



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 2 OF 2016

[FORMERLY HIGH COURT PETITION NO 11 OF 2015]

IN THE MATTER OF A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO

ARTICLES 22, 23, 165(B) & 258 OF THE CONSTITUTION OF THE REPUBLIC OF

KENYA

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE SUPREMACY OF THE
CONSTITUTION AS PER ARTICLE 2(1) & (4) OF THE CONSTITUTION AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE FUNDAMENTAL RIGHT AND
FREEDOMS UNDER ARTICLE 47(1) OF THE CONSTITUTION REGARDING THE RIGHT
TO EXPEDITIOUS FAIR ADMINISTRATIVE ACTION AND**

IN THE MATTER OF THE RIGHT TO THE PROTECTION OF PUBLIC OFFICERS AS

ALLOWED UNDER ARTICLE 236 OF THE CONSTITUTION

AND IN THE MATTER OF DUTIES AND OBLIGATIONS OF STATE OFFICERS

AND IN THE MATTER OF PRINCIPLE OF LEGITIMATE EXPECTATION

BETWEEN

PAUL CHRISTOPHER KIMALI KIOKO.....PETITIONER

AND

THE GOVERNOR OF THE COUNTY OF KITUI.....1ST RESPONDENT

THE COUNTY SECRETARY OF THE COUNTY OF KITUI.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF KITUI.....3RD RESPONDENT

JUDGMENT

Introduction

1. By a Further Amended Petition dated 4th November 2016, the Petitioner, Paul Christopher Kimali Kioko alleges that his rights under the Constitution and the law have been violated by the Respondents.
2. The Respondents' response to the Petition is contained in a replying affidavit sworn by the Acting County Secretary for the County Government of Kitui, Alexander Kimanzi on 26th September 2016.

The Petition

3. The Petitioner, Paul Christopher Kimali Kioko was appointed by the 3rd Respondent to serve as Executive Committee Member for Lands, Infrastructure and Urban Development by letter dated 6th June 2013. His appointment was confirmed by Gazette Notice No. 7864 of even date.
4. On 10th December 2015, the Petitioner was issued with a letter of interdiction from the office of the 2nd Respondent but signed by the County Executive Committee Member for Basic Education, Training and Skills, Peninah Kilonzi. The Petitioner was required to hand over all his duties to another officer, pending investigations into allegations of misconduct made against him. He states that he is a stranger to the allegations of misconduct leveled against him. During the interdiction period, the Petitioner would be paid half of his salary.
5. A committee formed after the Petitioner's interdiction presented its report to the Governor, Kitui County and on 20th May 2016, the Petitioner was served with a termination letter dated 19th May 2016. The Petitioner faults the committee for making general allegations against him, without any specifics as to allow him to defend himself. He states that prior to his interdiction, he was not informed of the allegations against him nor was he afforded any opportunity to be heard.
6. The Petitioner further pleads that prior to the termination he was not given an opportunity to be heard. He adds that the contents of the 1st Respondent's letter dated 19th May 2016 were driven by malice and nefarious intentions on the part of the 1st Respondent.
7. The Petitioner therefore maintains that the aforesaid letter is illegal and in contravention of the Constitution. He holds that the 1st and 2nd Respondents have no disciplinary control over him and as such, their actions were in complete contravention of the powers and functions they hold.
8. The petitioner avers that under the provisions of Article 236 of the Constitution, he had the right to a process provided by law and in accordance with the Constitution with respect to any disciplinary action taken against him. He adds that as a public officer, any disciplinary action taken against him ought to be in line with the provisions of Articles 10, 47 and 236 of the Constitution.
9. The Petitioner further avers that the action of the 2nd Respondent under the direction of the 1st Respondent to terminate his employment was in breach of Article 10(2) of the Constitution and Sections 31 and 44 of the County Government Act. The Petitioner goes on to state that his employment having been effected under Section 45 of the County Government Act, the 1st and 2nd Respondents had no authority to take any disciplinary action against him.
10. The Petitioner concedes that under the provisions of Article 179 of the Constitution, the 1st Respondent is the Chief Executive Officer of the 3rd Respondent. He however adds that the powers of the 1st Respondent as provided under Sections 30 and 31 of the County Government Act do not provide for the arbitrary dismissal of the Petitioner. According to the Petitioner, any disciplinary action to be taken against him is under the remit of the County Public Service Board.
11. The Petitioner seeks the following remedies:

- a) A declaration that the acts and/or omissions of the 1st to 3rd Respondents with respect to the

termination letter dated 19th May 2016 based on a committee report are a breach of the Petitioner's fundamental right to fair administrative action as provided under Article 47 of the Constitution;

- b) A conservatory order prohibiting the 1st to 3rd Respondents from proceeding to take any steps and/or action that would be detrimental to the interests of the Petitioner as a result of the 2nd Respondent's letter dated 10th December 2015;
- c) An order reinstating the Petitioner to his previous role;
- d) A declaration that the Petitioner's rights under Article 47(1) of the Constitution have been violated by the 1st to 3rd Respondents;
- e) Damages as a result of the termination letter dated 19th May 2016;
- f) Compensation for all salary deductions made against the Petitioner as a result of interdiction letter dated 10th December 2015 and termination letter dated 19th May 2016;
- g) Costs plus interest.

The Respondents' Case

12. In a replying affidavit sworn by the Acting County Secretary for the County Government of Kitui, Alexander Kimanzi on 26th September 2016, it is deponed that by Gazette Notice No. 7864, dated 6th June 2013, the Petitioner was appointed by the 1st Respondent as the 3rd Respondent's County Executive Member in charge of Lands, Infrastructure and Urban Development.

13. Kimanzi states that under written law, the Petitioner could be dismissed from office by the 1st Respondent if the 1st Respondent considered it appropriate to do so.

14. Kimanzi states that sometime in 2014/2015, it came to the attention of the 1st and 3rd Respondents that complaints of integrity and ethical conduct of the Petitioner were being raised by members of the public within the County. The accusations related to:

- a) Alteration of contract documents;
- b) Inflation of costs of infrastructure development within the County;
- c) Abuse of office through misinformation;
- d) Collusion with others to act inappropriately against the County's interests;
- e) Coercion and intimidation of members of staff;
- f) Fraudulent alteration of records;
- g) Irregular acquisition of public land;
- h) Deliberate acts of commission and omission with a view to inflating costs of projects;
- i) Seeking bribes from contractors;
- j) Poor departmental leadership;
- k) Poor performance of duties;

l) Disregard of rules and regulations.

15. Kimanzi further depones that similar and other complaints and allegations were received against other officers and in light of the concerns and after consultation with relevant institutions, including the County Public Service Board, the 1st Respondent directed that the Petitioner and the rest of the concerned officers be interdicted to allow for investigations.

16. While denying the Petitioner's assertion that he was not made aware of the allegations leveled against him, Kimanzi states that the interdiction letter contained all the allegations.

17. The investigation committee appointed to deal with the Petitioner's case came to the following conclusions:

- a) That due process was not followed in processing approvals for architectural and structural drawings for residential buildings being constructed by the Petitioner on his plot known as KITUI/MUNICIPALITY BLOCK II/115 yet such process and approval ought to have been conducted within the Petitioner's portfolio;
- b) That the development being carried out by the Petitioner on KITUI/MUNICIPALITY BLOCK II/115 was being conducted in breach of conditions of the lease of the plot;
- c) That the development on the plot was commenced and completed without prior approval of the National Environmental Management Authority;
- d) That an illegal access road had been constructed to the property being developed by the Petitioner;
- e) That there was evidence that the Petitioner had used the 3rd Respondent's vehicles to deliver materials to the construction site;
- f) That there was need for the Petitioner to account for the money he was using to develop the site but he failed to do so;
- g) That the Petitioner breached Section 58 of the Public Procurement and Disposal Regulations, 2006 by singularly negotiating variation of Bills of Quantities (BQs) with individual contractors;
- h) That the Petitioner failed to provide leadership in his department and allowed junior officers to perform assignments reserved for their seniors and on some occasions used junior officers to circumvent procedural requirements;
- i) That because of vested interests, the Petitioner ended up performing tasks which were not for his level, for example requiring to see all BQs and dealing directly with contractors. This not only caused conflict between him and his officers but it also delayed operations thus constraining departmental achievements.

18. On 29th January 2016, the 3rd Respondent wrote to the Petitioner requiring him to be reporting to the County Secretary every Monday during normal working hours with effect from 1st February 2016. By notice of summons dated 29th March 2016, the Petitioner was invited to appear before the investigation committee on 11th April 2016 to conduct his defence in the case against him.

19. The Petitioner is said to have failed to attend the meeting as requested for the reason that the subject matter of the investigations was in court. The Petitioner is also said to have been indisposed at the time. Kimanzi states that these were not valid reasons for the Petitioner to fail to appear before the investigation committee.

20. Kimanzi states that after the investigation committee found the Petitioner culpable, he was directed by the 1st Respondent to issue the termination letter dated 19th May 2010.

Findings and Determination

21. From the pleadings and submission filed by the parties, the Court has isolated the following two (2) issues for determination:

- a. Whether the Petitioner's rights under the Constitution and the law were violated;
- b. Whether the Petitioner is entitled to the remedies sought.

The Petitioner's Rights

22. In his Petition, which was amended three times, the Petitioner pleaded that he was initially appointed in the position of County Secretary for the 3rd Respondent. The Petitioner however corrected this apparent error in his supplementary submissions filed on 15th November 2017. The findings and determination by the Court will therefore proceed on the basis that the only position held by the Petitioner was that of Executive Committee Member for Lands, Infrastructure and Urban Development.

23. On 10th December 2015 the Petitioner was issued with the following interdiction letter:

“INTERDICTION

I have been directed to inform you that your general conduct and work performance as County Minister/CECM for County Ministry of Lands, Infrastructure and Urban Development has been found wanting and the following alleged acts of gross misconduct have been reported against you:

- 1. Changing or altering contract documents to corruptly inflate costs with a view to benefiting from the same;*
- 2. Abuse of office through misinformation, collusion, coercion, intimidation and fraudulent alteration of records to irregularly acquire public land for personal gain and benefit as well as to compromise service delivery;*
- 3. Deliberate acts of commission and omission including connivance and collusion to inflate project costs for personal gain and benefit;*
- 4. Demanding bribes from contractors and suppliers as a condition for the award of contracts and issuance of variation orders and inspection of works for processing of payments;*
- 5. Engaging in rent seeking and corrupt practices in collusion with suppliers and contractors*
- 6. Poor departmental leadership and unsatisfactory performance of assigned duties and responsibilities and*
- 7. Willful disregard of rules and regulations in the performance of duty.*

Consequently, H.E the Governor has directed that you be, and are hereby interdicted from exercising the duties of your office from the date of this letter pending investigation and determination of your case.

Further, you are directed to immediately prepare a comprehensive handover report and handover the same to Mr. Peter Gitonga Nkunda, the County Executive Member for Ministry of Tourism and Natural Resources. A Copy of the handover report should simultaneously be submitted to the

County Secretary and Chief Officer, County Ministry of Lands, Infrastructure and Urban Development.

Attached is the Handover Template which must be completed as outlined and specified.

While on interdiction, you will be on half salary, full medical cover, and any allowances as may be applicable.

(Signed)

Musyoka Nyamai

COUNTY SECRETARY”

24. In his Petition filed in court, the Petitioner states that the 1st and 2nd Respondents had no disciplinary authority over him and places such authority on a 1st Interested Party, who is not disclosed in the pleadings. The Court took this as yet another error in the Petitioner’s pleadings.

25. In his position as County Executive Committee Member for Lands, Infrastructure and Urban Development, the Petitioner was appointed pursuant to Article 179(2) of the Constitution and Section 30(2)(b) of the County Government Act, 2012. Once appointed, the Petitioner became a state officer as defined by Article 260 of the Constitution.

26. Section 31(a) of the County Government Act gives the Governor the power to dismiss a County Executive Committee Member if the Governor thinks that “it is appropriate and necessary to do so.” The Court of Appeal in **County Government of Nyeri & another v Cecilia Wangechi Ndung’u [2015] eKLR** defined the power given to the Governor by the aforesaid provision to mean that the Governor may not act arbitrarily or capriciously. In other words, before exercising the power to dismiss under Section 31(a) of the Act, the Governor must have reasons that make the dismissal appropriate or necessary.

27. To my mind, the appropriateness or necessity for the dismissal of a County Executive Committee Member can only be determined if the concerned officer is granted an opportunity to respond to allegations made against them.

28. From the evidence on record, the Petitioner was invited to appear before a committee appointed by the Governor to investigate allegations of gross misconduct made against him. By his own admission, the Petitioner did not appear before the committee because first, the matter was pending before the Court, second the allegations were not specific and third, he was indisposed.

29. Regarding the pendency of the matter before the Court, there was no evidence of an order barring the conduct of internal disciplinary proceedings at the workplace. On the issue of the charges being too general, the Court did not see any attempts made by the Petitioner towards obtaining particulars from the Respondents. Finally, on his assertion that he was indisposed, the Petitioner ought to have provided a medical certificate to that effect.

30. Disciplinary proceedings at the workplace are not optional for either the employer or the employee and as held by this Court in **Esha Chizi Lugogo v Pact Kenya [2013] eKLR** an employee who squanders an opportunity to be heard offered by their employer cannot turn around and complain that they were not heard. This was the same position taken by my brother, **Abuodha J** in **Perpetua Mponjiwa v Kenya Airways Ltd & Attorney General [2016] eKLR**.

31. In the submissions filed on behalf of the Petitioner, an attempt was made to respond to the allegations made against him. With much respect, this is not the route to follow. The Petitioner ought to have made his response to the investigation committee appointed by the Governor. Having failed to do so, he cannot be allowed to turn the Court into a disciplinary panel.

32. Regarding the Petitioner's complaint that his interdiction was unlawful in the first place, the only thing I will say is that the said interdiction was effected in accordance with the Human Resource Policies and Procedures Manual for the Public Service and the County Public Service Human Resource Manual.

Final Orders

33. For the foregoing reasons, I find the Petitioner's Petition to be without merit and proceed to dismiss it.

34. Each party will bear their own costs.

35. These are the orders of the Court.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Dr. Khaminwa, SC for the Petitioner

Mr. Obura the Respondents