



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 28 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLE 3 AND 258 OF THE CONSTITUTION AND

IN THE MATTER OF ARTICLES OF AN ALLEGED CONTRAVENTION OF

ARTICLES 41(1), (2), (4) AND (5), 232(1)(d), (e), (g) AND (i), 235(1) AND

236 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT 2012

(SECTIONS 57, 59, 60, 61, 62, 63, 64, 65, 66,

69, 70, 71, 72, 74, 75 AND 76)

AND

IN THE MATTER OF EMPLOYMENT ACT

AND

IN THE MATTER OF RULES 3, 4, 10 AND 23 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER

VERSUS

BUSIA COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

BUSIA COUNTY ASSEMBLY PUBLIC SERVICE BOARD....2ND RESPONDENT

BUSIA COUNTY GOVERNMENT.....3RD RESPONDENT

AND

1. VINCENT OCHIENG

2. EDWIN OGELO

3. MACDONALD OKUMU

4. SARAH NABWIRE

5. ROSE MUSEBE

6. ELIZABETH MULAMBA

7. CLEOPHAS WAMALWA

8. BRENDA OKUMU.....INTERESTED PARTIES

JUDGMENT

The petitioner herein, the Kenya County Government Workers Union is a trade union registered in Kenya under the Labour Relations Act to represent employees of County Governments.

The 1st respondent, the Busia County Public Service Board is established under the County Government Act with the mandate of establishing offices within the county government and appointing persons to those offices. The 1st respondent also has disciplinary and supervisory control over the staff appointed to the established posts.

The 2nd respondent, the Busia County Assembly Service Board is likewise established under the County Government Act with the mandate to recruit and supervise staff for the County Assembly.

The 3rd respondent is the Busia County Government established under the provisions of Article 176 of the constitution.

The Interested Parties are the employees of the 3rd respondent on whose behalf this petition has been filed by the petitioner, having been appointed by the 2nd respondent into various positions within the County Assembly Service.

Background

From the pleadings by the parties, the genesis of this dispute is the original recruitment of staff by the County Assembly Service Board in 2013 when it recruited a total of 159 employees and deployed them to the various departments within the County Assembly Service.

In April 2014 the Commission of Revenue Allocation raised concern over expenditure by the county governments and made recommendations on budget ceilings for County Assemblies and County Executive. For the 2nd respondent the recruitment expenditure was capped at Kshs.633,726,033.00. The Commission on Revenue Allocation further recommended a staffing level of 88 staff.

Following a staff rationalisation exercise the Interested Parties were by letters dated 19th October 2016 redeployed to various departments within the County Public Service on secondment.

Vincent Ochieng, 1st Interested Party and Edwin Ogello, the 2nd Interested Party were seconded to the Department of Lands, Housing and Urban Development; the 3rd Interested Party, Macdonald Okumu was seconded to the Department of Water and Environment together with Cleophas Lumbasi Wamalwa, the 7th Interested Party; Sarah Nabwire 4th Interested Party, Rose Musebe, 5th Interested Party and Brenda Okumu, 8th Interested Party were seconded to the Department of Youth, Sports, Culture, Tourism and Social Services.

The 6th Interested Party, Elizabeth Mulamba was however suspended from duty by letter dated 31st March 2017 on allegations of gross misconduct. Her case is therefore different from the other Interested Parties and will be dealt with separately.

It is the averment of the petitioner that the Interested Parties reported to the various departments as directed in their letters of secondment but were returned to the 2nd respondent. Upon reporting back to the 2nd respondent they were denied access to their previous workstations on grounds that they had been removed from the payroll of the County Assembly and put on the payroll of the 3rd respondent. This situation caused apprehension to the Interested Parties who feared that their services may be unprocedurally terminated. It is in the light of the foregoing that they filed this petition through the petitioner.

In the petition they seek the following reliefs –

- (a) A declaration that the actions of the respondents are discriminatory full of mistakes and amounted to unfair labour practices and therefore violated the provisions of the constitution, the County Government Act, the Employment Act and the rules of natural justice hence null and void.

(b) A declaration that the actions of the respondents and or its predecessor amounts to unfair administrative action and therefore against the letter and spirit of the constitution hence null and void.

(c) An order compelling the respondents to confirm which of them is to take full responsibility of salaries and allowances to the Interested Parties.

(d) An order compelling the County Assembly of Busia to continue paying salaries and allowances to the Interested Parties as the various arms of Busia County Government decide on a transparent mode of deployment.

(e) Costs of this petition be borne by the respondents jointly and severally.

(f) Interests on (e) above.

Together with the petition, the petitioner filed a motion seeking the following conservatory orders –

1. That the application be certified urgent and be heard ex-parte at the first instance.
2. That pending the hearing and determination of the application a conservatory order in the nature of prohibition be issued prohibiting the respondents from interfering with the Interested Parties' employment with the 3rd respondent herein in violation of the Interested Parties' rights to employment under the law and the constitution.
3. That pending the hearing and determination of the application a mandatory injunction do issue by way of conserving the Interested Parties' rights to employment without due process of the law and the constitution.
4. That pending the hearing and determination of the petition a conservatory order in the nature of prohibition be issued prohibiting the respondents from interfering with the Interested Parties' employment with the 3rd respondent herein in violation of the Interested Parties' rights to employment under the law and the constitution.
5. That pending the hearing and determination of the petition and for the fair and just determination of the petition, an order be issued compelling the respondents to sort out between themselves the posting and placement of the Interested Parties at the place of work and pay all their due salaries and allowances as per their terms of employment.
6. The court be pleased to grant any other order that it may deem fit to grant.
7. That the costs of the application be provided for.

After hearing the counsel for the petitioner ex-parte I certified the application urgent and issued a temporary order prohibiting the 3rd respondent from interfering with the employment of the Interested Parties in violation of their employment rights under the law and constitution pending the hearing and determination of the petition.

All the respondents oppose both the petition and application. The 1st and 3rd respondents responded through a joint replying affidavit of NICODEMUS ONYANGO MULAKU, the County Secretary of Busia County who deposes that this petition and petition no. 42 of 2017 both concern the constitutionality of the staff rationalisation process, that the petition is hopelessly faulty, frivolous, baseless and malicious, that it is an abuse of court process, that it is based on falsehoods and non-disclosure of material facts. It is deponed that the issues raised in the petition had not been raised with the 1st and 3rd respondents.

MULAKU deposes that the secondment was voluntary and the Interested Parties chose the departments to which they were seconded. He deposes that there are formal structures of complaint which the petitioner had not availed itself of. He denies that the 1st and 3rd respondents are guilty of the allegations by the petitioner. He deposes that the rationalisation process and secondment of the Interested Parties was in strict adherence to the Staff Rationalisation Policy in consultation with the relevant National Government Departments and that the prayers are unsustainable in the face of emerging realities and challenges of devolution that rendered some positions redundant in the defunct Local Authorities.

The 1st and 3rd respondents pray that the petition and application be dismissed with costs.

The 2nd respondent filed a replying affidavit of ALLAN W. MABUKA, the Clerk to the County Assembly in which he traces the history of the staff rationalisation exercise and the secondment of the Interested Parties. He deposes that the Interested Parties had not presented any evidence that they had been turned away from the departments where they were seconded to, that the allegations of discrimination, favouritism, non-payment of salaries and infringement of the Interested Parties' rights are unsubstantiated and must fail.

It is further the deposition of MABUKA that the Interested Parties should be grateful that they were not declared redundant. He deposes that they do not deserve the reliefs sought.

Submissions

Parties agreed to consolidate the application and petition and dispose of the same by way of written submissions. Although parties were

given an opportunity to highlight the submissions, they decided to rely entirely on their written submissions. Only the petitioner and 2nd respondent filed written submissions. There are no submissions on record for the 1st and 3rd respondents.

Petitioner's Submissions

The petitioner submits that the constitution 2010 established two levels of Government with distinct functions for the national and devolved governments. That assets of former local authorities under the then Ministry of Local Government including liabilities and staff were taken over by County Governments and staff transferred on same terms and conditions of service.

The petitioner submits that it has *locus standi* to bring the petition on behalf of the Interested Parties who are its members employed by the respondents under Article 22 of the constitution. The petitioner relies on the case of **CEREAL GROWERS ASSOCIATION & HUGO WOOD -V- COUNTY GOVERNMENT OF NAROK & 11 OTHERS [2014] eKLR** in which the court cited with approval the case of **BENSON RITHO MUREITH (suing on his behalf and on behalf of the general public) -V- J. W. KAKHUNGU & A.G.** In all these cases the court confirmed the application of Article 22 of the constitution.

The petitioner further relied on the cases of **JOHN MAINA TEMOI & ANOTHER -V- GOVERNOR OF BUNGOMA & ANOTHER** and **TIMOTHY OMOLLO & 79 OTHERS -V- KAKAMEGA COUNTY GOVERNMENT & ANOTHER** which settled the issue that all staff who were employees of former local authorities are deemed employees and transferred to the County Government.

The petitioner further submitted that there is no dispute that the Interested Parties were employees of the 2nd respondent transferred to the executive wing of the 3rd respondent. It is submitted that it was the responsibility of the respondents to ensure that the transfers were carried out in a way that does not infringe on the rights of the Interested Parties. It is submitted that Article 41(1) and (2) provide for protection of labour rights while Section 138 of the County Government Act protects employees from derogation of their terms and conditions of service.

It is submitted that there is no evidence of payment of salary to the grievants and that the respondents are harassing the grievants by threatening to take disciplinary action against them. The petitioner referred to the disciplinary letters written to Elizabeth Mulamba and MacDonald O. Wandera at appendixes 25 and 26 of the replying affidavit of MABUKA in which disciplinary action had been taken against them.

The petitioner relied on the case of **SILAS KIPRUTO & ANOTHER -V- COUNTY GOVERNMENT OF BARINGO & ANOTHER** in which the court stated that the County Assembly Service Board is not enabled by legislation to perform its human resource functions as Part VII of County Government Act did not apply to it.

It is further the submission of the petitioner that the court has jurisdiction to grant the reliefs sought. The petitioner relies on the case of **FIDA -V- A.G. & ANOTHER** and the case of **BENSON RITHO MUREITH (supra)**. In the two cases the court stated that it had jurisdiction to intervene even where the action complained of had already been taken.

The petitioner further relied on the case of **MICRO AND SMALL ENTERPRISES ASSOCIATION OF KENYA MSA, -V- MOMBASA COUNTY GOVERNMENT & OTHERS** in which the court restated that it is the primary duty of the court under Articles 20, 21, 22 and 23 of the Constitution to protect an applicant from possible harm or violation that is threatened or likely without waiting to remedy the harm after the threatened damage had occurred.

The petitioner urged the court to grant the reliefs sought to stem any threat of violation.

2nd Respondent's Submissions

For the 2nd respondent it is submitted that the petitioner lacks *locus standi* as the Collective Bargaining Agreement (CBA) between the petitioner and the Association of Local Government Employers provides that it does not apply to officers on contract and secondment. It further submitted that the CBA covered the period from 1ST September 2012 to run for 2 years and it had therefore lapsed. It is submitted that the CBA had not been renewed. That the petitioner therefore does not have *locus standi* to represent the Interested Parties who are not only on contract but have also been seconded. It prayed that the court finds the petition null and void for these reasons.

The 2nd respondent relied on the decision in **LIVING WATER CHURCH INTERNATIONAL -V- CITY COUNCIL OF NAIROBI (2008) eKLR** in which the court held that where a plaintiff lacks capacity or *locus standi* the suit is for striking out as it is null and void. It is further submitted that for the same reasons the petitioner does not have *locus standi* under Article 258(2)(c) to institute the petition.

It is further the 2nd respondent's submissions that the petitioner has not fulfilled the principles set in the case of **ANARITI KARIMI NJERU -V- THE REPUBLIC** as confirmed in the case of **EDWARD MWANIKI GATURU & ANOTHER -V- HON. ATTORNEY GENERAL & 3 OTHERS** and clarified in **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE -V- ATTORNEY GENERAL & 2 OTHER**. It is the 2nd respondent's submissions that the petitioner has not given sufficient particulars to allow the respondents to respond and the court to adjudicate the controversies between the parties.

The 2nd respondent relied on the decision in **AMOS KIUMO & 19 OTHERS -V- CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT & 8 OTHERS** in which a 3 Judge bench of Justices Lesit, Makau and Bwonwonga stated that the essentials of a valid constitutional petition are that the constitutional violation alleged to have been violated must be pleaded in the body of the petition with some degree of precision and setting the manner in which each respondent, has violated the specific provisions of the constitution.

It is submitted that the petitioner relied on Article 41, 232, 235 and 236 but failed to particularise the nature of the violation and the person(s) responsible. It prays that the petition be dismissed on these grounds.

The 2nd respondent acknowledged that under the County Government Act secondment is to be undertaken in the interest of the public officer. It is submitted that in the present case the Commission for Revenue Allocation capped the recurrent expenditure of the 2nd respondent and recommended staff rationalisation, that a Technical Committee established by the 1st and 2nd respondents recommended three viable options to address the staff reduction to 88 as recommended by the commission being secondment, redundancy and voluntary separation, that secondment was recommended by the committee as the best option as it is more favourable to the employee than redundancy or voluntary separation.

The 2nd respondent referred to the case of **DAVID BARASA -V- BRITISH PEACE SUPPORT TEAM & ANOTHER** in which Justice Mbaru defined secondment. It is submitted that both the petitioner and the Interested Parties consented to the secondment and the Interested Parties were to remain on the same terms of employment.

The 2nd respondent urged the court to take judicial notice of the financial challenges facing County governments which has resulted in delayed payment of salaries.

On the allegation of discrimination it is submitted by the 2nd respondent that all employees were treated equally based on assessed skills and completeness of employees in relations to the skills gaps in the county.

The 2nd respondent relied on the case of **BARBARA GEORGINA KHAEMBA -V- CABINET SECRETARY, NATIONAL TREASURER & ANOTHER** in which Judge Lenaola agreed with and followed the definition of discrimination in the case of **PETER K. WAWERU -V- REPUBLIC** as follows –

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to... restrictions to which persons of another description are not made subject or are accorded privileges of advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex.... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

The 2nd respondent prayed that the petition against it be dismissed with costs.

Determination

I have considered the pleadings and submissions on record. I have further considered the documents and authorities cited. There is no dispute that all the Interested Parties are employees of the 2nd respondent, that the 2nd respondent's budget ceiling for recurrent expenditure was capped and the Commission of Revenue Allocation recommended that staff of the 2nd respondent be reduced from 159 to 88. It is further not in dispute that the 3rd respondent established a technical committee to carry out a staff rationalisation exercise and recommended the secondment of the excess staff of the 2nd respondent to the 1st respondent. The court thus finds that the secondment of the Interested Parties was regular and within the Staff Rationalisation Policy adopted by the 2nd respondent. I do not find that any issue arises out of either the Staff Rationalisation Policy or the secondment.

My understanding of the issue in the petition is that the Interested Parties accepted their secondment and reported for duty as directed in the letters of secondment dated 19th October 2016. However upon reporting for duty, they were turned away by the Heads of Departments of the 3rd respondent to which they had been seconded. When they reported back to the 2nd respondent they were not allowed to resume duty on grounds that they had already been seconded to the 1st respondent and their positions at the 2nd respondent were no longer available.

Their fear is therefore that their employment contracts may be terminated on grounds that they were neither employees of the 1st or 2nd respondents or on grounds that they had failed to report for duty. The petitioner therefore viewed the situation to constitute an intention to unfairly terminate their employment without due process. It is for this reason that the petition was filed with the application under certificate of urgency for preservative orders.

From the foregoing the issues for determination are the follows –

- (i) Whether the petitioner has *locus standi* to file this petition on behalf of the Interested Parties.
- (ii) Whether the secondment of the Interested Parties is discriminatory and amounts to unfair labour practice.
- (iii) Whether the petitioner is entitled to the orders sought.

Locus standi

The respondents have contested the *locus standi* of the petitioner to file the present petition on behalf of the Interested Parties.

Article 41(2)(c) provides that every person has a right to form, join or participate in the activities and programs of a trade union. Section 4 and 5 of the Labour Relations Act provide for similar rights as follows –

4. Employee's Right to Freedom of Association

(1) Every employee has the right to -

(a) participate in forming a trade union or federation of trade unions;

(b) join a trade union; or

(c) leave a trade union.

(2) Every member of a trade union has the right, subject to the constitution of that trade union to -

(a) participate in its lawful activities;

(b) participate in the election of its officials and representatives;

(c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and

(d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation to -

(a) participate in its lawful activities;

(b) participate in the election of any of its office bearers or officials, and

(c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.

5. Protection of Employees

(1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.

(2) Without limiting the general protection conferred by sub-section (1), no person shall do, or threaten to do any of the following -

(a) require an employee or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union;

(b) prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act;

(c) dismiss or in any other way prejudice an employee or a person seeking employment?

(i) because of past, present or anticipated trade union membership;

(ii) for participating in the formation or the lawful activities of a trade union;

(iii) for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or

(iv) for failing or refusing to do something that an employee may not lawfully permit or require an employee to do.

(4) No person shall give an advantage, or promise to give an advantage, to an employee or person seeking employment in exchange for the person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act:

Provided that nothing in this section shall prevent the parties to a dispute from concluding an agreement to settle that dispute.

Section 48 of the Labour Relations Act provides for membership of trade unions by payment of union subscriptions and/or union dues. Trade union membership is signified by signing of Form S set out in the Third Schedule of the Act.

On the other hand, a collective bargaining agreement is negotiated by a trade union which has been recognised by an employer upon

attaining membership of a simple majority of unionisable employees as provided in Section 54 of the Act. This therefore means that an employee may be a member and therefore entitled to representation by a union even if the union does not have a collective bargaining agreement. It further means that any union with a collective bargaining agreement has members with the employer.

The 2nd respondent's argument of lack of *locus standi* because a collective bargaining agreement has lapsed is therefore a misunderstanding of what constitutes membership of a trade union and therefore the right to representation. The only way the 2nd respondent can prove that the petitioner has no *locus standi* to represent the Interested Party is by demonstrating that the Interested Parties are not members of the petitioner: on the contrary, the 2nd respondent confirmed that Interested Parties are members of the petitioner as reflected in the deduction of union dues in their payslips.

Further the lapse of a collective bargaining agreement does not bring the relationship between an employee and the union to an end. In any event, the collective agreement once registered becomes part and parcel of the terms of employment of an employee as provided in Section 59 of the Labour Relations Act which provides at subsection (3) and (5) of the Act which provide as follows–

59. Effect of Collective Agreements

(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

(5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

For these reasons I find that the 2nd respondent has not proved that the petitioner has no *locus standi* to represent the Interested Parties.

Discrimination and Unfair Labour Practice

The petitioner avers that the secondment of the Interested Parties was carried out contrary to Articles 235(1) and 236(b) of the Constitution and that the 1st respondent has deliberately engaged in acts of discrimination, favouritism and acts of omissions which amount to infringement of Interested Parties constitutional right to fair labour practices.

No evidence has been adduced to support these contentions of the petitioner in the petition.

As I have already stated above the secondment was regular and in accordance with the Staff Rationalisation Policy. The petitioner has not denied that it was consulted during the preparation of the policy or that it objected to the secondment of the Interested Parties in line with the Rationalisation Policy.

The petitioners did not deny that Elizabeth Mulamba, the 6th Interested Party and Macdonald O. Wandera, the 3rd Interested Party were under disciplinary process independent from the secondment process.

I find that the petitioner has not proved discrimination. I however find that by not handling the process of secondment properly, the Interested Parties were subjected to apprehension over the security of their jobs and genuine fears of losing their jobs without being subjected to due process and the protections guaranteed under Articles 235 and 236 of the constitution as well as under Section 73(4) and (5) of the County Government Act. The averments in the replying affidavit and in the submissions to the effect that the Interested Parties are lucky to have been seconded rather than declared redundant or subjected to voluntary separation suggests that the respondents did a favour to the Interested Parties by seconding them. This is not correct. The Interested Parties have a right to work like all other employees of the respondents.

Article 23 of the constitution empowers this court to give redress to applicants in cases of denial, violation or infringement or threat to, a right or fundamental freedom in the Bill of Rights. Having established that there was a threat of termination of employment of the Interested Parties without due process thereby subjecting them to unfair labour practices, it is a finding of this court that the petitioner is entitled to the protection of this court.

As stated by Justice Mureithi in **MICRO AND SMALL ENTERPRISES ASSOCIATION OF KENYA, MSA -V- MOMBASA COUNTY GOVERNMENT & OTHER**, the court has a primary duty under Articles 20, 21, 22 and 23 of the constitution protect an applicant from possible harm, from violation, or threatened or likely violation of his right without waiting to remedy the harm after the threatened damages has occurred.

In the present petition I find that the petitioner has established the threat or likely violation of the rights of the Interested Parties and it is the duty of the court to give appropriate relief to the petitioner and by extension, the Interested Parties.

Remedies

In conclusion therefor I find and hold that the petitioner has established a threat of violation of the constitutional rights of the Interested Parties with the exception of Elizabeth Mulamba and Macdonald O. Wandera who were under disciplinary process which is not the subject of this petition. I accordingly make the following orders –

1. I declare that the actions of the respondents in respect of secondment of the 1st, 2nd, 4th, 5th, 7th and 8th Interested Parties though valid, was carried out haphazardly leading to their rejection by the departments to which they were seconded and thus threatening

their continued employment with the respondents.

2. I confirm that the respondents are jointly and severally liable to ensure the smooth transition of the 1st, 2nd, 4th, 5th, 7th and 8th Interested Parties to the departments to which they were seconded including the payment of salaries and allowances without a break.

3. The prayers in respect of the 3rd and 6th Interested Parties have not been proved and are dismissed.

4. The respondents shall jointly and severally bear the petitioner's costs.

5. There shall be no order for costs of the Interested Parties.

DATED AND SIGNED AT NAIROBI ON THIS 18TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE