



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO.15 OF 2019

[formerly Nairobi ELRC Petition NO.161 OF 2019]

BERNARD NGENO.....1ST PETITIONER

JUSTUS MAINA.....2ND PETITIONER

VERSUS

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

SPEAKER COUNTY ASSEMBLY OF BOMET.....2ND RESPONDENT

AND

THE GOVERNOR, COUNTY GOVERNMENT OF BOMET.....INTERESTED PARTY

RULING

The interested party, Governor County Government of Bomet filed application and Notice of Motion dated 13th September, 2019 and under the provisions of Order 17 Rule (1) and (8) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 17 Rule 2(1) and 2(3) of the Civil Procedure Rules, section 3A of the Civil Procedure Act and seeking for orders that;

1. Spent.

2. The court be pleased to exercise its jurisdiction and review and vary or interpret its orders given on 28/08/2019 and extended on 9/09/20119.

3. Costs be provided for.

The application is supported by the annexed affidavit of Dr. Hillary Barchok and on the grounds that the court granted orders in which it in among other orders directed that;

Pending the inter-parties hearing or further orders by the court the decision by the 1st respondent as relates to concurrence and approval of the applicants as County Executive Committee Members for Bomet County as requested for by the 3rd respondents in the letter Ref. BN 26/15/5 dated 13.08.2019 and he decision flowing from the 1st respondent per gazette Notice No. 7344 as relates Applicants are hereby stayed from any further implementation.

There was a material non-disclosure and misrepresentation of material facts at the time of obtaining the orders of 28th August, 2019 under article 179(7) of the constitution it instructs that if a vacancy arises in the office of the County Governor, the members of the county executive committee appointed prior to the vacancy cease to hold office. The petitioner ceased to hold office by operation of the law after the death of the late Dr Joyce Laboso on 29th July, 2019 and who was governor of County of Bomet.

The petitioners misled the court through advancing a view that they had been re-appointed to the office of the interested party only to be removed by the respondents. The court relied on this misinformation by the petitioners and gave orders that are of fact ambiguous and impossible to implement. The office of County Executive Committee Member is a state office under article 260 of the constitution and one can only assume office after taking the prescribed oath of office. It would be unconstitutional for the interested party to implement the orders

of the court which would amount to appointing a person to state office on uncertain basis.

Other grounds in support of the application are that the petitioners are constitutionally not in office as County Executive Committee Members of the County Government of Bomet and thus not entitled by operation of the law to any interim orders issued which would amount to a restatement. The interested party stands the risk of being held in contempt of court considering the glaring possibility of failing to comply with the orders issued by the court.

The appointment of County Executive Committee Members is a political process and court of law cannot compel the appointing authority to appoint a particular individual and as such there exists sufficient reasons to warrant the court to review and or vary and interpret its orders granted on 28th August, 2019 and extended on 9th September, 2019.

In his Affidavit, Dr Marchok avers that he is the Governor of County Government of Bomet, the interested party herein and on the orders of the court issue don 28th August, 2019 and extended on 9th September, 2019 it is clear the petitioners deliberately failed to disclose to the court material facts that have not been re-appointed as CEC to the County Government of Bomet as required under article 179(7) of the constitution.

Dr Barchok also avers that he has not appointed or re-appointed any of the petitioners to the office of CEC. He forwarded the names of the petitioners to the County Assembly to advice on whether or not he should reappoint them to their previous offices and through a resolution this was declined and a fresh appointment is required.

Having considered the resolution of the County Assembly of Bomet he opted not to appoint the petitioners afresh until and unless he was assured that they had the confidence of the County Assembly. The petitioner then chose to prematurely move the court claiming that they had been unlawfully been removed from office whereas they had never been in office.

Dr Barchok also avers that on 28th August, 2019 the petitioners obtained orders staying further implementation of the decision of the 1st respondent with regard to the decision he had made and flowing from gazette notice No.7344 and the subject of the application seeking review, variation and or interpretation. The petitioner's construal of the court orders is that they have been reinstated to office and that their terms and benefits of office prior to constitutional termination of their tenure continues to apply until the determination of the suit. As noted in their advocates letter dated 9th September, 2019 requiring the County Government of Bomet to pay the petitioners salaries for the month of August, 2019.

It is untenable for one to hold any constitutional office for an interim and uncertain period more so for individuals who are not state or public officers. The orders issued are inconsistent with the constitution.

In response the respondents County Assembly of Bomet and the Speaker, County Assembly of Bomet filed Grounds of Opposition and the Affidavit of David Shadrack Rotich and the Speaker County Assembly of Bomet and on the grounds that the petitioners have failed to demonstrate how the decision of the County Assembly of Bomet on the approval of the new CEC members of Bomet County Government on 21st August, 2019 has failed to conform to the standing orders of the assembly, the Public Appointment (County Assemblies Approval) Act, 2017 and the constitution. There is no violation of principles of natural justice under Article 50(1) of the constitution when the appointing authority chose to eliminate the vetting process which could have given the petitioners the opportunity to appear before the assembly's approval committee.

The petitioners' allegation of unequal treatment under Article 27(1) is baseless and not substantiated by any evidence to show they were treated less favourably as a matter of fact when the appointing authority decided to re-nominate the petitioners and they were treated more favourably than others who were also eligible for the positions of CEC members.

Other grounds in opposition are that the petitioners have ceased to hold office in accordance with Article 179(7) of the constitution and are not CEC members of the county government of Bomet. The interpretation of the constitution, the County Government Act and the Public Appointments (County Assemblies Approval) Act is misguided and dishonest. There shall be no loss suffered to warrant the issuance of the conservatory orders sought.

In his Affidavit Mr Rotich avers that on 29th July, 2019 the Governor of Bomet passed away and such office became vacant in accordance with article 182 (1)(a) of the constitution. Such demise of the governor created a vacancy in the office and that of the CEC members by operation of the law at Article 179(7) of the constitution.

Upon taking office the new governor had to fill the vacant positions of CEC members pursuant to section 30(2) of the County Government Act, 2011. The governor and interested party decided to make the appointment of CEC with approval of the County Assembly of Bomet and in accordance with article 179(2)(b) of the constitution by submitting the former CEC members for approval. In so doing the interested party considered and followed the advisory opinion rendered by the Attorney General to the Speaker of Nyeri County Assembly dated 26th January, 2017 which recommended for the approval of the new CEC members by the County Assembly and the fresh administration of oath of office.

Mr Rotich also avers that the one of the powers of the interested party is the right to pick CEC members and the right to nominate the CEC members vests in the office of the governor and in making the appointments or reappointments there is obligation to observe the values and principles of governance, rule of law, accountability and participation of the people as enshrined under Article 10(2) of the constitution. Section 30(2) of the County Government Act provides for the appointment of CEC members with the approval of the county assembly.

The petitioners Counsel opted to rely on his oral submissions in court.

From the Notice of Motion and the affidavits the issue for determination is whether the court should review or vary or interpret its orders given on 28/08/2019 and extended on 9/09/20119.

The subject orders issued on 28th August, 2019 were following application by the petitioners and Notice of Motion dated 27th August, 2019 and seeking for orders that;

1. ...

2. *Pending hearing of this application inter parties, a conservatory order does issue staying the decision of the County Assembly of Bomet to remove or recommend the removal of the Petitioners from office as County Executive Committee Members of Bomet County Government.*

3. *Pending the hearing of this application inter parties, a conservatory order does issued to prohibit the Interested party (the Governor of Bomet County) from removing the Petitioners from office or in any way interfering with their contract of employment, the terms and benefits they derive from the said contract of employment with the County government of Bomet or prevent access of the petitioners into office based on the decision of the County*

Assembly of Bomet of 21st August 2019 that recommended the rejection of the petitioners as members of the County Executive Committee of Bomet County government.

4. *Pending the hearing of this application inter parties, a conservatory order does issue to stop the Interested Party (governor of Bomet County) from nominating or appointing any person to serve in the position that Petitioners hold in the County Executive Committee of Bomet County Government.*

Alternately

Pending the hearing of this application inter parties, a conservatory order does issue to stop the County Assembly of bomet from considering the name of any person for purposes of vetting and approval to serve in the positions that Petitioners hold in the County Executive Committee of Bomet County.

Inter-parties

5. *Pending the hearing of the petition ...*

The application was supported on the grounds that the petitioners were nominated by the late Governor Dr Joyce Laboso into office as CEC members Bomet County Government and upon her death the Deputy Governor was sworn into office and required to reconstitute the County Executive Committee by either making fresh nominations or re-appointment of the CEC. Upon the interested party taking office he opted to re-appoint all the CEC members and on 13th August, 2019 submitted the names to the County Assembly for concurrence and approval, a procedure unknown in law or the constitution as upon the re-appointment the CEC members did not require a re-vetting by the County Assembly. On 21st august, 2019 the respondents rejected the petitioners as CEC members and purported to approve others and which decision failed to conform to the County Assembly Standing Orders.

Upon the court considering the application and the grounds thereto interim orders were issued to the effect that;

(1) The application is hereby certified urgent to be served by close of 29/8/2019 for inter parties hearing or further orders on 09.09.2019 at ...

(2) Pending the inter-parties hearing or further orders by the court the decision by

the 1st respondent as relates to concurrence and approval of the applicants as County Executive Committee members for Bomet County as requested for by

the 3^d respondent in the letter Ref. BC 26/15/5 dated 13.8.2019 and the decision flowing from the 1st respondent's special sitting concerned by the 2nd respondent per Gazette Notice No.7344 as relates applicants are hereby stayed from any further implementation.

On this basis, parties attended court as directed on 9th September, 2019 where the interim orders were extended and hearing directions issued.

The court is vested with the power to review its decisions under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules) as held in the case of **Kithure M'Mwendwa Nyaga versus Teacher Service Commission [2019] eKLR**. where there is discovery of a new and important matter or evidence that was not within the knowledge of the applicant even after exercise of due diligence; where there is mistake or error apparent on the face of the record; where there is need for clarification and where there is other sufficient cause to warrant a review, variation, clarification or interpretation of the orders of the court.

Rule 33 of the Court Rules provides as follows;

33. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) On account of some mistake or error apparent on the face of the record;

(c) If the judgment or ruling requires clarification; or (d) for any other sufficient reason

In this case the interested party is seeking for a review, vary or interpretation of the court orders issued on 28th August, 2019 and extended on 9th September, 2019 on the basis that the petitioner obtained the impugned orders following material nondisclosure and misrepresentation of material facts and noting article 179(7) of the Constitution, 2010 instructs that a vacancy arises in the office of the County governor, the CEC members of the county appointed prior cease to hold office and in this case the with the demise of the Dr Joyce Laboso as Governor, Bomet County Government on 29th July, 2019 the petitioners who were CEC members under her government ceased to hold office and have not been appointed or reappointed to hold such office.

By obtaining the orders of 28th August, 2019 and which were extended on 9th September, 2019 the petitioners failed to disclose that their appointment by the interested party was not approved by the respondents and thus have not been reappointed and under Article 260 of the Constitution, 2010 they cannot assume office before taking oath of office and the court orders issued were in effect a reinstatement of the petitioners back into office contrary to the constitution under Article 179(7) read together with section 30 of the County Government Act.

It is not in dispute that the 2nd Governor of County Government of Bomet Dr Joyce laboso died on 29th July, 2019. With her demise, the position of governor, County Government of Bomet became vacant. By operation of the law and provisions of Article 179(7) the positions held by the various CEC members became vacant;

(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2) (b) cease to hold office.

In this regard Article 179(2) (b) of the Constitution, 2010 provides that;

(2) The county executive committee consists of--

(a) the county governor and the deputy county governor;

and

(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly. [underline added]

The positions contemplated under Article 179(2)(b) are what the petitioners held during the tenure of the late Dr Joyce Laboso as Governor, County Government of Bomet and thus ceased with her demise on 29th July, 2019.

Effectively, on 29th July, 2019 with the death of the governor of County government of Bomet of the CEC members ceased to hold office.

A new Governor, County Government of Bomet has since been appointed, the interested party being Dr Barchok and who has since been sworn into office. With his appointment, section 30(2) of the County Government Act comes into effect.

Before any CEC member of the County Government of Bomet can take office the requisite process under the County Government Act and leading to taking the oath of office pursuant to Article 260 of the Constitution, 2010 must take effect. the nominees approved by the County Assembly must take oath of office.

Section 8(1) of the County Governments Act empowers the County Assembly to vet and approve nominees for appointment to County Public Offices. A committee of the County Assembly has to consider the appointments first as provided under section 14 (3) of the County Government Act. The report of the Committee is to be tabled before the entire County Assembly for approval. The members of Executive committee are appointed by the Governor under Section 30(2) of the County Governments Act. Section 35 of the same Act gives guidelines to the Governor on appointment of Executive Committee members.

From the Affidavit of Dr Barchok, he submitted his nominees for approval with the respondents and from the affidavit of Mr Rotich and 2nd respondent, the County Assembly has since rejected the petitioners as nominees. The petitioners have therefore not been appointed as CEC members of the County Government of Bomet, there is no appointment or reappointment and fundamentally there is no oath of office as required under Article 260 of the Constitution, 2010 appointing them into office so as to enjoy the benefits and rights held by a CEC member County Government of Bomet. See **Simba Hasheem Gedow versus Ali Ibrahim Roba - Governor, County Government of Mandera & 2 others [2018] eKLR**

In this case, the orders of 28th August, 2019 put in context and requiring that;

Pending the inter-parties hearing or further orders by the court the decision by the 1st respondent as relates to concurrence and approval of the applicants as County Executive Committee members for Bomet County as requested for by the 3rd respondent in the letter Ref. BC 26/15/5 dated 13.8.2019 and the decision flowing from the 1st respondent's special sitting concerned by the 2nd respondent per Gazette Notice No.7344 as relates applicants are hereby stayed from any further implementation.

Effectively, The decision of the 1st respondent to reject the re-appointment of the petitioners among other persons listed vide letter of the interested party dated 13th August, 2019 to the 2nd respondent was stayed by the court.

Equally stayed was the implementation directed by the 2nd respondent pursuant to Gazette Notice No.7344 for the purpose of the tabling of the names of nominees to the County Public Service Board and the tabling of the *punguza mzingo* ... were stayed by the court orders.

On these orders and on the face of it and based on the interpretation of Articles 179(7) and 260 of the Constitution, 2010 read together with section 30(2) of the County Government Act, by the court staying the decision of the 1st and 2nd respondents, the petitioners remained as they stood as of the letter dated 13th August, 2019 from the interested party. Upon re-appointment by the interested party and having been placed for approval with the respondents and resulting decision which was stayed, the petitioners have not taken their oath of office as CEC members County Government of Bomet to accrue benefits and terms which go with the office as public officers.

As properly confirmed by the petitioners' Counsel in submissions, the petitioners are operating under their former contracts. Such submissions shall not be analysed and Without going into the merits of the petition at this stage, such shall suffice.

From the Notice of Motion and the submissions of the interested party and the respondents, there exists sufficient reasons to justify the review, variation and an interpretation of the orders of the court issued on 28th August, 2019 and extended to date.

In the interests of justice and to allow the court to hear the main petition on the merits, the interim orders issued on 28th August, 2019 and extended to date are hereby vacated; the requirement to pay the petitioners under any terms of engagement with the County Government of Bomet is hereby set aside; and on the main petition parties shall be heard on priority basis.

Delivered at Nakuru this 9th day of October, 2019.

M. MBAR?

JUDGE

In the presence of: