



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 935 OF 2018

SHUKURI ALAWSO MUHAMED.....CLAIMANT

VERSUS

WAJIR COUNTY SECRETARY,

AHAMED SAHAL OMAR1ST RESPONDENT

MOHAMED ABDI MAHAMUD.....2ND RESPONDENT

RULING

Introduction

1. The application before me is the Claimants' Notice of Motion dated 11.6.2018 and it seeks the following orders:

a. THAT pending the hearing and determination of the suit herein, the respondent's, their officers and/ or agents be restrained from interfering with the claimant's employment at the County Public Service Board.

b. THAT costs of this application be provided for.

2. The application is supported by the affidavits sworn by the claimant on 11.6.2018 and 18.6.2018 but it is opposed by the Respondents through the Replying Affidavits sworn on 18.6.2018 by the first respondent on his behalf and that of the second respondent. The application was heard *inter partes* on 19.6.2018.

Applicant's case

3. Mr. Onderi Learned counsel for the applicant urged the application on behalf of the applicant by relying on the affidavit in support of the motion. He submitted that the applicant was appointed Secretary Wajir County Public Service Board (CPSB) for six year non-renewable contract starting 26.6.2013 and by dint of section 58 (1) of the County Government Act (CGA) he was a member of the CPSB for all intent and purpose. He specially urged that under section 58(5) of the CGA, a member of the CPSB can only be removed from office on the grounds set out under Article 251 (1) of the constitution, and by a vote of not less than 75% of the County Assembly.

4. Flowing from the foregoing provision of the law, Mr. Onderi submitted that, the first respondent has no power to suspend him from office by the letter dated 5.6.2018 on allegation of negligence, absenteeism, incompetence and insubordination. He further urged that the first respondent has no legal authority to appoint a member of the CPSB including his deputy to act as the Secretary to the CPSB. He also urged that the first respondent has acted in blatant breach of the constitution and the CGA by writing the letter dated 5.6.2018 suspending the applicant for 60 days and another letter dated 7.6.2018 appointing a Mr. Osman Sheikh Abdiraham, the Wajir Deputy County Secretary, as the acting Secretary to the Wajir CPSB from 7.6.2018 until the position is substantively filled.

5. He further urged that the appointment of the said acting Secretary until the position is substantively filled suggested that the applicant had been unlawfully removed from office by the first respondent. He relied on the **Mundia Njeru Gateria –v- Embu County Government & 5 others [2015] eKLR**, **Richard Bwogo Birir –v- Narok County Government & 2 others [2014] eKLR** and **Newton K. Mkabue & 2 others -v- Kakamega County Government [2014] eKLR** to urge that illegal suspension and interference with his employment as the Secretary Wajir CPSB, by the respondents by restrained pending the hearing and determination of this suit.

Respondents' case

6. Ms. Kamende Advocate led Mr. Odhiambo and Abdulahi learned counsel for the respondents in opposing the motion. She relied on the replying affidavit sworn by the first respondent to urge that the application is premised on misapprehension and misunderstanding of section 58(5) of the CGA. She referred to the letter appointing the applicant to the position of the CEO/ Secretary to the CPSB and contended that he is not and was never a member of the CPSB under section 58 of the CGA. She further contended that section 56 of the CGA provides appoints the County Secretary as a Member of the CPSB but not the applicant who is only an administrative officer of the CPSB and not a board member.

7. The counsel observed that the applicant has not denied the grounds set out in the suspension letter and urged that they are the same grounds set out by Article 251 of the constitution for the removal of member of CPSB from office. She referred to the letters marked "ASO 2" and "ASO 3" to submit that since 2015 the applicant had been warned by the County Secretary after the CPSB requested for his replacement on account of negligence of duty, recruitment of staff without authority, absence from leave, mismanagement of finances. She relied on the Public Service Commission HR Policies and Procedure Manuals 2016 to further urge that, under the delegated authority, the impugned suspension letter was lawfully issued to the applicant.

8. The counsel opposed the grant of conservatory order for the reason that the applicant has concealed material facts from the court and because he has not met the threshold for the grant of interlocutory injunction. She further urged that the applicant has come to equity with unclean hands because he has refused to hand over his office during the suspension. Finally, she contended that granting the application would effectively determine the suit prematurely before trial.

9. Mr. Odhiambo submitted on the precedents. He distinguished the facts of this case with those in *Mundia Njeru Gateria case* and *Richard Bwogo Birir case* on ground that the former dealt with the Chairperson of the CPSB while the latter dealt with a County Executive Committee member and not a CEO/ Secretary of the CPSB. He however relied on the Supreme court decision in *Mabel Muruli -v- Hon. Wycliff Ambetsa Oparanya & 3 others [2016]eKLR* to urge that Secretaries to Commissions and boards are not members of the commissions and the boards. He concluded by denying that the applicant has been constructively terminated and submitted that he was only on suspension for investigations and he his drawing all his allowances and benefits.

10. Mr. Abdulahi reiterated the submissions by Ms. Kamemnde by dismissing the applicant's alleged membership to the CPSB with full protection under Article 251 of the constitution as absurd. He further submitted that the secretary to the CPSB is a member of the Executive arm of the county government seconded to the CPSB under section 58 of the CGA and as such, he is not a member of the CPSB. He also submitted that the CPSB and its Secretary were not exempted from the principles of good governance contained in the constitution and *Mwongozo* which the applicant has breached as the Accounting officer of the Wajir CPSB.

Applicant's rejoinder

11. Mr. Onderi reiterated his earlier submission that the applicant was a member of the CPSB by dint of section 58 (1) (a) of the CGA. He observed that paragraph 2 of the appointment letter outlined his duties as the CEO/ Secretary in addition to his duties as a member of the CPSB. He reiterated that the first respondent had no authority to suspend the applicant or to appoint any one to act in his place as the Secretary to the Wajir CPSB. He maintained that the applicant was a member of the CPSB and not a mere administrative officer of the CPSB. He further distinguished this case from the *Mabel Muruli case* and urged that the secretary in the said case was not established under the CGA whose express provision has been violated by the respondents. He contended that ground 1-30 of the motion and the supporting affidavits demonstrate a prima facie case and urged that the balance of convenience favours the applicant because justice cannot tilt in favour of a person who is breaching the law.

Analysis and Determination

12. There is no dispute that the applicant is the CEO/secretary of the Wajir CPSB and that he was served with a suspension letter dated 5.6.2018 authored by the first respondent. There is also no dispute that the first respondent has by the letter dated 7.6.2018 appointed his own deputy to act as the CEO/ Secretary Wajir CPSB until the position is substantively filled. There is further no dispute that the applicant has rejected the said suspension and has impugned the respondent's authority to suspend him and further accused him of violating express provisions of the law. The main issue for determination herein is whether the applicant has met the threshold for granting interlocutory injunction.

13. The threshold for the grant of interlocutory injunction was set out by *Giela Vs Caseman Brown [1973] EA 358* where the Court held that the applicant must:

- a. establish a prima facie case with probability of success
- b. demonstrate that if the order is denied, the applicant will suffer irreparable harm.
- c. if the Court is in doubt, to decide the case on a balance of convenience.

Prima facie case

14. A prima facie case was defined in *Mrao vs First American bank of Kenya limited[2003]eKLR* as follows:

"A prima facie case in civil application includes but is not confined to "a genuine and arguable case ". It is a case which, on

the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. In this case, the applicant has demonstrated that the first respondent has purported to suspend him from work and has appointed another person to act in place until the position is substantively filled vide the letters dated 5.6.2018 and 7.6.2018 respectively. The applicant has submitted that the said decision and conduct is in breach of the express provisions of section 58 (5) of the CGA and Article 251 of the constitutions and should be restrained pending the hearing and determination of the suit. The applicant has contended that he is a member of the Wajir CPSB enjoying the protection from removal from office by section 58(5) of the CGA read with Article 251 of the constitution. He therefore urged that the purported suspension and appointment of an acting secretary to replace him was unlawful and unfair labour practice because the respondents lack the authority to remove or appoint a member of the CPSB.

16. The respondents have however dismissed the applicant as a mere administrative officer appointed by the Governor and seconded to the CPSB and it is absurd for him to equate himself with a member of the CPSB. They denied that the applicant was entitled to the same protection from removal from office by section 58 (5) of the CGA as the substantive members of the CPSB. They therefore contended that the first respondent being the Head of the County Public Service, had the authority to suspend the applicant for the misconduct cited in exercise of the delegated powers under the PSC HR policy and procedure Manuals 2016.

17. I have carefully considered the provisions of the law and the judicial precedents cited by both sides. Section 58 of the CGA provides that:

“(1) the County Public Service Board shall comprise-

- a. a chairperson nominated and appointed by the county governor with the approval of the county assembly;**
- b. not less than three and not more than five other members nominated and appointed by the county governor , with the approval of the county assembly; and**
- c. a certified public secretary of good professional standing nominated and appointed by the governor, with approval of the county, who shall be the secretary to the board.”**

10. The foregoing provision is clear that the secretary to the CPSB is a member of the Board and for that reason, the claimant is entitled to the protection of the law from disciplinary control by the respondents. I have also considered the Supreme Court decision in *Mabel Muruli case* but agree with the applicant that the facts of the said case were distinguishable from the present case because of the applicable law. In this case section 58 (1) (c) of the County Government Act provides expressly that the secretary to the CPSB is a distinct member of the Board.

19. I have also considered the advisory by the Attorney General dated 12.10. 2015 to the chairperson of the defunct Transitional Authority whereby, the secretary to the CPSB was confirmed to be a member of the board.

The advisory stated partly as follows:

“2. It is imperative to note that the construction of the members of the CPSB as outlined in section 58 thereof includes the chairperson, members and the certified public secretary who is a distinct member of the Board, but serves as the secretary of the Board. For this purpose thereof, the analysis of the CPSB secretary and the chairperson are to be construed jointly as members of the CPSB.

...

6. The County Government Act does not envision a disciplinary process over members of the CPSB other than removal of office, which must be undertaken by the county assembly that vetted the candidates’ appointment while keeping in mind the principles articulated in Art.236 of the constitution that requires due process on administrative action.”

20. As clearly provided by section 58 (5) of the CGA, the applicant can only be removed from office by a vote of 75% of the county assembly. The said provision states as follows:

5. The 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 the members of the county assembly.”**

21. In *Mundia Njeru Gateria case* Onaya J while dealing with the removal of a chairperson of CPSB held that :

“The person who is desirous that the chairperson is removed from office must satisfy the substance and the procedure by first, alleging the details of the grounds that satisfy any of those enumerated in the constitution and secondly, submitting the

appropriate petition to the county assembly for the assembly's consideration and resolution.”

22. In view of the express provisions of section 58(5) of the CGA, and the foregoing advisory from the Attorney General, I concur with the learned judge in the foregoing precedent that the first respondent herein lacks authority to remove members of the CPSB, including the applicant from office. It therefore my holding that, if either the head of county public service or members of the CPSB have just cause to warrant removal of secretary to the CPSB removed from office, they should comply with section 58 (5) of the CGA by petitioning the county assembly and seek the support of a majority vote of 75% of the county assembly. Until that is done, the law in place is blank about the possibility of suspension of the Board members.

23. Although the respondents contended that the suspension was lawful pursuant to the delegated powers under the PSC HR Policy and procedure Manual 2016 the said evidence was not availed to the court. Consequently, I find that the applicant was unlawfully suspended in breach of section 58(5) of the CGA and I proceed to hold that the applicant has established a prima facie case with likelihood of success as defined by the *Mrao Limited case*.

Irreparable harm

24. The applicant has through his counsel alluded that the suspension was constructive termination because by the letter dated 7.6.2018, the first respondent appointed another person to act as the secretary to the CPSB until the office is substantively filled. The respondents have however disputed the foregoing allegation and maintained that the applicant was only on suspension and he is drawing allowances and other benefits. In my view, the purpose of interlocutory injunction is to protect the prima facie case established by the applicant from being rendered nugatory. I have perused the letter dated 7.6.2018 and found that recruitment of another person to replace the applicant is contemplated and unless the respondents are restrained, the applicant may lose his job unlawfully before the suit is heard and determined. The letter dated 7.6.2018 partly stated as follows:

“ I am pleased to inform you that you have been appointed as the acting secretary to Wajir County Public Service Board W.e.f 7th June, 2018 until the position is substantively filled”

Balance of convenience

25. I am not in any doubt that the applicant has met the two main grounds for granting interlocutory injunction as espoused by *Giella-v-Caseman Brown & co. ltd[1973]EA 358*. Even if the foregoing was not the case, the balance of convenience would still favour the applicant because justice does not tilt in favour of a party who is in breach of the law.

Conclusion and disposition

26. In view of the fact that the applicant has established a prima facie case with probability of success and that he stands to lose his job unless the order sought is granted, leading to an irreparable harm, I proceed to allow the applicants' notice of Motion dated 11.6.2018 in terms of prayer D and E, that is to say, pending the hearing and determination of the suit herein, the respondents, their officers and or agents are hereby restrained from interfering with the claimant's employment at the Wajir County Public Service Board.

27. Costs in the cause.

28. As a parting shot, however, I wish to register my concern that the County Government of Wajir and the Board have not enjoined to this suit. In my view, the said entities are necessary parties to these proceedings because they are likely to be affected by the outcome the suit. Consequently I direct that the she be enjoined as a defendant in this suit forthwith to enable the court to effectively adjudicate over the dispute herein and avoid the risk of future application to set aside the proceedings.

Dated and Signed at Nairobi this 26th day of June, 2018

ONESMUS N. MAKAU

JUDGE

Delivered at Nairobi this 27th day of June, 2018

HELLEN WASILWA

JUDGE