



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO. 342 OF 2014

IN THE MATTER OF ARTICLES 1, 2, 3, 19, 20, 21, 22, 23, 24, 47 OF CONSTITUTION OF KENYA

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

WALID KHALID.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF MOMBASA.....1ST RESPONDENT

THE SPEAKER COUNTY

ASSEMBLY OF MOMBASA 2ND RESPONDENT

THE GOVERNMENT COUNTY

GOVERNMENT OF MOMBASA.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner was a County Executive Member (CEM) Finance and Economic Planning until 30.7.2014 when he was dismissed by the Interested Party on the basis of a resolution passed by the first Respondent under section 40 of the County Government Act (CGA) 2012. The Petitioner was aggrieved and filed this petition on 25.7.2014 and amended the same on 30.6.2017. The petition seeks the following order:

a. A declaration to issue that the 1st Respondent's decision to recommend the impeachment and removal from office of the Petitioner is unconstitutional and therefore unlawful on account of violation of Section 40 of the County Government Act 2012 as read together with Article 47 and 236 of the Constitution and Section 41 of the Employment Act.

b. That an order of certiorari does issue to bring into this Honourable Court for purposes of quashing the 1st Respondent's decision purporting to impeach the Petitioner

c. Orders of prohibition do issue to prohibit the Respondents by themselves, servants or agents or whomsoever from recommending the impeachment of the Petitioner.

d. Costs of the Petition be borne by the Respondent.

- e. Damages for violation of the Petitioner's fundamental rights under the law.
- f. Loss of income and or salary as a result of illegal impeachment.
- g. Any other orders that the court shall deem just.

2. The petition is supported by the Affidavit sworn by the petitioner on 30.8.2017. The summary of the petitioner's case is that the procedure followed to dismiss him from office was not only unlawful and unconstitutional, but it was also in contempt of court because the 3rd Respondent and interested party had been served with the court order restraining him from dismissing the petitioner on the basis of the said resolution by the first respondent.

3. The petition is opposed by the Respondents and the Interested Parties vide their respective grounds of oppositions filed on 6.8.2014 and 29.8.2014. The gist of the defence case is that the petition is a generalized, frivolous and vexation claim which is seeking untenable and ambiguous orders.

4. The Petition delayed for 3 years due to interlocutory matters which were resolved and on 23.10.2017, the parties agreed to dispose of the petition by written submission. The claimant filed his submissions on 24.11.2017, the 1st & 2nd Respondent filed on 7.12.2017 and the Interested Parties filed on 11.12.2017.

Petitioner's Case

5. The Petitioner's case is that he was nominated by the third respondent as the CEM Finance and Economic Planning and after vetting by the first respondent, he was appointed by the letter dated 30.5.2013. In July 2014 he was accused of incompetence, abuse of office and violation of the constitution and other provisions of the law. As a result a motion for his removal from office was tabled before the first respondent pursuant to section 40(2) and (3) of the C.G Act and a select committee of the Assembly was appointed to investigate the alleged misconduct. After the investigations and giving the petitioner a chance to defend himself, the committee found that all the charges against him were unsubstantiated.

6. According to the petitioner, under section 40(5) (e) of the C.G. Act, no further action could be taken against him by the respondents after the select committee returned a verdict that the charges were not substantiated. He therefore urged that the first and second respondents violated section 40(5) of the C.G Act by proceeding with the impeachment motion on 24.7.2014 in total disregard of the report by the select committee. The petitioner further urged that the action by the first and second Respondent violated his right to fair Administrative action as enshrined under Article 41, 43 and 47 of the Constitution because he had no chance to defend himself before the Assembly.

7. The petitioner was aggrieved and brought this Petition and a Notice of Motion and he obtained Court orders on 28.7.2018 to stop the implementation of the same but again, in disobedience of the Court orders, the Interested Party dismissed him by the letter dated 30.7.2014 citing the resolution by the first respondent.

8. The petitioners relied on **Richard Burgo Biriri –v- Narok County Government & 2 others (2014) eKLR, Kenya Human Rights Commission –V- Non Governmental Organisations coordination Board [2016] eKLR, and Government of Nyeri & another –V- Cecilia Wangechi Ndungu [2015] eKLR** to fortify his contention that his dismissal was done in violation his constitutional right to fair administrative action.

9. Flowing from the foregoing contentions, the petition prayed for damages to remedy the alleged violations of the constitution and the statute law. He urged the court to award him Kshs.10,000,000 for that item plus a further award for the loss salary for the remainder of his contract term. He relied on **Beatrice Achieng Osir –V- Board of Trustee Teleposta Pension Scheme** where the court awarded Kshs.9,573,624 for loss of future earning due to unfair dismissal. He also prayed for costs of the suit.

Respondent's Case

10. The first respondent admits that on 24.7.2014 she passed a resolution for impeachment of the petitioner and the second respondent dutifully informed the Governor of the 3rd respondent about the said resolution. The respondents further admit that the petitioner was finally removed from office vide the letter dated 30.7.2014. The respondents contended that the said removal from office never violated the petitioner's fundamental right to fair administrative action as enshrined under Article 47 of the Constitution. They urged that the petitioner has not demonstrated the breach of the alleged fundamental rights to the required threshold. They relied on **Bernard Murage Vs Fineserve Africa Limited & 3 others (2015)eKLR** to support the foregoing submissions.

11. The respondents submitted that the petitioner was accused of incompetence, abuse of office and gross violation of the constitution and other laws, warrant removal of an CEM from office under section 40(1) of the C.G Act. They further submitted that the petitioner was accorded his right to fair administrative action as provided by Article 47 of the constitution when a select committee of the Assembly was constituted to investigate the allegations made against him and gave him a chance to defend himself as required by section 40 of the C.G Act.

12. The respondents denied the allegation by the petitioner that the select committee found that all the allegations made against the petitioner were unsubstantiated. They further denied that the matter was reopened in his absence after the acquittal by the select committee leading to an impeachment without compliance with section 41 of the Employment Act. According to the respondents, the petitioner had no right to participate in plenary session of the Assembly. They further submitted that the provisions of the Employment Act were not applicable to state officer. They relied on the Court of Appeal decision in **County Government of Nyeri Vs Cecilia Wangechi Ndung'u [2015] eKLR** to fortify the foregoing submission. They therefore maintained that the impeachment of the petition was fair and in compliance with section 40 of the CG Act and Article 47 of the constitution.

13. The respondent concluded by urging that the petitioner is not deserving the orders sought because the respondent never acted in breach of the procedure laid down by the law and they never acted *ultra vires* their statutory powers under the C.G Act. They further urged that the claim for damages and loss of income have not been supported by evidence or public policy. They relied on the Court of Appeal's decisions in *Commissioner of Lands Vs Kunste Hotel Ltd [1997] eKLR* and *Gitabu Imanyara & 2 others Vs Attorney General [2016] eKLR* to fortify the foregoing submissions.

Interested Party's Case

14. The interested Party submitted that the removal of the petitioner from office was not initiated by himself but by the first Respondent under section 40(2) of the C.G Act. He further submitted that the removal was on account of alleged accusations which were investigated as provided for under section 40 of the C.G Act. He urged that the process leading to the impeachment of the petitioner was in accordance with the law and it cannot be subjected to judicial review.

15. In conclusion, the Interested Party submitted that the report of the select committee of the Assembly produced as an exhibit by the petitioner was not complete. He contended that the omitted portion of the report contains the resolution by the Assembly and the recommendation for removal of the petitioner. He also contended that the petitioner resigned from office but failed to annex that letter as an exhibit to the petition. He accused the petitioner of material non disclosure by withholding the said resignation letter in order to get favourable judgment.

Analysis and Determination

16. It is common knowledge that the petitioner was state officer serving the third Respondent as CEM Finance and Economic Planning. It is also without dispute that he was accused of incompetence abuse of office and violations to the constitution and other laws, he was impeached by a resolution of the first respondent and later removed from office by the Interested Party vide the letter dated 30.7.2014. The issues for determination are:

- a. Whether the process of removing the Petitioner from office was in breach of section 40 of the C.G Act.
- b. Whether the said removal was a violation of his fundamental right to fair Administrative Action enshrined under Article 47 of the Constitution.
- c. Whether the petitioner is entitled to the reliefs sought.

Breach of Section 40 of the CG Act

17. Section 40(2) of the C.G Act provides that a member of the County Assembly, supported by at least one third of all the members of the County Assembly, may propose a motion requiring the Governor to dismiss a County Executive Committee Member on any of the grounds set out under subsection (1). The said grounds includes incompetence; abuse of office; gross misconduct; failure to attend three consecutive meetings of the county executive committee without reasonable excuse or written authority from the Governor; physical or mental incapacity which renders the executive committee member incapable of performing the duties of that office; or gross violation of the constitution or any other law. Subsection (3) provides that if the motion is supported by at least one third of the County Assembly, the Assembly shall appoint a select committee comprising five of its members to investigate the matter and report back to the County Assembly within ten days whether or not it finds the allegations against the County Executive member to be substantiated. Subsection (4) gives the County Executive Committee Member the right to appear and be represented before the select committee during the investigations.

18. Subsection (5) and (6) provides as follows:

“(5) If the selection committee reports that it finds the allegations:-

- a. Unsubstantiated, no further proceedings shall be taken; or
- b. Substantiated, the County Assembly shall vote whether to approve the resolution requiring the County Assembly to be dismissed.

(6) *If a resolution under subsection (5)(b) is supported by a majority of the members of the County Assembly:-*

- a. The speaker of the County Assembly shall promptly deliver the resolution to the Governor; and
- b. The Governor shall dismiss the County Executive Member.”

19. In this case, the petitioner was accused of incompetence, Abuse of office and violation of the constitution and other laws. After investigations the select committee prepared its report as per the draft annexed to the petition as exhibit 'WK 2'. The respondents' counsel have submitted from the bar that the said report is incomplete and lacking the resolution by the County Assembly. However, I find that without any other report to the contrary, the report produced herein by the petitioner is *prima facie* a true record of the proceedings by select committee and its findings.

20. After careful perusal of the report it, is clear that the select committee interrogated the accuser of the petitioner among other witnesses and invited the petitioner to defend himself on each and every allegation made against him. It is also clear that the select committee

considered both oral and documentary evidence adduced and analysed all the issues raised and the legal provisions before making its decision. Finally, it is clear that the committee reached a verdict that all the allegations made against the claimant were unsubstantiated and reported as such to the County Assembly on 24.7.2014.

21. Under Section 40(5) (a) of the CG Act, the said verdict should have ended any further proceedings against the petitioner;

Subsection (5) and (6) provides as follows:

“(5) If the selection committee reports that it finds the allegations:-

c. Unsubstantiated, no further proceedings shall be taken; or

d. Substantiated, the County Assembly shall vote whether to approve the resolution requiring the County Assembly to be dismissed.

6. If a resolution under subsection (5)(b) is supported by a majority of the members of the County Assembly:-

a. The speaker of the County Assembly shall promptly deliver the resolution to the Governor; and

b. The Governor shall dismiss the County Executive Member.”

22. In view of the express and mandatory provision of section 40(5) (a) of the C.G Act, it is obvious, and I must hold that it was unlawful for County Assembly to entertain further proceedings against the petitioner after the findings by the select committee that the allegations levelled against him were unsubstantiated. The said provision of the law is unambiguous and it is couched in mandatory terms that once the select committee acquits the accused County Executive Committee member, the impeachment proceedings against him must be stopped. Consequently, the answer to the first question is in the *officio mature*.

Violation to the Fundamental Right to fair Administrative Action

23. The petitioner has contended that his right to fair administrative action as enshrined under Article 47 of the Constitution was violated by the reopening of the proceeding at the County Assembly Plenary after the matter had been brought to a close under section 40(5) of C.G Act by the finding of the select committee that all the allegations made against him had not been substantiated. In his view, he was not offered a chance to defend himself in the further proceedings. The Respondents have however denied that the petitioner’s right to fair administrative action had been violated. In their view, the petitioner being a none member of the County Assembly, had no right to participate in proceedings at the Assembly’s plenary.

24. I have carefully considered the materials presented to me including the rival submissions by counsel. In my view, the further proceedings against the petitioners after the select committee found all the allegations unsubstantiated amounted to reopening of an already closed case. Under section 40(5) (a) of the C.G Act, the proceedings against the petitioner ended by an operation of the law after the select committee of the County Assembly reported back to the Assembly that all the allegations against the petitioner were unsubstantiated. The corollary to the foregoing is that the County Assembly acted *ultra vires* and condemned the petitioner through proceedings which under the law, he had no opportunity to participate in order to defend himself.

The said removal also went against Article 23 (b) of the constitution, which protects public officer from dismissal or removal from office without due process of the law.

25. It is trite law that the power to remove a public officer or state officer for that matter, is a Siamese twin with duty to follow due process and the two are conjoined at the hips. Under the constitution every person in authority who for any lawful and justifiable reason contemplates removing a public officer or state officer from office is duty bound to follow the tenets of a fair process. In this case, the process is expressly provided by section 40 of the CG Act but the County Assembly disregarded it, and acting *ultra vires* proceeded to impeach the petitioner against the finding of the select committee. Such proceeding amounted to violation of the petitioner’s right to fair administrative action as provided under Article 47 of the constitution which states as follows:

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or Fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for action.”

26. In this case, in addition to the unfair procedure followed to impeach the petitioner, the reasons for which he was removed from officer were never communicated to him in writing by the second respondent and the Governor. In deed the dismissal letter dated 30.7.2014 produced as an exhibit never stated reasons for which the petitioner was dismissed.

27. Finally, it is obvious from the record that the dismissal of the petitioner by the Governor was done after this Court’s order dated 28.7.2014 were served upon the respondents and the Governor. The said order restrained the 1st and 2nd Respondent from presenting the recommendation of the impeachment of the petitioner to the Governor. There is however, no evidence that the said order was made and served before the resolutions for impeached of the petitioner was presented to the Governor. There is however, a subsequent conservatory orders dated 1.8.2014 which stayed the dismissal letter. The said conservatory order is still in force albeit for moot purposes because the life of the County Government then in office lapsed in August 2017 after the General Election and constitution of a new Government

Reliefs

Declaration

28. In view of the matters aforesaid, I grant prayer (a) of the petition that is, a declaration that the first respondent's recommendation for the impeachment and removal from office of the petitioner was unconstitutional and unlawful on account of violation of section 40 of the C.G Act as read with Article 47 and 236 of the Constitution. The failure to follow a mandatory statutory procedure for the removal of a County Executive Member who is a public officer under the constitution, was an affront to Article 236(b) constitution which protects public officers from dismissal, or removal from office without following due process of the law. Article 200 of the constitution instructed the Parliament to enact legislations to provide for all matters necessary or convenient to give effect to chapter 11 of the constitution which provides for Devolved Government. The parliament complied in 2012 by passing the County Government Act with section 40 thereof, providing for a mandatory procedure for impeachment of a County Executive Committee Member. It is that mandatory procedure that was breached herein to the detriment of the petitioner.

Certiorari

29. The County Assembly proceeding for removal of the petitioner conducted even after the select committee reported that the allegation against the petitioner were unsubstantiated were done outside the mandate provided under section 40 of the C.G. Act. As I have already found herein above, the Assembly acted *ultra vires* and that brought the said proceedings within the supervisory powers of the Court under Article 165(5) of the constitution read with Article 23 of the Constitution and Section 12 of the ELRC Act. By dint of the foregoing provisions, the Court has the power to quash, by order of certiorari, any proceedings by a public body exercising judicial or quasi-judicial powers, which are done in excess of the powers donated to it by a statute or the constitution as in this case. Consequently, I grant an order of certiorari to bring into this Court for purposes of quashing the proceedings and recommendation by first Respondent for impeachment of the petitioner. However due to the lapse of time from the date of his impeachment to date, this order will not restore him to his office as County Executive Committee Member. He will have to content with compensation by way of damages.

Damages

30. Under Article 23(3) (e) of the Constitution and section 12 of the ELRC Act, this Court has the jurisdiction to award compensation to the petitioner for the said violation. The petitioner has prayed for Kshs.10,000,000 and relied on *Beatrice Achieng Osir –vs- Board of Trustees Teleposta Pension Scheme* where this Court awarded Kshs.9,573,624 for unlawful and unfair dismissal from employment. The petitioner is awarded Kshs.8,000,000 for the unlawful and unconstitutional removal from office on 30.7.2014. The said award is made in consideration of his rank in the County Government which was protected from unfair removal by Article 236 of the Constitution and Section 40 of the C. G. Act.

31. I further award him Kshs.4,000,000 for loss of income and for salary due to the unjustified and premature removal from office of the petitioner. It is obvious that the abrupt removal occasioned loss of salary to him probably higher than the said award.

Disposition

32. For the reasons stated herein above I enter judgment for the petitioner declaring his impeachment and removal from office as unlawful and unconstitutional and award him Kshs.12,000,000 plus costs and interest from the date hereof till payment in full. The said award shall be subjected to statutory deductions.

Signed and dated and at Nairobi this 15th day of May, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of July, 2018.

JAMES RIKA

JUDGE