit and is an abuse of the court process. The 3rd Respondent assert the Claim is an attack on the venerable separation of powers among the 3 arms of government. The 3rd Respondent sought that the court permits the constitutional organ to exercise its powers and that the Claimant would be given an opportunity to be heard before any adverse action is taken. It was asserted that the report produced by the Claimant directs the relevant County Executive Member to initiate financial and systems audit of the department and a stay of the implementation of the report would mean the court would be interfering with the operations of another constitutional organ in an attack of the doctrine of separation of powers. The 3rd Respondent argued that it is premature to lodge the claim in court as the investigations are yet to be conducted and there is no recommendation to dismiss the Claimant from employment to warrant the court's intervention.

3. Directions were given for the filing of submissions and the Claimant/Applicant was the only party that filed submissions. The Claimant submitted that the 1st and 2nd Respondent had despite opportunity being granted to them failed to file a response to the motion and that the Application in so far as it related to the 1st and 2nd Respondent is not controverted and should accordingly be allowed. In her submissions she asserted that she was entitled to the grant of the conservatory orders in view of the legal and procedural improprieties and/or breaches committed by the Committee that purported to come up with the adverse report against the Applicant. The Claimant/Applicant submitted that the Sectoral Committee chose to make a report detrimental to the Applicant (subject of the inquiry) without so much as seeking her input,

representation or response to the same. She asserts that this is a clear violation of the various applicable laws and regulations. The Applicant cited the infarctions as:-

- a. Improper exercise of its mandate as conferred by Section 8(1) of the County Governments Act, 2012
- b. Denial of the Applicant's right to fair process contrary to Article 25(c) of the Constitution
- c. Failing the test of an independent tribunal as envisaged by Article 50(1) of the Constitution by including the complainants/victims of the Applicant's alleged misconduct in its membership
- d. Violation of the Applicant's rights to fair labour practices contrary to Article 41 of the Constitution
- e. Undermining of the Applicant's right as a public officer not to be dismissed, removed from office or otherwise subject to disciplinary action without due process of law as guaranteed by Article 236 of the Constitution
- f. Ignoring the salient provisions of the Employment Act requiring that the Applicant to be accorded a fair hearing prior to suspension from office
- g. Failing to consider the express provisions of the Standing Orders of the County Assembly and purporting to have conducted an investigation without considering the Applicant's input as the officer whose conduct was the subject of its proceedings.

4. The Applicant relied on the case of **Giella v Cassman Brown & Company Limited [1973] EA 358** and the case of **Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR**. The Claimant submitted that she had demonstrated a *prima facie* case with a chance of success as she was neither given an opportunity to defend herself before the Sectoral Committee nor explore any appeal mechanism prior to an adverse decision and action being rendered against her contrary to various constitutional and other legal provisions. She submitted that the grant of injunction will act as a safeguard and maintain *status quo* for the greater ends of justice pending the hearing and determination of the main cause. The Claimant submitted that the harm that will befall the Applicant will no doubt be colossal and irreparable given that she will be hounded out of a constitutional office based on grounds that are flimsy and at best without due process being followed. She urged the court to adopt the principle of greater versus lesser justice espoused in the case of **Films Rover International [1986] 3 All ER 772** where the court held that the court should take whichever course that appears to carry the lower risk of injustice should it turn out to have been wrong. The Claimant submitted that the lower risk is to allow the Applicant to continue discharging her duties for the people of Embu County pending the hearing and determination of the issues raised in the cause. She submitted that the balance of convenience lies in favour of granting the injunction and in any event the no prejudice will be occasioned to the Respondents in the interim. She argued that the 3rd Respondent had raised in its grounds of opposition that the Application and the Claim herein is an attack on the doctrine of separation of powers amongst various arms of government. She submitted that the most imperative aims and rationale behind the notion of separation of powers is the safeguarding of the independent judiciary, a vital cornerstone in establishing a democratic and constitutional state where law is supreme. The Claimant submitted that the broad principle of separation of powers certainly incorporates the scheme of checks and balances whose ultimate objective is good governance involving phases of co-operation and collaboration. She cited the case of **Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate & 2 Others [2013] eKLR** where Njoki SCJ stated that the system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power. The case of **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011** where the Supreme Court stated that the effect of the Constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The cases of **Jayne Mati v Attorney General & Another [2011] eKLR** and **Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others [2014] eKLR** were cited for the arguments that the court was being called upon to delve into the constitutionality or lack of it in the actions of the members of the legislature and by extension the county assemblies. She submitted that under Article 165(3)(d) the court has jurisdiction to hear any matter relating to any question in respect to the interpretation of the Constitution including the determination of the contravention of the Constitution and any other matter relating to the Constitutional relationship between levels of Government. The Claimant submitted that the courts must come in when called upon to ensure that parliament or the executive is operating within the Constitution and the courts may give orders accordingly. She thus submitted that the court is properly enjoined to consider the issues raised in the application and grant orders accordingly.

5. The matters that were raised by the Claimant/Applicant as enumerated above clearly point to the fact that the Court is imbued with the power and the jurisdiction to intervene where there is excesses by the other arms of Government. Whereas there is the concept of co-equal arms of Government, the legislature enacts legislation that is enforced and overseen by the executive arm which exercises the sovereign power of the people. The Judiciary in its role is the proverbial referee and keeper of the post as it checks the executive and legislature for excesses and infarctions against the Constitutional order. Should legislation be unlawful, *ultra vires* the Constitution or otherwise repugnant to justice or morality, it is for the courts to pronounce it so. Where the executive or legislative arm abuses power the Judiciary checks that. It is the vanguard and clearly the place of refuge for those aggrieved by actions of the various arms of government including itself as where a decision is made which aggrieves a party, it is within the courts that relief can be obtained against the actions of a judicial officer. In the Application before me, the Claimant/Applicant asserts she is entitled to the grant of the injunctive relief from the action of the County Assembly of Embu's Sectoral Committee which approved her stepping aside pending investigations into alleged abuse of office and maladministration as a Chief Officer in the County Government of Embu. She asserts she was not heard prior to the action impugned in the proceedings before me. In keeping with the doctrine of separation of powers, the Court is loath to interfere where legislative arms are executing their mandates within the purview of the law. Under Standing Order No. 204 of the County Assembly of Embu and in particular 204(4) and (5), the Standing Orders provide as follows

(4) *The mandate of Sectoral Committees in respect of the subject matter assigned under paragraph (3) above, shall only be exercised within the limits contemplated under Part 2 of the Fourth Schedule to the Constitution.*

(5) *The functions of a Sectoral Committee shall be to—*

(a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned departments;

.....

(e) investigate and inquire into all matters relating to the assigned departments as they may deem necessary, and as may be referred to them by the County Assembly;

The Standing Orders do not explicitly state the procedure to be adopted in the investigations. The requirement of the Constitutional imperative under which the County Government operates and the rules of natural justice is that the investigation must be carried out in a manner consistent with the Constitution and therefore there must be a right to be heard. The Claimant/Applicant asserts that prior to recommendations for her stepping aside and replacement being made she was not heard. The 3rd Respondent asserts that the doctrine of separation of powers bars the court from interfering as the Claimant/Applicant shall have the opportunity to be heard when the matter progresses to the next stage after the investigations. It would however seem from the proceedings undertaken by the 1st and 2nd Respondent that the Claimant/Applicant was not afforded an opportunity to give her side of the story meaning that the investigations stated to have taken place were at best a farce and not in keeping with the dictates of the law. She attacks the composition of the Sectoral Committee but in the matter before me that is neither here nor there as the composition of Sectoral Committees is set out under the Standing Orders. She would have to demonstrate the errors in establishment or composition of the Sectoral Committee with razor sharp specificity. In as far as the injunction she seeks is concerned, **Giella v Cassman Brown & Co. Ltd** (supra) set the bar. It was held:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

On the first limb of injunctive relief, there is a *prima facie* case with a probability of success. The second limb is on irreparable injury. The Respondents seeks to have the Claimant/Applicant step aside. 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. The Applicant has not shown the degree of harm she will suffer by being suspended cannot be compensated by an award of damages. As it is for a stated purpose, the finite suspension of the Claimant/Applicant is not calamitous to the extreme of being incapable of being compensated by an award of damages. The court will not need to delve into the final limb as there is no injunctive remedy available on the basis of the material before me. Injunction denied no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 16th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar