



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAKURU**  
**CAUSE NO.57 OF 2019**

**[Formerly Mombasa ELRC Cause No.53 of 2019]**

**VENANSIO MBATARU KARIUKI.....CLAIMANT**

**VERSUS**

**THE GOVERNOR, COUNTY GOVERNMENT OF NYANDARUA.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NYANDARUA.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF NYANDARUA.....3<sup>RD</sup> RESPONDENT**

**RULING**

The claimant, in his application and Notice of Motion dated 22<sup>nd</sup> August, 2019 is seeking for orders of reinstatement to his employment as the County Executive Committee Member (CEC Member) in charge of Public Administration and ICT at the County Government of Nyandarua and that the 3<sup>rd</sup> respondent be barred from vetting any nominees to replace him pending the hearing of his suit. The claimant is also seeking that;

*4. The 1<sup>st</sup> respondent be barred from replacing, dismissing, sacking, firing and or removing the claimant from his office of the CECM for Public Administration and ICT at the County Government of Nyandarua pending the hearing and determination of the application.*

*5. The 1<sup>st</sup> respondent be barred from filling the said position of County Executive Committee Member in charge of Public Administration and ICT until the instant application is heard and determined.*

In his affidavit, the claimant avers that on 17<sup>th</sup> October, 2017 the 1<sup>st</sup> respondent forwarded a list of nominees to the 3<sup>rd</sup> respondent for vetting and appointment as CEC Members and the claimant was listed as the Nominee for appointment as Public Administration and ICT. Such list was approved and the 1<sup>st</sup> respondent pursuant to article 179(2) (b) of the constitution appointed the claimant for the position of CEC Member and published in Gazette Notice No.10933.

The claimant also avers that on 20<sup>th</sup> August, 2019 the 1<sup>st</sup> respondent unfairly and illegally terminated his employment summarily without notice and through a press release dated equal date and released at midnight. There was also communication sent to the 3<sup>rd</sup> respondent submitting another nominee to be vetted in replacement of the claimant and the 1<sup>st</sup> respondent appointed another CEC member in an acting capacity to be in charge of the duties undertaken by the claimant.

The claimant also avers that he learnt of his termination through the media. Such violated his rights under article 35, 28, 41 and 47 of the Constitution where the 1<sup>st</sup> respondent failed to communicate his decision to terminate employment through summary dismissal and thus subjected the claimant to severe psychological torture, unfair labour practices and failed to meet fair administrative action.

The 1<sup>st</sup> respondent in purporting to dismiss the claimant acted under the guise of the pleasure doctrine under section 31 of the County Government Act that he had power to hire and fire the claimant at will and without following due process and which doctrine does not apply under the new constitution. the 1<sup>st</sup> respondent also seek to rely under the pretext that there was a two year contract which is in violation of article 179(7) of the constitution which provides the term of office for the claimant.

The claimant also avers that he has suffered loss and damage owing to the manner in which his employment was terminated and publicised.

He is a registered engineer in good standing and the chairperson of the Kenya Independent Petroleum Dealers Association, and chairman of the Nairobi Friends of Nyahururu Catholic Diocese and which has occasioned him great reputational and professional damage. As such the orders sought should issue pending the hearing of his claim.

The 3<sup>rd</sup> respondent filed a Replying Affidavit of Hon. James Wahome Ndegwa and Speaker of the County Assembly of Nyandarua and who avers that he is aware that the 1<sup>st</sup> respondent on 20<sup>th</sup> August, 2019 through a press statement terminated the employment of the petitioner and prior to such statement he was unaware that there would be termination of employment. He was not consulted before the summary dismissal of the claimant.

Hon. Wahome also avers that the County assembly has not passed any resolution to remove the petitioner as member of the county executive committee as envisaged under section 40 of the County Government Act and he may have been removed under the provisions of section 31 (a) of the Act under which section the Court of Appeal in the case of **County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR** does not give the 1<sup>st</sup> respondent unfettered powers to dismiss a county executive committee member as the pleasure doctrine is inapplicable in the current dispensation and has been replaced by due process. In the case of **Richard Birir versus Narok County Government & 2 others [2014] eKLR** the court held that the pleasure doctrine does not apply in public and state service under the new constitution and cannot be legitimately invoked in the dismissal of an employee.

Hon. Wahome also avers that from the press statement of the 1<sup>st</sup> respondent on 20<sup>th</sup> August, 2019 no reasons were given for the termination of the claimant's employment in contravention of article 47 and 50 of the constitution and contrary to natural justice. Under article 179 of the constitution the contract of employment of a CEC member runs concurrently with that of the Governor and only terminates with the expiry of the term of the governor by way of dismissal on valid grounds outlined under section 40 of the County Government Act.

Hon. Wahome also aver that In this case, due process was not followed and thus in support of the application filed by the claimant.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed the Replying Affidavit of Hiram M Kahiro and who avers that he is the County Secretary of Public Service in the County Government of Nyandarua and the 1<sup>st</sup> respondent may dismiss a CEC member under the pleasure doctrine as he is the appointing authority and must enjoy the confidence and trust for the sustenance of his tenure. There was no violation of the claimants rights under article 35, 41, 47, 50 and 236 of the constitution as alleged as the concept of due process does not apply where an employee serves under the pleasure doctrine.

Mr Kahiro also avers that section 31(a) of the County Government Act allows the governor to dismiss a CEC member once there is a determination there are valid reasons to do so. CEC members are political appointees whose assumption of office, tenure and removal from office hinges on the political mandate granted by the appointing authority, the governor and who has the prerogative to dismiss and in this case the claimant's dismissal was lawful and proper.

A CEC member cannot challenge the decision of the governor to remove him under section 31(a) of the County Government Act. The governor is not limited by the Employment Act, 2007 and the 1<sup>st</sup> respondent exercised his prerogative in dismissing the claimant. The Employment Act is not applicable to the current dispute.

The claim made for the payment of gratuity is addressed under the Salaries and Remuneration Commission (SRC) guidelines with the claimant entitled to a 31% of his basic salary and is available upon request. The due salaries are paid by the County Government and not the 1<sup>st</sup> respondent. The orders granted by the court were based on the Employment Act and thus erroneous. The claimant cannot hold the County Government of Nyandarua at ransom when he was a non-performer and should not be allowed to enjoy an order erroneously granted and the application and orders issued should be dismissed and vacated respectively.

The claimant also filed a Supplementary Affidavit and on the grounds that all persons holding public or state office are servants of the people of Kenya and the pleasure doctrine does not apply. Removal from public office or state office is constitutionally chained with due process and rules of natural justice. The pleasure doctrine violates article 236 of the constitution which provides that due process must be followed in the removal, demotion of a state officer.

The 1<sup>st</sup> respondent cannot lawfully remove the claimant from office upon reliance of section 31(a) of the County Government Act as he is required to accord him reasons to satisfy the provisions of the law. There is a constitutional requirement upon the 1<sup>st</sup> respondent under chapter 6 for objectivity, impartiality and promotion of public confidence and the decision to dismiss the claimant through the media was without justification.

The claimant also avers that the 1<sup>st</sup> respondent cannot allege that he was a nonperformer yet fail to adduce grounds in support of the fact. Performance within an employment relationship should be based upon known targets within a set period of time. The 1<sup>st</sup> respondent has not demonstrated how the measurement and or evaluation of the claimant was conducted to arrive at the finding of non-performer.

Under Article 41 of the constitution the 1<sup>st</sup> respondent is bound by the rules of fair labour practices and should not act arbitrarily to dismiss the claimant from his employment and the argument that he held a political appointment is not correct.

The orders issued on 29<sup>th</sup> August, 2019 were not erroneous.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents have acted in a discriminatory manner when they failed to reinstate the claimant yet did reinstate other CEC members who had been dismissed. This has created confusion to other employee. Further, by appointing the CEC member for finance to act in the claimant's position is in gross violation of the express court orders.

Despite the court directing the respondents to reinstate the claimant on 29<sup>th</sup> August, 2019 his official vehicle has been withdrawn which is proof of bad faith. The 1<sup>st</sup> respondent should be held personally culpable for damages and loss suffered.

The parties made their oral submissions in court.

## **Determination**

The claimant is seeking for his reinstatement back to his position with the 2<sup>nd</sup> respondent as CEC member for Public Administration and ICT and following what he considers his termination of employment based on a media statement issued by the 1<sup>st</sup> respondent on 20<sup>th</sup> August, 2019. The claimant has relied on Appendixes "VN4", a press release issued by the 1<sup>st</sup> respondent on the basis that;

### *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 2020, 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.*

... ..

*I have also recommended to the County Public Service Board (CPSB) the appointment of the following as my ADVISORS:*

*1. Eng. Venansio M Kariuki – Ol'jororok Constituency*

*2. ...*

*3. ...*

There is no letter of summary dismissal terminating the claimant's employment attached to the Notice of Motion, memorandum of claim or to the respondents' affidavits in response. The subject contract of employment is not availed by either party.

The claimant asserts that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent violated his rights by the summary dismissal from his employment contrary to the constitution. at the heart of his arguments is that the two 92) years contract upon which the 1<sup>st</sup> respondent based his termination of employment is in violation of Article 179(7) of the Constitution as such provisions provides for his term of office to run the full term of the 1<sup>st</sup> respondent. The argument that the claimant was serving under the pleasure of the 1<sup>st</sup> respondent is contrary to the constitutional dispensation.

On their part the 1<sup>st</sup> and 2<sup>nd</sup> respondents assert that section 31(a) of the County Government Act allow the 1<sup>st</sup> respondent, Governor to dismiss a CEC member once there are valid reasons. The constitution and the County Government Act have given the Governor a prerogative in dealing with CEC members under the pleasure doctrine.

The 3<sup>rd</sup> respondent has supported the claimant and taken the position that the County Assembly of Nyandarua and his office of the Speaker were not informed that there were CEC members whose employment would be terminated save for the public statement of the 1<sup>st</sup> respondent on the dismissal of the claimant from his employment. There is no resolution by the 3<sup>rd</sup> respondent under section 40 of the County Government Act on the removal of the claimant and the 1<sup>st</sup> respondent may have relied on section 31(a) of the County Government Act without involving the 3<sup>rd</sup> respondent which is contrary to the constitution and which does not provide for the pleasure doctrine but requires due process.

At this stage, what the court is called upon to do by the claimant is whether there should be reinstatement to the position as CEC member for Public Administration and ICT; whether the 3<sup>rd</sup> respondent should be barred from vetting any new nominees to replace the claimant; whether the 1<sup>st</sup> respondent should be barred from replacing, dismissing, sacking, firing, removing the claimant from office; and whether the 1<sup>st</sup> respondent should be stopped from filling the position of CEC member for Public Administration and ICT.

With regard to whether the court should reinstate the claimant, the argument that his two (2) years contract has ceased and then recommended for appointment as *advisor* invites the court to examine the employment relationship between the parties and ascertain whether a CEC member appointed under the provisions of Article 179 of the Constitution, 2010 is subject to the provisions of the Employment Act, 2007 with regard to contract term or is premised under the provisions of Article 179(7) of the Constitution, 2010. These are weighty matters which cannot be determined in the interim and without calling for evidence as to rely solely on the filed affidavits the court will be denied crucial information which should be examined in evidence by the parties.

It would also require the court to delve and examine the pleasure doctrine as asserted by both parties, the claimant seeking to assert that such position is no longer tenable under the current constitutional dispensation and he relied on the case of **Richard Birir versus Narok County Government & 2 others [2014] eKLR** and **County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR** and which position is supported by the 3<sup>rd</sup> respondent. On the other hand the 1<sup>st</sup> and 2<sup>nd</sup> respondents assert that in a presidential system of government, the claimant was a political appointee and thus served at the pleasure of the 1<sup>st</sup> respondent as the Governor, County government of Nyandarua.

As noted above these are weighty constitutional and legal matters which can only be gone into at a full hearing. To address them at this stage would be to deny the parties and the court a chance to make their arguments at the full hearing.

The order of reinstatement back into employment is a final order seeking specific performance. The issuance of such an order is discretionary and should only issue in exceptional circumstances. Section 49(4) of the Employment Act, 2007 lists some of the circumstances the court should consider in making an order for reinstatement of an employee back to his employment after termination of the employment contract. This is also given context under Article 10 of ILO **Convention No 158: Termination of Employment Convention, 1982.**

In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** the Court of Appeal stated;

*The remedy of reinstatement is discretionary. However, the Court is required to be guided by factors stipulated in section 49(4) of the Employment Act which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract of employment should not be offered except in very exceptional circumstances. The Court should also balance the interest of the employee with the interest of the employer.*

See also **Parliamentary Service Commission versus Christine Mwambua [2018] eKLR** that the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

As noted above, the court requires examining the nature of the relationship between the parties particularly the constitutional and legal provisions attendant thereto. To order reinstatement of the claimant back to his position at this stage would in my view mar such an enquiry.

**On whether the 3<sup>rd</sup> respondent should be barred from vetting any other person to replace the claimant and whether the 1<sup>st</sup> respondent should be barred from replacing, dismissing, sacking, firing, removing the claimant from office** are closely linked and intertwined in the first issue. By a determination of the nature of relationship between the parties, such will give the court material to address and cover these issues. To proceed and bar the 3<sup>rd</sup> respondent from vetting any other person or bar the 1<sup>st</sup> respondent from replacing, dismissing, sacking, firing or removing the claimant from office will be to pre-empt a finding without any basis or grounds. Such would deny the respondent a defence. Where the court makes a finding in the affirmative, the remedies sought may issue as a final order.

This then deals the last issue on whether the 1<sup>st</sup> respondent should be stopped from filling the position of CEC member for Public Administration and ICT. As a government functioning to serve the people, pending hearing and determination of the claimant's suit, the 1<sup>st</sup> respondent has a duty to the people in the County of Nyandarua.

**Accordingly, application dated 22<sup>nd</sup> August, 2019 is declined and the interim orders issued on 29<sup>th</sup> August, 2019 vacated to allow the court to hear the parties on the main suit and which shall be heard on priority basis. Hearing directions shall therefore issue. Costs shall be in the cause.**

**Delivered at Nakuru this 9<sup>th</sup> day of October, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:.....