



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 45 OF 2017

(Before Hon. Justice Mathews N. Nduma)

1. THE BUNGOMA COUNTY PUBLIC SERVICE BOARD
2. MR. GEDION B. SIRAI
3. DR. JANET N. MANYASI
4. MRS. ELIZABETH WANYONYI
5. MR. PETER S. MASENGELI
6. MR. STEPHEN M. WESONGA
7. MR. BONVENTURE WASIKOYO.....PETITIONERS

VERSUS

1. THE GOVERNOR, COUNTY
GOVERNMENT OF BUNGOMA
2. COUNTY ASSEMBLY OF BUNGOMA
3. COUNTY GOVERNMENT OF BUNGOMA
4. A. C. WAMALWA

AND

MOSES WANJALA LUKOYE.....INTERESTED PARTY

R U L I N G

1. By consent of the parties filed on 7th February, 2018, the advocates for the parties agreed that applications dated 11th December, 2017, 28th December, 2017 and 6th February, 2018 be heard and determined together.

Application Dated 11th December, 2017

2. Application dated 11th December, 2017 sought conservatory orders restraining the 1st Respondent from acting on recommendation by the 2nd Respondent made on 7th December, 2017 to remove the Petitioners from office as members of the Bungoma County Public Service Board pending the hearing and determination of the Petition. Interim orders were issued on 11th December, 2017.

Application dated 28th December, 2017

3. This application was filed by the Petitioners seeking to have H. E. Wycliffe Wangamati, the Governor, County Government of Bungoma and the 1st Respondent be cited for contempt and be imprisoned for a term not exceeding six(6) months and a fine not exceeding Kshs.200,000 and the 3rd Respondent County Government of Bungoma pay a fine not exceeding Kshs.200,000 for contempt of court for willful disobedience of the court order issued on 11th December, 2017.

Application dated 11th February, 2018

4. This application seeks to have the 1st and 2nd Respondent compelled to unlock and grant entry and access to the Petitioners Offices of the Public Service Board allegedly locked illegally and irregularly on 14th December, 2017 in defiance of the court orders issued on 11th December, 2017 and the officer commanding station of Kanduyi Police Station, Bungoma be directed to enforce the court orders.

5. The issues for determination are:-

- i. Whether the applicants in the application dated 11th December, 2017 have satisfied the requisites for grant of the conservatory orders.
- ii. Whether the 1st and 3rd Respondents are in willful defiance of the orders of the court issued on 11th December, 2017 and therefore subject to penalties for contempt of court.
- iii. What remedies are available to the applicants in this matter.

Issue 1

6. The issue for determination at this stage with regard to the application dated 11th December, 2017 is whether the applicants have satisfied the prerequisites of granting conservatory orders against the Respondents as set out in **Dr. Alfred Mutua vs EACC & 4 others, Court of Appeal at Nairobi Civil Appeal No. 31 of 2016 [2016] eKLR** and **Gitirau Peter Munya vs Dickson Mwendu, Supreme Court [2014] eKLR**.

7. The factual basis of the application is set out in the Notice of Motion itself and in the supporting affidavit of Gedion B. Sirai, the Chairman of the Bungoma County, Public Service Board.

8. In evaluating the evidence before court at this stage, the court is cautious not to pre-empt the substantive hearing and determination of the petition itself and will be satisfied by only prima facie evidence, indicative of a case with a probability of success. The court is however mindful of the Court of Appeal decision in *County Assembly of Kisumu & 2 others Vs Kisumu County Assembly Service Board & 6 Others [2015] eKLR* as follows:-

“We agree with counsel for the Respondents that County Service Boards do not exist at the pleasure of County Assemblies or any other state organ... they are not subordinate to County Assemblies or any other state organ. County Assemblies have no constitutional or statutory authority to disband, dissolve or even suspend the operations of County Service Boards”

9. In this regard the court is satisfied that the Petitioners were appointed for a six (6) year term as members of the Bungoma County Public Service Board which term has not expired and the 4th Respondent N. C Wamalwa acting as County Secretary wrote and served the applicants with letters of removal dated 7th December, 2017 pursuant to the provisions of County Government Act, 2012, section 58(5) (b) and to the Communication received from the clerk of the County Assembly by a letter of the same date, communicating a Resolution of the county Assembly requiring immediate vacation and removal from the position of Chairman and members of the County Public Service Board of Bungoma. The letter summarily dismisses the Chairman and members from the Board.

10. Section 58(5) of the Act reads:-

“The members of the Board may only be removed from office –

- a. On grounds set out for removal of members of a constitutional commission under Article 251(1) of the constitution and*
- b. By a vote of not less than seventy five percent of all members of the County Assembly”*

11. Article 251(1) of the Constitution provides –

“(1) A member of a commission (Other than an ex officio member), or the holder of an independent office, may be removed from office only for –

A serious violation of this constitution or any other law, including a contravention of chapter six;

Gross misconduct, whether in the performance of the members or office holder’s functions or otherwise;

Physical or mental incapacity to perform the function of office;

in competence; or

bankruptcy.

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause petition to the National Assembly setting out the alleged facts constituting that ground”

12. The applicants state that the removal was *ultravires* the powers of the County Assembly; it was irregular and unprocedural.

13. That the 4th Respondent usurped the powers of 1st Respondent in issuing the Letters of removal and same was null and void.

14. That the County assembly did not resolve to remove the Chairman or any member of the Public Service Board and the purported resolution to remove the County, Public Service Board was null and void.

15. In the present case, the County Assembly found –

“there was violation of various provisions of the constitution and other enabling laws by the Respondents and in particular Articles 251(1)(a) and (d) and Article 232(1)(a)(b) and (2) of the constitution as read together with section 58(5)(b) of the County Governments Act, this committee from the foregoing recommends the removal of the Bungoma county public service Board.”

16. The adoption schedule of the ICT Committee of County Assembly of Bungoma is signed by ten (10) members for –

“The removal of the County Public Service Board from office.”

17. The Petition dated 31st August, 2017 however moved the County Assembly of Bungoma for the removal of the following members from the County Public Service Board:

1. Mr. Gideon N. Sinai

2. Dr. Janet N. Manyasi

3. Mrs. Elizabeth Wanyonyi

4. Mr. Pter Masengeli

5. Mr. Stephen M. Wesonga and

6. Mr. Bonventure Wasikoyo

18. It is submitted that the recommendation by the 2nd Respondent was made without jurisdiction in that the County Assembly has no constitutional or statutory authority to remove the Bungoma County Public Service Board.

19. Furthermore, only the Governor could implement the recommendation of the County Assembly and that a non-existing office of Acting, County Secretary had no such mandate.

20. The County Secretary is appointed under section 44(1) of the County Government Act no. 17 of 2012 and the section makes no provision of an Acting County Secretary. The County Secretary is the Secretary to the County Executive Committee and is appointed by the governor.

21. The County Public Service Board is a body corporate with perpetual succession and a seal and is established in terms of section 57 of the County Government’s Act, No. 17 of 2012. It is therefore a statutory creature that may be abolished by the National Assembly. County Assemblies have no power to amend or repeal any of the provisions of the County Governments Act, No. 17 of 2012, or for that matter any legislation enacted by the National Assembly.

22. Considering all the above analysis, the applicants have made a *prima facie* case that the Bungoma, County Assembly acted *ultravires* its statutory mandate and made a recommendation that is likely to be set aside.

23. Further determination of this possibility will be after hearing and determination of the petition.

24. It is in public interest that there be no void in the governance of the Bungoma, County. As was stated by the Court of Appeal in **Dr. Alfred N. Mutua v EACC (supra)** citing with approval the rendition by the Supreme Court in **Gitirau Peter Munya Vs Dickson Mwenda Githinji & 2 others [2014] eKLR** where the Supreme Court stated –

“[86] conservatory orders bear a more decided Public law connotation for there are orders to facilitate ordered functioning within Public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest Conservatory orders, therefore,

are not, unlike interlocutory injunctions, linked to such private party services as “prospects of irreparable harm” occurring during the pendency of a case or ‘high probability of success’ in the Applicant’s case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

25. In the present case the inherent merit of the case, coupled with the public interest that independent offices be protected from any unlawful and unwarranted interference by either the executive or legislative arm of the County Governments is in favour of granting the conservatory orders sought and the court grants the application dated 11th December, 2017 in terms of prayer 3 of the Notice of Motion.

26. In the same vein the application dated 6th February, 2018 is granted in its entirety and the 1st and 2nd Respondents are directed to unlock the offices of the Bungoma, County Public Service Board and grant access to the Chairman and all members of the board to the said offices and to facilitate proper functioning of the board forthwith.

27. With regard to the application dated 28th December, 2017, the court is not satisfied that the Governor and the County Government of Bungoma are in willful disregard of the court order issued on 11th December, 2017. However, should this ruling be not be implemented by the 1st and 2nd Respondents, forthwith and upon service of the same, personally to the Governor or to the appropriate officer in the office of the County, Government of Bungoma, the court shall find the said Respondents guilty of contempt of court upon application and without any further reference to the 1st and 2nd Respondents and mete out appropriate sentence.

27. In the final analysis, the court orders the following:-

1. The interim conservatory order granted on 11th December, 2017 is confirmed and the Petitioners be allowed back to office immediately.
2. The office of the Bungoma County Public Service Board be opened, forthwith and the petitioners/applicants be granted access.
3. The application to commit the 1st and 2nd Respondents for contempt of court orders issued on 11th December, 2017 is dismissed with a caution that the same would be revisited in the effect the ruling of this court is not complied with forthwith.
4. Costs in the cause.

Ruling Dated, Signed and delivered this 12th day of April, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Shifwoka for Petitioners/Applicants

Mr. Makokha for 1st, 3rd & 4th Respondents

Mr. N. Sifuna for interested Party

Anne Njung'e – Court Clerk