



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 6, 7, 8, 9, 10, AND 11 OF 2019

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 28, 30, 40, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA**

BETWEEN

- 1. EUNICE NJERI WAMBUGU**
- 2. BEATRICE WAMUTIRA GITARI**
- 3. JACINTA WANJIRU MURIITHI**
- 4. BEATRICE MWARI MIRITI**
- 5. ANN WARUGURU NYAGA**
- 6. ALICE WAMBUI WAMBUGU.....PETITIONERS/ APPLICANTS**

VERSUS

PUBLIC SERVICE BOARD KIRINYAGA COUNTY.....RESPONDENT

RULING

1. Before the Court for determination are the Petitioners/Applicants' Notice of Motion applications dated 18th June 2019 brought under a certificate of urgency. These motions all seek the following orders:-

1. Spent

2. THAT pending the hearing of this application inter parties, a conservatory order be issued that the petitioner be retained in the service of the respondent under the terms of remuneration subsisting and in effect as at 30.11.2018.

3. THAT upon the inter parties hearing of this application and pending the hearing and determination of the substantive petition herein, a conservatory order be issued that the petitioner be retained in the service of the respondent under the terms of remuneration subsisting and in effect as at 30.11.2018.

4. THAT pending the hearing and determination of the petition, the respondent be and is hereby restrained from implementing its resolutions as contained in its letter to the petitioner/ applicant dated 28.3.2019.

5. The costs of the application be provided for.

The Motions were supported by the Petitioner/Applicants' affidavits and premised on the grounds expressed on the face of the motion, to wit, that the Respondent contravened the Petitioners rights particularly Articles 28, 30, 40, 41, 47 and 50 and other statutory provisions to the detriment of the Petitioners interests and the Petitioners shall continue to suffer loss and damage unless urgent orders sought herein are granted by this honorable court. The Respondent was stated to have unilaterally re-designated the Applicants from the positions held and altered their job groups. The Petitioners assert that the said re-designation was carried out unilaterally, without notice, without warning and

without giving the Applicants a hearing. The Petitioners assert that the said re-designation has resulted in a demotion, loss of position, reduction of salary and deduction of alleged arrears of overpayment. The Petitioners stated that the deductions are leaving the Applicants without any money at the end of the month to their detriment and that of their dependants. The Motions were canvassed by way of oral submissions. Mr. Macharia for the Petitioners submitted that the Petitioners seek orders in item of prayers 2, 3, 4 of the motions. He stated that he relied on the grounds (a) to (e) in support of affidavits of the Petitioners. He asserted that the Petitioners rely wholly on the grounds and the affidavits in support and the annexures thereto. He submitted that the genesis of the issues before court is the Respondent's decision to re-designate the Petitioners by moving them from one cadre to another which had effect of demoting them and reducing their remuneration. He stated that this was done without any hearing or their being consulted. He submitted that the Respondent begun to deduct and recover alleged overpayments in salary and he invited the court to look at annexures in the motion and that at the time of the hearing they were taking home a negative salary despite working for the Respondent. He stated that they did write a demand letter and there was no response and argued that the Constitution enjoins the Respondent to carry out its functions lawfully and ensure there is no unfair labour practices. He cited Article 41 and Section 10(5) as read with 13(1) of the Employment Act which enjoin the Respondent to consult first before there is any change in remuneration. He urged that pending the hearing and determination of the Petitions the decision of the Respondent in letter of 18th March 2019 ought to be suspended to enable them get her monthly remuneration to avoid suffering. He submitted that there is a *prima facie* case for breach of the Articles of the Constitution as filed with the motion with high chances of success. He urged that the Applications be allowed as prayed

2. The Respondent did not file a replying affidavit and restricted itself to the law. Mr. Kibet, the Respondent's counsel cited Section 57 of the County Governments Act to distinguish between the Board and the County Executive established under Section 6 of the County Governments Act. He submitted that the County executive is a body corporate with perpetual succession capable of suing and being sued. He argued that the Respondent is different from the County Executive. He submitted that the Respondent is not in existence and until the body is constituted the orders sought would not be executable hence the matter should be held in abeyance. Respondent's counsel argued that the Petition is against the provisions of Section 77(1) of the County Government Act which provides that any person dissatisfied by the decision of the Public Service Board may appeal to the Public Service Commission. He argued that the terms of service and remuneration are among the decisions that can be appealed against and that there was nothing that shows that the Petitioners attempted that remedy before coming to this honorable court. He argued that failure by a party to exhaust a remedy under law renders the motion superfluous. He cited the case of **Eliud Wafula Maelo v Ministry of Agriculture & 3 Others [2016] eKLR** where it was held that the jurisdiction of the Court can be ousted or restricted by statute. He relied on the case of **Thuku Kirori v County Government of Murang'a [2014] eKLR** in which the court stated that courts should be reluctant to interfere where there are bodies set up. He submitted that parties should have been given an opportunity to mediate before coming to court as envisaged under Article 159(2)(c) of the Constitution which provides for alternative dispute resolution. He placed reliance on the case of **Diana Kethi Kilonzo v IEBC & 2 Others [2013] eKLR**, where the court said that the bodies set up under statute must be given opportunity to exercise their jurisdiction by arbitration. The Respondent submitted that the Petition goes against the spirit of the Constitution as no such steps were attempted before coming to court. He submitted that the court therefore lacks jurisdiction to entertain the Petition and the Petitioners should be directed to first exhaust the available remedies under statute before coming to court. He cited the case of **Perital Health Care EPZ Ltd v Ministry of Health & 5 Others [2013] eKLR** and submitted that parties should not raise constitutional issues to avoid going before the tribunal and that they should first raise substantial issues before tribunal then come to court if they are dissatisfied. He urged the court to dismiss the Petitioners' applications and direct them to exhaust the remedies they are entitled to in the tribunals and other bodies.

3. In reply, Mr. Macharia for the Petitioners stated that the Respondent's argument is not candid as he cannot purport to say that the Respondent does not exist when he received instructions from the same respondent to act on its behalf. He submitted that from the advertisement shown to court only 3 positions were disbanded and not the entire County Public Service Board and that in the absence of any evidence to the contrary the Board is running and well functioning. He submitted that Section 77 of the County Governments Act does not oust the jurisdiction of the court and the appeals under that Section are in respect to disciplinary matters. He submitted that the matters before court today are not disciplinary in nature but rather relates to the employment of the Petitioner and nothing stops them from coming to court if a dispute arises. He asserted that Section 12 of the Employment and Labour Relations Court Act vests this court with original and exclusive jurisdiction and that any suggestion that the jurisdiction of the court can be taken away by implication is erroneous. He urged the court not to be misguided by the said cited decisions but rather allow the application pending the hearing and determination of the Petition.

4. The arguments that the Respondent does not exist as a body on account of the positions that were advertised to be vacant are hollow. Under the rubric of the County Governments established under Chapter Eleven of the Constitution do not envisage a lacunae or gap between the various arms of the County Government. Section 57 of the County Governments Act establishes the Respondent and states that the County Public Service Boards so established shall be bodies corporate with perpetual succession. In this case a dubious argument has been propounded that the Respondent is not in existence. Who then instructed counsel to appear for the Respondent? In my view, the Respondent has capacity to effect court orders or any directives issued to it or take actions as necessary under the County Governments Act. In regard to the reliefs sought by the Petitioners, it is argued that they are matters within the realm of Section 77 of the County Governments Act. In my view, the Petitioners have raised issues that have risen to the Constitutional threshold as there is allegations of complaint to Article 28 as their dignity has not been respected. They assert their income has been reduced drastically to their detriment and that of their families. This matter absent even those that fall under Article 30 on servitude and those under Article 41 on fair labour practices, places this dispute beyond the reach of the Public Service Commission as it has no authority in relation to the disputes impacting the Constitution a position reserved for the Superior Courts. In my view, the Petitioners are rightly before this court and having so held is of the firm view that they require conservatory orders in the following terms:-

- i. That pending the hearing and determination of the substantive Petitions, a conservatory order do and is hereby issued retaining the Petitioners in the service of the Respondent under the terms of remuneration subsisting and in effect as at 30th November 2018.
- ii. That pending the hearing and determination of the Petitions herein the Respondent be and is hereby restrained from implementing its resolutions as contained in its letter to the Petitioners dated 28th March 2019.
- iii. The costs of the motions will abide the outcome in the Petitions.

It is so ordered.

Dated and delivered at Nyeri this 6th day of November 2019

Nzioki wa Makau

JUDGE