



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO.14 OF 2019

[Formerly Nairobi ELRC Petition No.160 of 2019]

ROSE ESTHER MUTHONI WAMUIYA.....1ST PETITIONER

FAITH WANJIRU MBUGUA.....2ND PETITIONER

SIMON MWANGI NGANGA.....3RD PETITIONER

VERSUS

THE GOVERNOR

COUNTY GOVERNMENT OF NYANDARUA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYANDARUA.....2ND RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF NYANDARUA.....3RD RESPONDENT

THE COUNTY ASSEMBLY

COUNTY GOVERNMENT OF NYANDARUA.....4TH RESPONDENT

RULING

The petitioners filed application and Notice of Motion dated 26th August, 2019 and seeking for orders that;

1. Spent.

2. Spent.

3. Pending the hearing and determination of the substantive petition inter-parties this court an order be and is hereby issued that;

a. The 1st petitioner be reinstated with full salary and benefits to her positions as the County Government of Nyandarua member of Executive Committee – Industrialisation, Trade and Cooperatives.

b. The 2nd petitioner be reinstated with full salary and benefits to her positions as the County Government of Nyandarua member of Executive Committee – Education, Gender Affairs, and Culture & Social Services.

c. The 3rd petitioner be reinstated with full salary and benefits to her positions as the County Government of Nyandarua member of Executive Committee – Water, Environment, Tourism and Natural Resources.

4. Pending hearing and determination of the substantive petition inter-parties a conservatory order be issued restraining the 1st, 2nd, 3rd and 4th respondents from nominating, vetting and/or appointing any person to the position of County Government of Nyandarua member of Executive Committee - - Industrialisation, Trade and Cooperatives, Education, Gender Affairs, Culture & Social Services and Water, Environment, Tourism and Natural Resources.

5. Pending hearing and determination of the substantive petition inter-parties by this court a conservatory order be issued restraining the 4th, 3rd and 2nd respondents from deliberating the impeachment of the petitioners.

6. Costs of the application be provided for.

The application is supported by the claimants' affidavits and on the grounds that until 21st August, 2019 the petitioners were members of the County Government of Nyandarua serving in various capacities as County Executive Committee Members (CEC Members). Appointments were done in accordance with article 179 of the Constitution, the County Government Act and the Nyandarua Public Appointment (County Assembly Approval) Act, 2017.

The 1st respondent in contravention of the constitution and the law terminated the petitioners' employment contract with the 2nd respondent as CEC members for reasons that had no relation or connection with their abilities to carry out their roles. No reasons have been given. The decision to terminate the petitioners' employment was done through social media. No formal reasons have been given contrary to due process where the constitution and the County Government Act gives elaborate procedures for the appointment, interdiction, disciplinary, impeachment and or removal of a CEC member. Such provisions have been ignored by the 1st respondent.

Other grounds are that nobody has been successfully vetted and appointed to replace them and no prejudice shall be occasioned to the respondents if the decision of the 1st respondent is suspended pending the hearing of the main petition. There is apprehension that the respondents are scheming to further violate the constitution and the law in a bid to have new persons assume office which shall cause loss and damage to the petitioners.

In reply the 1st and 2nd respondents filed the Replying Affidavit of Hiram M Kahiro and who avers that he is the County Secretary and Head of Public Service at the 2nd respondent and the 1st respondent as head of the County may dismiss a CEC member under the pleasure doctrine. Petitioners rights under articles 41, 47, 50 and 236 of the constitution have not been violated as alleged as the concept of due process does not apply where an employee serves under the pleasure doctrine. The CEC members are not employed by the County Public Service Board but by the Governor to assist him fulfil his political mandate.

Section 31(a) of the County Government Act allow the Governor to dismiss a CEC member once he has determined there are valid reasons and the petitioners cannot challenge his decision as there is a prerogative to remove at all times. The 1st respondent is not bound by the Employment Act, 2007 and in removing the petitioners from office it was in accordance with the constitution and the Employment Act, 2007 is not applicable to this dispute.

Mr Kahiro also avers that the petitioners cannot claim for pay for 5 years term of the Governor as they were hired to serve under the pleasure doctrine and could be fired any day and the only term embedded in the constitution is that of the Governor. There no evidence that the 1st respondent acted arbitrarily or in error in the dismissal of the petitioners. The claim made for payment of gratuity is baseless noting the Salaries and Remuneration Commission (SRC) guidelines and the Retirement Benefits Authority (RBA) regulations and the provision for 31% gratuity provision which is available to the petitioners upon application.

The 1st respondent is within his powers to nominate a new person to take up the positions held by the petitioners once their two (2) years term ends. Dues salaries are paid by the 2nd respondent and the interim orders issued are premised on the provisions of the Employment Act, 2007 which is not applicable to this suit. The petitioners should not be allowed to enjoy orders issued in error and the application should be dismissed.

In reply by the 3rd and 4th respondents they filed the Replying Affidavit of Hon. James Wahome Ndegwa and who avers that as the 3rd respondent and head of the 4th respondent there has been no resolution to remove the petitioners as CEC members as envisaged under section 40 of the County Government Act and the removal as contemplated under section 31(a) of the Act does not involved the 3rd or 4th respondents.

Hon. Wahome also avers that the Court of Appeal in the case of **County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR** held that section 31(a) of the County Government Act does not give the 1st respondent unfettered powers to dismiss a CEC member as the doctrine of pleasure is inapplicable in the current dispensation and has been replaced by due process. The court in the case of **Richard Bwogo Birir versus Narok County Government & 2 others [2014] eKLR** held that the pleasure doctrine and the doctrine of servants of the crown does not apply and could not legitimately be invoked in the dismissal of the petitioner.

From the press statement by the 1st respondent on 20th August, 2019 there were no reasons given on why the petitioner's employment as CEC members of the county government was terminated. In light of no valid grounds and failure to allow for a hearing prior to such action to terminate employment is in contravention of article 47 and 50 of the constitution. article 179 of the constitution allow for the employment of a CEC members to run concurrently with that of the governor or upon dismissal for valid grounds as require under section 40 of the County Government Act. In his case there is no resolution by the 4th respondent to reduce the term of CEC members and thus the 1st respondent is in contravention of article 170 of the constitution by ending the term.

Hon Wahome also avers that the application by the petitioners has merit and should be allowed.

The parties made oral submissions in court.

The petitioners counsel submitted that the petitioners were dismissed by the 1st respondent without being given any reasons on 21st August, 2019. This position is confirmed by the respondents. In the interim orders issued by the court on 27th August, 2019 the petitioners were

reinstated back into office and the principles upon which the court should issue conservatory orders meant to give relief for actions done wrongfully should be allowed as held in the case of **Michael Osundwa Sakwa versus Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR**. At this stage what the petitioners are seeking is not the established of questions of fact or law but to establish that there is real danger and prejudice to them if conservatory orders are not granted.

The 1st and 3rd petitioners are young and without any other employment and they sacrificed their careers to join the respondent. The 3rd petitioner is a person with disability. The petitioners have taken loans and shall be prejudiced if employment is terminated and they stand to suffer as a result.

The petitioners also submitted that the 1st and 2nd respondents in response assert that the 1st respondent can dismiss the petitioner at pleasure but such is not constitutional or lawful. The court has supervisory powers over the decision of the 1st respondent and section 31 of the County Government Act does not take such power of the court. Article 47 of the constitution gives power to the court to order for fair administrative action.

The 1st and 2nd respondents submitted that the court cannot reinstate CEC members dismissed by the respondents as such members is appointed under section 30 of the County Government Act by the governor and not by the public service board and thus serve at the pleasure of the governor. In the case of **County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR** the Court of Appeal confirmed the pleasure doctrine as applicable and a CEC member is not subject to the Employment Act, 2007 as such member holds office at the pleasure of the governor.

The 1st respondent has valid reasons to dismiss the petitioners contrary to what has been alleged by the petitioners. For good governance as required under Article 10 of the constitution, the petitioners were to hold the 1st respondent undertake his political mandate and as he is elected for a limited term he has the right to dismiss any CEC member for poor performance. If the petitioners have any case before the court their private interests can be remedied in compensation and not to be reinstated back in office as held in the case of **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

A reinstatement of the petitioners is in error to separation of powers as such is to hold the 2nd respondent at ransom over ex parte orders and the functioning of the County government of Nyandarua.

The 3rd and 4th respondent also submitted that they are not involved in the termination of employment of the petitioners and thus wrongly enjoined in these proceedings and on this basis the application should be dismissed. The dispute herein relates to the petitioners and the 1st and 2nd respondents.

The role of the 4th respondent is to oversight the executive and had there been any alleged misconduct and before dismissal these matters ought to have been addressed through the 4th respondent. In this regard the doctrine of holding office at the pleasure of the 1st respondent does not apply and due process is required. To terminate contracts of the CEC members should have with the involvement of the 4th respondent which was not done.

It can be discerned from the affidavits of the petitioners and Mr Kahiro in reply that the petitioners have been dismissed from the service of the 2nd respondent following the public statement of the 1st respondent issued on 20th August, 2019.

The 1st petitioner, Rose Esther Muthoni Wamuiya in her Affidavit dated 26th August, 2019 at her paragraph 9 and 10 avers that;

Vide press Release in the wee hours of the 21st August, 2019 the 1st respondent purported to terminate my contract of employment with the 2nd respondent without giving me a reason(s) that warranted my spontaneous and humiliating termination. This was in breach ...

To date no formal reason(s) for terminating the petitioners from their employment has never been communicated to me save for a letter referenced and dated 22nd August, 2019 which I only got to learn about when someone pointed it to me on social media. The gist of it was that I should hand over to the acting County Executive Committee Members occupying their positions.

These averments are replicated by the 2nd and 3rd petitioners in their affidavits of equal dates. The 2nd petitioner further avers that she is registered person with disability with the due salary being income tax exempt and has taken a car loan for 5 years expected term of office. The 3rd petitioner also avers that following his employment by the 2nd respondent he had legitimately expected to serve for a term of 5 years and thus he took up a mortgage facility. The 1st petitioner has also secured a similar mortgage facility for the expected term of 5 years with the 2nd respondent.

In the referenced Press release by the 1st respondent of 20th August, 2019 and attached to the Affidavits of the petitioners appendices "RE-4" and which relates to the following;

PRESS RELEASE ON APPOINTMENT OF NEW COUNTY EXECUTIVE COMMITTEE MEMBERS AND ADVISORS

I wish to notify the great people of Nyandarua County that I have made the following communication to the Hon. Speaker of the County Assembly:

"As the Two year Contract Term for my County Executive Committee Members nears completion, and as we begin the New

Financial Year July 2019 to June 2010, it has become necessary to reinvigorate my transformation agenda through injection of new strategic competences for optimal performance and accountability to the citizenry.

In accordance, therefore, with the constitution of Kenya Article 179 and the County Government Act No.17 of 2012 Part V Section 35, I hereby submit the list of my new nominees for the position of County Executive Committee Members in the following Departments.

.....

The statement thus references *a two year contract term for my County Executive Committee Members.*

Without going into the merits of the main petition and aware of the orders sought in the interim, the petitioners assertions that there is summary dismissal and termination of employment as CEC members and taking into account section 12 (3) (vii) of the Employment and Labour Relations Court Act, 2011 read together with section 49(4) of the Employment Act, 2007 and further the court reading of Rule 17 (10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 that;

(10) Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.

To therefore issue an order requiring specific performance pending hearing the parties on the merits is not in aid the course of justice. A full hearing of the parties is imperative. The only exception to the rule(s) as stipulated under the law and the rules as set out above is where there is a claim premised on direct or indirect discrimination of an employee on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status. These are prohibited grounds for termination of employment and an infringement of the very essence of employment under section 5 of the Employment Act, 2007.

The petitioners in their respective affidavits avers that following their employment by the 2nd respondent, they have secured various facilities in mortgages and a car loan for the 2nd petitioner and who is a person with a disability but these averments in my view are not pegged on any alleged violation of the provisions of section 5 of the Employment Act, 2007 to justify the court application of the exceptional circumstances contemplated in law and under the rules to allow for the order of reinstatement in the interim and pending the court hearing both parties on the merits. In this regard see the Court of Appeal in the case of **OI Pejeta Ranching Limited versus David Wanjau Muhoro [2017] eKLR** and **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR**.

The court must then ensure the delicate balance between individual rights via-a-vies constitutional and legal safeguard as set out above in addressing the issue of reinstatement as an interim measure. Such does not negate any rights due to the employees upon a finding by the court that there was a violation and remedies available to the employee under section 49 of the Employment Act, 2007 or any other law read with constitutional protections.

The 1st and 2nd respondents assert that the Employment Act, 2007 and its provisions do not apply to the current dispute and that under the provisions of section 31(a) of the County Government Act give the Governor a prerogative in dealing with his CEC members under the pleasure doctrine and on his office of governor is secured under the constitution for a term of 5 years and not that of the CEC members who work under his pleasure. In this regard the respondents have relied on the Court of Appeal decision in the case of **County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR**.

In the same vein the petitioners and with the support of the 3rd and 4th respondent assert that the pleasure doctrine does not apply in the current constitutional dispensation by virtue of the findings by the court in the case of **Richard Bwogo Birir**, cited above and the case of **County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR**.

Based on these rival arguments and noting reinstatement shall not be ordered in the interim, it is only fair and just that the court addresses the main petition on the merits for final orders to issue. To order for conservatory orders as sought by the petitioners at this stage would deny all parties a fair chance to argue each case on the merits and allow the court the advantage of all necessary and relevant material in this case.

Accordingly application by the petitioners and dated 26th August, 2019 is declined. Interim orders subsisting are hereby vacated. The court shall hear the Petition on priority. Hearing direction shall issue. Costs shall be in the petition.

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

M. MBARU

JUDGE