



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO. 5 OF 2018

(Before Hon. Justice Mathews N. Nduma)

1. SAMWEL OKURO
2. SAMWEL ONDOLA
3. JACOB MUGA
4. GEORGE AKONGO
5. CEPHAS KASERA
6. DEREK OBURA
7. GEORGE KOYIER
8. SELINE ODHIAMBO BONYO.....PETITIONERS

VERSUS

DR. OLANG'O ONUDI

THE AG. COUNTY SECRETARY KISUMU COUNTY.....RESPONDENT

J U D G M E N T

1. The petition was filed on 12th February, 2018 by the eight petitioners who are Chief Officers in various departments of the County Government of Kisumu.

2. The Petitioners seek the following reliefs –

(i) A declaration that the Respondent's action of commencing and exercising disciplinary control over the petitioners through the suspension letters dated 29th November, 2017 or thereabout and the show cause letters dated 23rd January, 2018 without the authority and sanction of the KISUMU COUNTY PUBLIC SERVICE BOARD is a violation of the petitioners' rights under articles 2,3,10,28,35,47,50 and 236 of the constitution and section 59 of the county government act and the same is illegal, null and void.

(ii) A declaration that the actions of the respondent of suspending the petitioners and further asking the petitioners to show cause to charges; the basis of which documents have not been supplied to the petitioners and without the express authority and consent of the KISUMU COUNTY PUBLIC SERVICE BOARD amounts to illegal usurpation of the powers and functions and interference with the statutory powers and functions of the KISUMU COUNTY PUBLIC SERVICE BOARD, the same is unlawful by dint of sections 59 of the County Government Act and that the petitioners are not entitled to go through such an unlawful disciplinary process. The suspension letters and letters of show cause are hereby nullified.

(iii) Damages for violation of the petitioners' constitutional rights and costs of and incidental to this suit.

The petition is based on the following grounds.

3. The Petitioners are appointed in terms of section 45 of the County Government Act No. 17 of 2012, which provides thus:-

“(1) The governor shall –

(a) Nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and

(b) With the approval of the county assembly appoint County Chief Officers.

(2) The office of a County Chief Officer shall be an office in the County Public Service “

4. It is submitted for the Petitioners that the Chief Officers, being officers in the County Public Service may only be subjected to any disciplinary process by the County Public Service Board established in terms of section 57 of the Act, and whose functions are set out under section 59 to include to:-

(a) Establish and abolish offices in the County Public service;

(b)

(c) Exercise disciplinary control over, and remove persons holding or acting in those offices as provided for under this part; ...”

5. In terms of section 56 of the Act, the head of County Public Service is the County Secretary appointed under section 44 of the Act, who is also the secretary to the County Executive Committee.

6. In terms of section 44(3)(c), The County Secretary shall convey the decisions of the County Executive Committee to the appropriate persons or authorities.

7. The impugned letters of suspension to the petitioners were written on behalf of County Executive Committee by Dr. C. Olang’o Onudi, Acting County Secretary. Suspension was with effect from 29th November, 2017. The Petitioners remained in suspension and were served with Notices to Show Cause dated 23rd January, 2018 signed by the Acting County Secretary.

8. The Letters of Suspension and Notices to Show Cause were copied to the Governor and to the Secretary County Public Service Board.

9. In terms of section 58(c), the Secretary to the County Public Service Board is appointed by the Governor upon approval by the County Assembly.

10. It is this Secretary who may make official communication on behalf of the County Public Service Board.

11. It is submitted that the Letters of Suspension and Notice to Show Cause were null and void ab initio because they were authored firstly, by a non-existent, Acting officer and if even if, the Acting officer was in office properly, he lacks statutory authority to communicate on behalf of the Board, which has the mandate to take any disciplinary measure against the Chief Officers. The Petitioners, pray that the petition be allowed.

Response

12. The Respondent responded to that petition by an unsworn statement of response filed on 23rd February, 2018.

13. The Respondents aver that the Petitioners being public officers are responsible and answerable to the County Executive Committee by virtue of section 45(2) and (3) of the County Government Act No. 17 of 2012.

14. That the County Government has power and authority to institute and commence disciplinary process with a view to make recommendations to the County Public Service Board for final decision as per the law.

15. That the County Public Service Board exercises “delegated powers” from the County Government and hence acts on recommendations of the County Government.

16. The Respondents aver that its action to suspend, and issue notice to show cause to the petitioners was proper and lawful and the petition be dismissed with costs.

17. The issues for determination are as follows:-

(i) Was the suspension of the chief officers by the Executive Committee lawful?

(ii) Are the Petitioners entitled to the reliefs sought?

Issue 1

18. A plain reading and interpretation of section 45(1), (2) & (3) of the County Government Act, No. 17 of 2012 leads to the inevitable conclusion that County Chief Officers are officers in County Public Service and are responsible in their functions to the executive committee.

19. However, in terms of section 59(1) (c), it is the County Public Service Board which may exercise disciplinary control, over and remove persons holding or acting in all offices in the County Public Service established under section 56 of the Act.

20. Whereas, the County Secretary is the head of Public Service and Secretary to the County Executive Committee, the County Secretary has no power or authority to communicate on behalf of the County Public Service Board. The Board has its own Secretary appointed in terms of Section 58(1) (c) of the Act.

21. The County Public Service Board is a body corporate and with perpetual succession and a seal; and capable of suing and being sued in its corporate name in terms of section 57(a) & (b) of the Act.

22. Furthermore, to protect its independence, from other organs of the County Government, including the Governor, the Executive Committee, and the County Assembly, in terms of section 58(5), members of the Board may only be removed from office –

“(a) On grounds set out for the 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”

23. This provision underlines the special place for the County Public Service Board, and this protection is given to protect the Board from encroachment of its functions by any other organ and to ensure that the Board discharges its duties impartially, independently, and without fear or favour.

24. Though this power is exercised on behalf of the County Government, the Board is protected from any interference in its functions by the executive.

25. Therefore, the purported action by the executive committee to usurp the powers of disciplinary control over county public service officers through the Acting Secretary to the Executive Committee is unlawful, null and void ab initio.

26. Accordingly, and in disposal of issue (ii) above, the petition has merit and is granted as follows:-

a. The Respondent’s action on behalf of the executive committee to exercise disciplinary control over the petitioners vide the letters of suspension dated 29th November, 2017 and the notices to show cause dated 23rd January, 2018 is *ultra vires* the County Governments, Act no. 17 of 2012 and is unlawful, null and void ab initio.

b. All the Chief Officers continue to hold their offices without loss of any remuneration including during the period they were in unlawful suspension.

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

Mathews N. Nduma

Judge

Appearances

Mr. Nyamweya for Petitioners

Mr. Yogo for Respondent

Chrispo – Court Clerk