



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 10 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

PATRICK OYUGI WAKINE.....1ST PETITIONER

MAURICE THOMAS CHACHA.....2ND PETITIONER

PETER OMONDI OUMA.....3RD PETITIONER

-VERSUS-

COUNTY ASSEMBLY OF MIGORI.....1ST RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD,

MIGORI COUNTY.....2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD,

MIGORI COUNTY.....3RD RESPONDENT

TOM ONYANGO OPERE.....4TH RESPONDENT

JUDGMENT

The 1st Petitioner was the Clerk to the County Assembly of Migori, the 1st Respondent herein, until 23rd February 2017 while the 2nd and 3rd Petitioners were the Finance and Economic Planning Officer and Accountant 1 of the 1st Respondent respectively until 23rd February 2017.

The 1st Petitioner was by virtue of section 12 of the County Governments Act also the secretary to the County Assembly Service Board - Migori, the 2nd Respondent herein.

The 1st Respondent herein is the County Assembly of Migori County established under Article 185 of the Constitution 2010 and part III of the County Government Act 2012 and vested with the Legislative and oversight Authority over and in respect of the County Executive Committee and any other County Executive Organ. Its address of service for the purposes of this suit shall be care of P O Box Number 985-40400, SUNA-MIGORI.

The 2nd Respondent is a Statutory Board under County Government Act No. 17 of 2012 and bestowed and or conferred with mandate to ensure the proper discharge and or execution of duties pertaining and or relating to the affairs of Migori County Assembly, including employment and disciplining of such Officers for and on behalf of the County Assembly. Her address of service for the purposes of this suit shall be care of Post Office Box Number 985-40400, SUNA-MIGORI.

The 3rd Respondent is a Statutory Board created pursuant to Section 57 of the County Government Act with functions spelt out under Section 59 of the said Act which functions are confined to County Public Service its address of service for the purposes of this suit shall be care of Post Office Box Number 985-40400, SUNA-MIGORI.

The 4th Respondent is a male Adult of sound mind residing and working for gain in Migori who was unlawfully appointed by the 3rd

Respondent vide letter dated 30th October 2015 as the acting Clerk Migori County Assembly contrary to provisions of Section 13 and 14 of the County Governments Act. His address of service for the purposes of this suit shall be care of Post Office Box Number 985-40400 SUNA-MIGORI.

The Petitioners were by letters dated 23rd January 2017 dismissed from service of the 2nd Respondent. The letters were signed by the 4th Respondent in his capacity as Clerk to Migori County Assembly.

The petitioners aver that their dismissal was unfair and in violation of their constitutional and fundamental rights. They seek the following remedies:

- a) Declarations to issue to declare that the removal and dismissal of the 1st, 2nd and 3rd Petitioners as the Clerk to County Assembly of Migori Finance and Economic planning Officer and Accountant 1 respectively vide the 1st and 2nd Respondents' letters issued and served on 23rd February 2017 but cleverly backdated to read 23rd January 2017 are unconstitutional and therefore unlawfully on account of violations of the aforesaid provisions of the Constitution and the Status enumerated in the Petition herein.
- b) An order of Certiorari to issue to bring into this Honourable Court for purposes of being quashed the decisions of the 1st and 2nd Respondents removing and dismissing the 1st, 2nd and 3rd Petitioners as Clerk to the County Assembly of Migori, Finance and Economic Planning Officer and Accountant 1 respectively vide letters served upon the Petitioners on 23rd February 2017 but maliciously and cleverly backdated to 23rd January 2017 for being in contravention of the provisions of the constitution and of the Status aforesaid in the Petition herein.
- c) An order reinstating the 1st, 2nd and 3rd Petitioners in their respective positions of employment as the Clerk of County Assembly of Migori, Economic and Planning Officer and Accountant 1 respectively.
- d) Permanent injunction prohibiting and restraining the Respondents either by themselves, Agents, Servants and or employees from appointing and or constituting or directing appointment or constitution of any other person (s) to act as the substantive clerk to the County Assembly, Finance and Planning Officer and Accountant 1 in place of the 1st, 2nd and 3rd petitioners respectively without regard to the law.
- e) Compensation.
- f) Costs.
- g) This Honourable Court be pleased to issue Orders and Writs, as the Court may deem fit and expedient.

The petition was filed together with an application seeking the following orders-

1. This application be certified as urgent and service thereof be dispensed with in the 1st instance.
2. This Honourable Court be pleased to grant injunctive Conservatory Orders restraining the Respondents by themselves, Servants, Agents or otherwise howsoever from undertaking an Advertisement, recruitment or appointment to substantively fill the position of the Clerk to the County Assembly and the offices of Finance and Economic planning Officer and Accountant 1 in the 1st and 2nd Respondents pending hearing of this Application or further Orders by the Court.
3. This Honourable Court be pleased to grant Injunctive Conservatory Orders restraining the Respondents by themselves, Servants, Agents or otherwise howsoever from undertaking an Advertisement, recruitment or appointment to substantively fill the position of the Clerk to the County Assembly and the offices of Finance and Economic Planning Officer and Accountant 1 in the 1st and 2nd Respondents pending hearing of this Petition or further Orders of the Court.
4. That cost of this Application be provided for.

Upon hearing the application, which was filed under certificate of urgency the court ordered that status quo obtaining on 15th March 2017, be maintained pending hearing and determination of the petition, that the application consolidated and heard together with the petition and further that the parties proceed by way of written submissions to be highlighted on 10th April 2017. Parties had however not complied by that date and the case was eventually fixed for judgment on 19th October 2017 after they abandoned the initial intentions to highlight the submissions.

The Respondents opposed both the petition and the application. They filed grounds of opposition and a replying affidavit of **Tom Opere Onyango** the 4th Respondent sworn on 22nd March 2017. Both parties thereafter filed and exchanged written submissions.

Petitioners' Case

The petitioners aver that they were interdicted by letters dated 30th October and 2nd November 2016 and moved to court to challenge the validity of the interdictions vide Petition No. 4 of 2016. The petition was heard and determined on 19th January 2017 when the court dismissed the same. The petitioners have since challenged the dismissal of the petition in the Court of Appeal.

It is the petitioners' case that the Respondents attempted to dismiss them unlawfully during the pendency of Petition No. 4 of 2016 but the attempts were thwarted by the Petitioners' counsel who wrote to the Respondents cautioning them that there were orders of status quo issued by the court pending determination of the petition.

The petitioners aver that by letters dated 17th February 2017 they were invited to give written responses on the issues raised in the Auditor General's report on financial operations of Migori County Assembly and to appear before the County Public Accounts and Investments Committee on 24th February 2017. However, before that date, on 23rd February 2017 the petitioners were served with letters of summary backdated to 23rd January 2013.

The petitioners aver that their right to fair administrative action was breached by the Respondents who also infringed on their statutory protection under section 41 of the Employment Act by failing to accord them a hearing. They aver that their dismissal was punitive and vindictive. The petitioners aver that they were subjected to unfair and inhuman treatment, unfair labour practices and deprived of their legitimate expectations contrary to the provisions of Articles 2(2), 10(2)(c), 25, 27(1), 50(1) and 236 of the Constitution.

The petitioners relied on the following cases:

1) Richard Bwogo Birir Versus Narok County Government & 2 others NAKURU INDUSTRIAL COURT PETITION NO.1 OF 2014

2) Kizoto M. Lubano Versus Kemri & 8 others NAIROBI INDUSTRIAL COURT PETITION NO. 1 OF 2014

3) Mary Chemweno Kiptu Versus Kenya Pipeline Co. Ltd NAIROBI INDUSTRIAL COURT CAUSE NO. 435 OF 2013

4) Narok County Government and another Versus Richard Bwogo Birir & another COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. 74 OF 2014

Respondents' Case

In the replying affidavit and the submissions filed on behalf of the Respondents it is averred that the petitioners were in the service of the County Assembly Service Board until 23rd February 2017 when they were dismissed by letters dated 23rd January 2017, that the dismissals were justifiable and due process was followed. The Respondents aver that the petitioners were first interdicted to pave way for investigations, issued with notices to show cause which they failed to respond to following which they were dismissed and letters communicating the dismissal sent to them by the 4th Respondent in his capacity as secretary to the 2nd Respondent.

It is the Respondents' further averment that the 2nd Respondent has statutory power to exercise disciplinary control over its employees including the petitioners and that there was no malice in the dismissals.

In the written submissions, the Respondents have averred that the petitioners have not made any allegations of wrongdoing against the County Assembly of Migori, the County Public Service Board and Tom Onyango Opere the 1st, 3rd and 4th Respondents respectively. They submit that the petition as filed, does not disclose any cause of action against the said Respondents and their names should be struck off these proceedings.

It is further submitted that the Petition does not disclose with reasonable precision the rights, which the petitioners allege to have been infringed, nor the injury caused to them by the Respondents. The Respondents have cited section 107(2) of the Evidence Act, which obligates the petitioners to prove their claim.

The Respondents aver that the petitioners did not question the contents of the report that was discussed and adopted by the County Assembly.

Determination

I have considered the pleadings and submissions filed as well as the documents and authorities on record. The issues for determination are whether the dismissal of the Claimants was fair and if they are entitled to the remedies sought.

All the Petitioners were officers of the County Public Service as admitted at paragraph 23 of the Replying Affidavit of Tom Onyango Opere the 4th Respondent. County Public office, officer and Service have further been defined in section 2 of the Act as follows-

“county public office” means an office in the county public service or an office in a public body but does not include any office specifically exempted by the Constitution from the powers of the county government;

“county public officer” means any person appointed by the county government and holding or acting in any county public office whether paid, unpaid, or on contractual or permanent terms but does not include a person engaged on a part-time basis in a county public body paid at an hourly or daily rate;

“county public service” means the collectivity of all individuals performing functions within any department of the county

government or its agency, but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly;

A county public officer being an office within the public service is therefore public officer protected by Article 236 of the Constitution from arbitrary removal from office. Article 236 provides as follows:

236. A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

The 4th Respondent deposed in the Replying Affidavit that due process was followed. He however did not deny the averments by the Petitioners that the Respondents attempted to dismiss them unlawfully during the pendency of Petition No. 4 of 2016 but the attempts were thwarted by the Petitioners' counsel who wrote to the Respondents cautioning them that there were orders of status quo issued by the court pending determination of the petition. The show cause letter dated 21st June 2016 and the letter from the Petitioners' Counsel in response thereto dated 28th June 2016 are exhibited as Appendices "POW7" and "POW 8" respectively of the Petition respectively.

Further, the 4th Respondent did not deny the averments of the Petitioners that by letters dated 17th February 2017 the 4th Respondent invited them to give written responses on the issues raised in the Auditor Generals' report on financial operations of Migori County Assembly and to appear before the County Public Accounts and Investments Committee on 24th February 2017. He further did not deny that before that date, on 23rd February 2017 he served the petitioners with letters of summary backdated to 23rd January 2013.

The 4th Respondent did not explain how or when the petitioners were subjected to due process when in fact they were dismissed before the date they were to appear before the County Public Accounts and Investments Committee on 24th February 2017 to show cause.

The 4th Respondent further did not deny that the 2nd and 3rd Petitioners responded to the Show Cause letters served upon them. Maurice Chacha the 3rd Petitioner responded to the show cause letter on 27th June 2016 the Secretary County Assembly Service Board stating that his responsibilities did not include the initiating, instructing or authorising or making payments as alleged in the show cause letter as these were powers vested in the County Assembly Clerk. A copy of the letter is exhibited at page 63 of the petition.

The 1st Petitioner also responded by his Show Cause letter dated 15th February 2016 seeking to be supplied with several documents to enable him respond substantively to the same.

It is clear from the foregoing that the Petitioners were not subjected to due process. They were called upon to respond to the charges against them and given a date to appear before County Public Accounts and Investments Committee were dismissed before that date.

It is instructive that even the County Public Accounts and Investments Committee is not the forum to hear disciplinary cases against employees, as it is not the employer of the Petitioners. Even had they appeared before the Committee it would still have been mandatory for the County Assembly Service Board to give them a hearing.

For these reasons, I find that the Respondents violated the petitioners right to fair Labour practices under Article 41, right to fair administrative action under Article 47 and section 4(3) of Fair Administrative Actions Act and right to due process under Article 236. The Respondents further failed to comply with sections 41, 43 and 45(2) (4) (b) and (5) of the Employment Act.

Remedies

The Petitioners prayed for a declaration that their removal from office was unconstitutional. I hereby declare the removal of the petitioners from office unconstitutional, which I hereby do. They further prayed for orders of certiorari removing into this court and quashing of the letters of dismissal of the 1st, 2nd and 3rd petitioners. This would have the effect of reinstating the petitioners into office. Being public officers who are also subject to the Employment Act the court has to consider if there are exceptional circumstances warranting their reinstatement. No evidence was led in this respect. It is the court's opinion that in view of the changes that have taken place since the petitioners were dismissed and with the general elections of August 2017 ushering in a new county government it may not be in the public interest to reinstate the petitioners. In the circumstances, I decline to grant orders of certiorari but will instead award damages for breach of the petitioners' constitutional rights and compensation for loss of employment.

For the same reasons I cannot order reinstatement as prayed or issue an order prohibiting the Respondents from filling the positions held by the Petitioners. It is my opinion that damages would be adequate in the circumstance. In awarding the damages I have taken into account that the Claimants are also entitled to compensation but because the ultimate injury was the loss of employment, I cannot award them both damages and compensation.

I therefore award the Claimants damages as follows:

PATRICK OYUGI WAKINE.....KSHS.5,000,000/=

MAURICE THOMAS CHACHA.....KSHS.3,500,000/=

PETER OMONDI OUMA.....KSHS.4,000,000/=

The Respondents will also jointly and severally pay the Petitioners costs and the decretal sum shall attract interest at court rates from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 19TH DAY OF OCTOBER 2017

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 3RD DAY OF MAY 2018

MATHEWS N. NDUMA

JUDGE