



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 121 OF 2016

AHMED ADEN HIRE..... PETITIONER

- VERSUS -

NATHIF JAMA.....1ST RESPONDENT

COUNTY GOVERNMENT OF GARISSA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

JUDGMENT

The petitioner filed the petition on 28.07.2016 through Otieno Ogola & Company Advocates. The petition was titled in the matter of the enforcement of the Bill of Rights under Article 22(1) of the Constitution of Kenya, 2010; in the matter of the alleged contravention of Articles 2, 10, 20, 27, 28, 41, 43, 47, 50, 165, 200, 236, and 258 of the Constitution; in the matter of section 31 of the County Governments Act; in the matter of the County Government of Garissa; and in the matter of the Executive Committee Member for Environment, Energy, Natural Resources, Wildlife Management, and Tourism of the County Government of Garissa. The petitioner prayed for a:

- a) Declaration order to be issued to the effect that the petitioner is entitled to protection under the provisions of the Constitution.
- b) Declaratory order be issued to declare that the removal, termination and dismissal of the petitioner as the Executive Committee Member for Environment, Energy, Natural Resources, Wildlife Management, and Tourism of the County Government of Garissa vide the 1st respondent's letter dated 25.07.2016 is unconstitutional and hence unlawful on account of violation of the Constitution and the law.
- c) Declaration that the action of the 1st respondent herein constitutes and amounts to unfair labour practices, mistreatment of the petitioner and gross abuse of office contrary to Articles 41(1), 47(2), 73, and 236 of the Constitution.
- d) Declaratory order be issued to declare that the petitioner herein remains the lawful and legitimate holder of the position of the Executive Committee Member for Environment, Energy, Natural Resources, Wildlife Management, and Tourism of the County Government of Garissa.
- e) Permanent injunction to issue restraining the 1st respondent from terminating the services of the petitioner as the Executive Committee Member in a manner that violates the fundamental rights and freedoms of the Petitioner.
- f) In the alternative and without prejudice, The Honourable Court is pleased to award compensation to or in favour of the petitioner on account of violation, breach, and infringement of the petitioner's fundamental rights and freedoms.
- g) Costs of the petition are borne by the respondents.
- h) The Honourable Court is pleased to issue such orders and writs as the Court may deem fit or expedient.

The petition was supported with the petitioner's affidavit attached on the petition.

The respondents opposed the petition by filing a response to petition and the replying affidavit of Abdi M. Ali (the County Secretary at all material time) sworn on 06.06.2018. The respondents were represented by Musyoki Mogaka & Company Advocates. Parties filed their

respective final submissions.

The petitioner was appointed by the 1st respondent (being the Governor for the County of Garissa at all material time) to serve as a County Executive Member for the Garissa County Executive Committee (CEC). The petitioner served initially as the CEC member for Finance, Revenue, Economic Planning and County Affairs effective 26.01.2016. By the letter dated 08.07.2016 the 1st respondent reassigned the petitioner from that docket to that of Environment, Energy, Natural Resources, Wildlife Management, and Tourism. The petitioner's case is that he was taken ill immediately he was reassigned and was admitted at the Nairobi South Hospital effective 23.07.2016. It is further his case that he was surprised when he received the letter of termination of services dated 25.07.2016. The termination letter dated 25.07.2016 addressed to the petitioner by the 1st respondent stated as follows:

“SUB: TERMINATION OF YOUR SERVICES”

This has reference to your letter dated 20th July 2016 in response to my previous letters to you. After careful consideration, I find your explanations unacceptable in view of the following:

a) Regarding the disbursement of June 2013 recurrent funds, your failure to act on the issues discussed and agreed upon at the meeting of 29th June 2016 is unacceptable as this has caused huge embarrassment to the government in terms of settling overdue obligations and/or attending to crucial county operations. Similarly, your response as carried in your letter of 20th July is objectionable as my letter of 5th July was also sent to you via e-mail to enable you early access. Nevertheless, neither have I approved nor am I aware of any official duty that took you out of your official station of work during the said period.

b) Your inability to make a timely response to my letter of 8th July 2013 represents a gross failure of duty on your part particularly in view of the importance and urgency of the matter. Similarly, your explanation that you did not respond because you were transferred to another department and information was either readily available to you or could easily be availed to you if requested. In any case, it is a fact that up to as at Friday 22nd July 2016 you have not officially handed over your duties as CEC finance to the incoming executive who, as per best practice, cannot take over the office without proper handover.

In addition to the foregoing matters, it is regrettable that you have been out of your station of work for over the last 2 weeks and have not assumed your new role as CEC Environment and Energy. Of course, neither have I granted any approval to your being out of office, nor am I aware of any circumstances leading to such lengthy absenteeism from your station of work.

The issues raised above represent gross misconduct and explicit violations by you of the requirements of official (government) duty as per law. In consequence thereof, continuation of your employment with the County Government as a member of the County Executive is no longer tenable. This letter, therefore, signifies to you that in exercise of the powers vested upon me by section 31 and 40 of the County Government Act 2012, I hereby terminate your services as County Executive with effect from today, Monday 25th July, 2016.

All emoluments due to you shall be paid to you as appropriate. Please liaise with the Deputy Governor for proper handover of all government business and/or property.

Regards

Signed

Nathif J. Adam

Governor”

The respondent's case is that by the letter dated 05.07.2016 the 1st respondent wrote to the petitioner enquiring into disbursements of the June 2016 recurrent allocation from the 2nd respondent's Treasury. By a further letter of 08.07.2016 the 1st respondent wrote to the petitioner enquiring about payments of Kshs. 20, 840, 000.00 the petitioner had made to Aran Consulting Limited for alleged consultancy services – and the petitioner was to reply by 13.07.2016. The reassignment of department took place on 08.07.2016 and the changes were immediate. The petitioner was admitted in hospital on 23.07.2016 long after the reassignment of duty on 08.07.2016. Thus the petitioner failed to explain his absence from duty from 08.07.2016 to 23.07.2016.

On 19.07.2016 the 1st respondent wrote to the petitioner requiring the petitioner to show cause as to why appropriate disciplinary action should not be taken against the petitioner – on account of unexplained disbursements of the June 2016 recurrent expenditure and payment for the consultancy services; being as per 1st respondent's earlier letters in that regard but which the petitioner had failed to reply. The petitioner was to show cause in writing by Wednesday, 20.07.2016.

The petitioner replied by the letter dated 20.07.2016 to the following effect:

a) The letter of 05.07.2016 was received on 08.07.2016.

b) The letter of 05.07.2016 came to the petitioner's attention on 08.07.2016 as it arrived when he was out on official assignments.

c) On 08.07.2016 he was in the process of replying the letters of 05.07.2016 and 08.07.2016 but he was reassigned and so he did not reply them as he took it that they were addressed in his official capacity as CEC Finance and following reassignment the duty to reply had lapsed. It was his view that the incoming CEC for Finance would deal with all pending matters.

The respondent's case was that the petitioner was terminated from service by the letter dated 25.07.2016 and on 26.07.2016 the 1st respondent wrote correcting typographical errors in the termination letter thus:

a) Regarding the disbursement of recurrent funds, the date therein should read “**of June 2016**” and not “**of June 2013**”

b) The response required was to my letter of “**8th July 2016**” and not “**8th July 2013**.”

Thus, the respondent denied that the petitioner's termination had violated Articles 10(2), 27, 28, 41(1), 43, 47(2), 50(1), 73 and 236 of the Constitution as was alleged for the petitioner.

The Court has analysed the facts of the case and the evidence and makes the following findings:

a) The petitioner has not explained his absence from duty from 08.07.2016 to 23.07.2016.

b) The letters of 05.07.2016 and 08.07.2016 were addressed to the CEC Finance, Revenue, Economic Planning and County Affairs. The petitioner's case is that the letters were addressed to the office and therefore the official holder was required to reply is found valid. However, the Court finds that his duty to reply did not lapse upon reassignment on 08.07.2016 because the petitioner has not established that he had officially handed over to the new CEC following the immediate transfer of 08.07.2016.

c) The Court further finds that the grounds for termination in the letter of termination were therefore valid. In any event, the petitioner was accorded due process by reason of the show-cause notice but he decided to circumvent the substantial issues on account of the transfer or reassignment of 08.07.2016. The Court finds that in any event the transfer or reassignment did not render the show-cause letters and the need to reply the allegations or concerns stale. In such circumstances, the Court returns that the termination by the 1st respondent was reasonable and justified. The court finds that the petitioner was given the reason for the termination. The court finds that the termination as an administrative decision communicated the written reasons as the justification of the termination as envisaged in Article 47(2) of the Constitution. Section 31(a) of the County Government Act, 2012 provides that the governor may, despite section 40 of the Act, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so. The Court returns that in the circumstances of the present case the 1st respondent has established that it was appropriate or necessary to dismiss the petitioner and the petitioner's claims and allegations for violation of the cited constitutional provisions was unfounded.

d) The court upholds and follows the holding by the Court of Appeal in **County Government of Nyeri and Another –Versus- Cecilia Wangechi Ndung'u [2015]eKLR** that in a dismissal under section 31(a) of the Act appropriateness or necessity is not arbitrariness or whimsical but that appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. The Court further returns that the 1st respondent having provided the reasons and showed that they were valid as at the time of the dismissal, the petitioner's termination is found not to have been unfair or unlawful or in violation of the constitutional provisions as was alleged for the petitioner.

e) As submitted for the petitioner the Court follows the holding in **Shadrack Wang'ombe Mubea –Versus- County Government of Nyeri & Another [2015]eKLR** thus, “**Needless to state, provisions in Article 41 of the Constitution conferring the fundamental right to fair labour practices are universal as they apply to all employees including public and state officers as employees of the people and the Article applies to public and state officers subject only to such qualifications or limitations that may be enacted as provided for in Articles 24 and 25 of the Constitution. To the extent that the Employment Act, 2007 implements the right to fair labour practices as enshrined in Article 41 of the Constitution, in absence of an express relevant Constitutional or legislative provision or qualification, in the opinion of this court, there would be no justification to bar public and state officers from enjoying the minimum terms and conditions of employment as provided for in the Act.**” In the present case the Court returns that the 1st respondent accorded the petitioner the due process but the petitioner failed to take up the opportunity to exculpate himself hence the imposed termination.

f) As submitted for the respondent, the Court follows its opinion in **Patrisio Njeru Njiru –Versus- Embu County Government & Another [2016] eKLR**, thus, “**The 1st issue for determination is whether the 2nd respondent was entitled to remove the petitioner from the office (by way of initiating disciplinary process) of the county executive member under section 31(1) (a) of the County Government Act, 2012, being an independent process from that under section 40 of the Act which involves the county Assembly in the disciplinary process. The court finds that the procedure under section 31 (1) (a) is initiated by the governor and concluded by the governor and is independent from a removal under section 40 of the Act. For that finding the court follows its holding in Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR that the removal under the two sections is independent and separable. Thus, the court finds that the 2nd respondent acted within the law to issue the show-cause notice as was done for disciplinary action to be initiated against the petitioner on account of alleged poor performance or misconduct as was envisaged in Article 236 of the Constitution, section 31 (1) (a) of the County Governments Act, 2012 and section 41 of the Employment Act, 2007 prescribing notice and hearing in event of such disciplinary action. The court has found that the 2nd respondent, notwithstanding the provisions of section 40 of the County Governments Act, 2012, was entitled to dismiss the petitioner if the 2nd respondent considered it appropriate or necessary to do so per section 31(1) (a) of the County Governments Act, 2012. The court's opinion is that if a member of the county executive is dissatisfied with the disciplinary procedure as initiated, then the court would intervene only if the procedure as invoked is shown to be in contravention of the Constitution, statute or other law. If at the end of the process the punishment of removal is imposed by the governor under section 31(1) (a) of the County Government Act, 2012, it could be that the**

member may question the removal on account that the reason as advanced towards removal was not genuine or valid as envisaged in section 43 and of the Employment Act, 2007. Such is not the case in the present case and the court returns that the petitioner is not entitled as prayed for.”

g) Finally, In Narok County Government and Another –Versus- Richard Bwogo Birir and Another [2015]eKLR, the Court of Appeal while reflecting upon its earlier decision in County Government of Nyeri and Another –Versus- Cecilia Wangechi Ndung'u [2015]eKLR , held that the pleasure doctrine is not applicable in Kenya under the current Constitution. The Court of Appeal then proceeded to state that in a dismissal under section 31(a) of the County Governments Act, 2012, the use of the word “**consider**” connoted that the governor in exercising his power under that section should take into account a ground or allegation against a member of the county executive committee and any explanation by the said member before making a decision. The Court of Appeal further stated that the use of the words “**appropriate**” and “**necessary**” connote that the decision to dismiss ought to be based on reasonable grounds. The Court of Appeal then stated, “**46. The above learning leads us to the finding that the Governor’s contention that his power to dismiss can be exercised without any reasons being advanced has no basis in law. It is the reasons for dismissal that determine whether the power was exercised reasonably, and the reasons ought to be valid and compelling.**” The Court returns that in the present case the 1st respondent complied and acted accordingly by giving the reasons and according the petitioner due process so that the present petition will fail.

h) The Court considers that the proceedings have progressively contributed to the law towards proper implementation of the Constitution of Kenya 2010 in the area of devolved system of governance and each party shall bear own costs of the petition.

In conclusion, the petition filed herein for the petitioner on 28.07.2016 is hereby dismissed with orders that each party shall bear own costs of the petition.

Signed, dated and delivered in court at Nairobi this Friday 22nd June, 2018.

BYRAM ONGAYA

JUDGE