



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO 3 OF 2016**

**[FORMERLY HIGH COURT PETITION NO 9 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**

**STANLUS MUSYOKA NYAMAI.....PETITIONER**

**AND**

**THE GOVERNOR OF THE COUNTY OF KITUL.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY OF THE COUNTY OF KITUL.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KITUL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Further Amended Petition dated 4<sup>th</sup> November 2016, the Petitioner, Stanlus Musyoka Nyamai 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 two affidavits sworn by the Acting County Secretary for the County Government of Kitui, Alexander Kimanzi on 10<sup>th</sup> June 2016 and 6<sup>th</sup> October 2016.

### **The Petition**

3. The Petitioner was appointed to the position of County Secretary for the 3<sup>rd</sup> Respondent effective 1<sup>st</sup> January 2014. He earned a monthly salary of Kshs. 152,060 plus a house allowance of Kshs. 70,000 and a commuter allowance of Kshs. 20,000.
4. On 10<sup>th</sup> December 2015, he was issued with a letter of interdiction from the office of the 2<sup>nd</sup> 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 20<sup>th</sup> May 2016, the Petitioner was served with a termination letter dated 19<sup>th</sup> 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 1<sup>st</sup> Respondent's letter dated 19<sup>th</sup> May 2016 were driven by malice and nefarious intentions on the part of the 1<sup>st</sup> Respondent.
7. The Petitioner therefore maintains that the aforesaid letter is illegal and in contravention of the Constitution. He holds that the 1<sup>st</sup> and 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent under the direction of the 1<sup>st</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no authority to take any disciplinary action against him. He holds that only the County Service Board could discipline him.
10. The Petitioner concedes that under the provisions of Article 179 of the Constitution, the 1<sup>st</sup> Respondent is the Chief Executive Officer of the 3<sup>rd</sup> Respondent. He however adds that the powers of the 1<sup>st</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> Respondents with respect to the termination letter dated 19<sup>th</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> 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 2<sup>nd</sup> Respondent's letter dated 10<sup>th</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> Respondents;
- e) Damages as a result of the termination letter dated 19<sup>th</sup> May 2016;
- f) Compensation for all salary deductions made against the Petitioner as a result of interdiction letter dated 10<sup>th</sup> December 2015 and termination letter dated 19<sup>th</sup> May 2016;
- g) Costs plus interest.

### **The Respondents' Case**

12. The Respondents' response to the Petition is contained in two affidavits sworn by the Acting County Secretary for the County Government of Kitui, Alexander Kimanzi on 10<sup>th</sup> June 2016 and 6<sup>th</sup> October 2016. Kimanzi depones that sometime in the year 2015, the County Government received numerous complaints against the Petitioner including:

- a) Incompetence and unsatisfactory performance of duties and responsibilities assigned to him;
- b) Engaging in corrupt practices inconsistent with high office;
- c) Abuse of office through misinformation, collusion, coercion and intimidation to influence award of contracts to otherwise ineligible relatives contrary to the Public Procurement and Disposal Act;
- d) Disrespect and insubordination to County Executive Committee Members;
- e) Poor leadership resulting to inefficiency and ineffectiveness in service delivery.

13. Consequent to these concerns and more particularly because there were other senior officers over whom similar and other allegations had been made, the 1<sup>st</sup> Respondent, as Head of Government consulted with the relevant institutions, including the County Public Service Board and a decision was taken to interdict the Petitioner so as to facilitate investigations and give him an opportunity to respond the allegations.

14. Vide Kenya Gazette Notice No. 386, the Governor appointed an investigation committee to investigate the allegations against the Petitioner and other senior officers.

15. Kimanzi states that the Petitioner was invited to make representations before the investigation committee but he did not honour the invitation.

16. On 18<sup>th</sup> May 2016, the Governor received the final report of the investigating committee with its findings. The committee found the Petitioner culpable for:

- a) Engaging in corrupt, unethical and immoral practices;

- b) Awarding contracts to relatives contrary to the Public Procurement and Disposal Act;
- c) Publicly engaging in political activities while on interdiction;
- d) Poor leadership, incompetence and inefficiency;
- e) Insubordination;
- f) Breach of Chapter 6 of the Constitution of Kenya.

17. Consequently, a decision was made by the relevant institution to terminate the Petitioner's contract which decision was communicated by letter dated 19<sup>th</sup> May 2016.

18. In his further affidavit filed on 6<sup>th</sup> October 2017, Kimanzi depones that the Petitioner failed to report to the Acting County Secretary every Wednesday as instructed by letter dated 29<sup>th</sup> January 2016. By letter dated 29<sup>th</sup> March 2016, the Petitioner was invited to attend a meeting convened by the investigation committee to provide his defence against the allegations made against him.

19. The Petitioner failed to appear before the investigation committee and a final report was therefore prepared and submitted to the Governor and the County Public Service Board, upon which a decision was made to terminate the Petitioner's contract.

### **Findings and Determination**

20. There are three (3) issues for determination in this Petition:

- a) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had power to discipline the Petitioner;
- b) Whether the Petitioner's rights under the Constitution and the law were violated;
- c) Whether the Petitioner is entitled to the remedies sought.

### **Disciplinary Powers**

21. In his Further Amended Petition, the Petitioner contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no power to interdict him or to terminate his employment. He maintains that under Section 59(1)(c) of the County Government Act, he could only be disciplined by the County Public Service Board.

22. The County Public Service Board is established under Section 57 and its powers and functions are set out in Section 59(1) of the Act, among them being establishing and abolishing offices in the County Public Service and exercising disciplinary control over persons holding those offices.

23. Conversely, the position of County Secretary is established under Section 44(1) of the Act and Section 44(2) thereof provides that the holder of this office may be dismissed by the Governor. It seems to me that the position of County Secretary having been already created under Section 44 cannot be one of the offices anticipated for creation by the County Public Service Board under Section 59(1). The argument that the Petitioner could only be disciplined by the County Public Service Board therefore has no basis in law and is rejected.

24. From the evidence on record, the Petitioner's interdiction letter was signed on the direction of the Governor by Peninah Kilonzi the County Minister/CECM for Basic Education, Training and Skills Development who was also the County Minister/CECM responsible for Public Service. The termination letter was issued pursuant to findings of the investigation committee.

25. Having established that the Governor had disciplinary control over the Petitioner, the only breaks to

be applied are those set out by the Court of Appeal in **County Government of Nyeri & another v Cecilia Wangechi Ndung'u [2015] eKLR** to the effect that in exercising the disciplinary power granted by law, the Governor may not act arbitrarily or capriciously.

### **The Petitioner's Rights**

26. The Petitioner's interdiction was communicated by letter dated 10<sup>th</sup> December 2015 stating as follows:

#### ***"INTERDICTION***

*I have been directed to inform you that your general conduct and work performance as County Secretary has been found wanting and the following alleged acts of gross misconduct have been reported against you:*

- 1. Incompetence and unsatisfactory performance of assigned duties and responsibilities;*
- 2. Engaging in corrupt, unethical and immoral practices inconsistent with your high office;*
- 3. Abuse of office through misinformation, collusion, coercion and intimidation to influence the award of contracts to ineligible relatives contrary to the Public Procurement and Disposal Act;*
- 4. Disrespect and insubordination to CECM/Ministers;*
- 5. Poor leadership resulting in lack of efficiency and effectiveness in service delivery.*

*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. Alex Kimanzi, the Deputy County Secretary, Office of the Governor.*

*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)*

*Peninah Kilonzi*

***County Minister/ CECM for Basic Education, Training and Skills Development & Also County Minister/CECM Responsible for Public Service"***

27. The Petitioner was invited to appear before a committee appointed by the Governor to investigate allegations of gross misconduct made against him. In his further affidavit sworn on 17<sup>th</sup> October 2017, he states that he did not appear before the investigating committee because he was advised by his Advocates on record not to engage in direct communication with the Respondents, as the matter was pending in court. With much respect, it would appear that the Petitioner received the wrong advice on this account as there was no order barring the conduct of internal disciplinary proceedings at the workplace.

28. 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.***

29. In his further affidavit sworn on 17<sup>th</sup> October 2017 as well as in his written submissions the Petitioner made an attempt to respond to the allegations made against him. Again with much respect, this was the wrong route to take. 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.

30. 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**

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

32. Each party will bear their own costs.

33. These are the orders of the Court.

**DATED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JANUARY 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Dr. Khaminwa, SC for the Petitioner

Mr. Obura the Respondents