



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 86 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**GRACE KAVINYA MUIMI.....PETITIONER**

**-Versus-**

**THE GOVERNOR, KITUI COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY, KITUI COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY PUBLIC SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The petitioner Grace Kavinya Muimi was appointed to the position of Chief Officer, Treasury in the County Department of Financial and Economic Planning in Kitui County by letter dated 17<sup>th</sup> December 2013. The appointment was for a fixed term of 5 years renewable and took effect on 1<sup>st</sup> April 2014. On 10<sup>th</sup> December 2015 she received a letter of interdiction along with four other senior officers of Kitui County Government requiring her to immediately cease performing the duties of her Officer pending investigations into allegations made against her.

According to the letter of interdiction the following allegations were made against her –

- a. Deliberate acts of commission and omission including connivance and collusion with revenue payers and collectors resulting in revenue loss to the Respondent.
- b. Demanding bribes from contractors and suppliers as a condition for the processing and signing of Local Service Orders (LSOs) and contracts.
- c. Engaging in rent seeking and corrupt practices in collusion with suppliers and contractors.
- d. Abuse of office through misinformation, collusion, coercion, intimidation and fraudulent alteration of records to irregularly acquire public land for personal gain and benefit.
- e. Disrespect, insubordination and lack of consultation.
- f. Wilful disregard of rules and regulations in the performance of duty.

The 1<sup>st</sup> respondent, the then Governor of Kitui County vide Notice published under Gazette Notice No. 368 appointed a committee to investigate acts of gross misconduct of five (5) County Government of Kitui public officers. Among the five officers to be investigated was the petitioner.

The petitioner was summoned by letter dated 29<sup>th</sup> March 2016 to appear before the committee on 12<sup>th</sup> April 2016 at 2.00 pm. She appeared before the committee on the appointed date and defended herself. The committee submitted its report to the 1<sup>st</sup> respondent on 18<sup>th</sup> May 2016. On 20<sup>th</sup> May 2016 the petitioner received a letter dated 19<sup>th</sup> May 2016, terminating her contract of employment in public interest.

The petitioner avers that the termination was based on unknown grounds and a reason outside the allegations levied against her as contained

in the letter of interdiction. It is her contention that the termination was in violation of Articles 10, 22(1), 41(1), 47(1) and 47(2) of the constitution 2010. She further avers the termination was in violation of Sections 43 and 45 of the Employment Act.

She prays for the following remedies –

1. A declaration that the termination of the employment contract of the petitioner on the ground of public interest amounts to an unfair labour practice and unfair termination.
2. A declaration that the termination of the employment contract of the petitioner account of public interest is an illegal and unlawful ground for the termination of a contract of employment.
3. An order for injunction restraining any other respondents from in any way advertising, conducting interview or in any way taking steps to fill or point any person to the position of Chief Officer, Treasury in the County Ministry of Finance and Economic Planning in the respondent's offices, other than the petitioner.
4. An order of *certiorari* to bring vide court and be quashed the decision of respondents terminating the contract of service in respect of the petitioner on public interest.
5. Any other relief that the court may deem fit to grant.
6. The costs of the petition.

In a further affidavit sworn on 29<sup>th</sup> November 2017, the petitioner avers that the investigation committee exonerated her against the allegations made against her and found her fit to hold office, that the committee did not make a recommendation to terminate her services hence the termination was unlawful and without justifiable cause. She deposes that termination of contract in the public interest is not provided for either in the County Public Service Human Resource Manual or in the Public Service Commission Human Resource Policy Manual.

In the petition she has named the Governor of Kitui County as the 1<sup>st</sup> respondent, the County Secretary, Kitui as the 2<sup>nd</sup> respondent and the County Public Service Board, Kitui as the 3<sup>rd</sup> respondent.

The respondents filed a replying affidavit of ALEXANDER N. KIMANZI, Acting County Secretary of the County Government of Kitui in which he deposes that sometimes in 2015 the County Government received numerous complaints against the petitioner. That these complaints raised concerns and the 1<sup>st</sup> respondent as Head of Government consulted the relevant institutions including the County Public Service Board. A decision was consequently made to interdict the petitioner to facilitate investigations and give an opportunity to the petitioner to respond to the allegations against her. The petitioner presented herself before the committee appointed to investigate the matter. The final report of the committee was presented to the 1<sup>st</sup> respondent on 18<sup>th</sup> May 2016 and after analysing the report in totality decision was made that the contract of the petitioner be terminated in public interest. He deposes that as Head of Public Service he communicated the decision to the petitioner.

The respondents filed further supplementary affidavits of ALEXANDER N. KIMANZI, JOSEPH NZUNGI NGWELE and CHRISTOPHER KITONGA respectively. Kimanzi deposes that the petitioner having been appointed under Section 45 of the County Government Act was an employee of Kitui County Government and not the Governor, that upon her appointment the petitioner became an occupant of the County Public Service responsible to the Executive Committee Member for Administration of the County Department of Finance and Economic Planning.

It is deposed that the letters of interdiction and termination were signed by the County Secretary and Acting County Secretary respectively as Head of County Public Service of the County Government of Kitui as provided under Section 44 of the Act and not in their individual capacities, that the 3<sup>rd</sup> respondent is wrongly joined in this petition as it is only responsible for discipline of officers appointed under Part VII of the County Government Act on whose behalf the 1<sup>st</sup> and 2<sup>nd</sup> respondent acted at all times material to this suit. He deposes that the County Government is not a party to this petition as admitted by the petitioner in paragraph 4 of her further affidavit sworn on 29<sup>th</sup> November 2017 and she had no intention to join the County Government as stated at paragraph 11 of her original affidavit.

He deposes that during the year 2015 the County Government received numerous complaints against the petitioner that the County Government considered the complaints which if proved would constitute violations of Public Service (Values and Principles) Act 2014, the Public Service Commission Human Resource Policies and Procedure Manual 2016 and the Public Service Commission of Kenya County Public Service Human Resource Manual 2012, all of which applied to the petitioner. He deposes that according to Regulation K6 of the Public Service Commission – Human Resource Policies and Procedure Manual for the Public Service, a public officer may be interdicted to allow for investigations. That the 1<sup>st</sup> respondent in consultation with members of the Executive Committee decided to interdict the petitioner to facilitate investigations and give her an opportunity to respond to the charges against her. He deposes that the first phase of the investigations constituted receiving complaints from members of public, which was to inform the next cause of action involving the petitioner being given an opportunity to respond to the charges.

He deposes that contrary to the averments of the petitioner, none of the cases filed by the officers whose employment contracts were terminated at the same time as the petitioner have been concluded. That there were five senior officers and each officer had distinct and separate charges preferred against him or her by the county government and there were no common facts adduced against them in the process of investigations. All the five officers filed court cases against various persons associated with their interdiction and the eventual termination of employment citing separate reasons for the challenges and to date the cases are at the following stages:-

(a) In **CAUSE NO. 18 OF 2016 - DR. EVANS MUMO MWANGANGI VERSUS KITUI COUNTY PUBLIC SERVICE BOARD** - the court issued a conservatory order pending the hearing of the main suit. The case is still pending.

(b) In **PETITION NO. 2 OF 2016 - CHRISTOPHER PAID KIOKO VERSUS THE GOVERNOR, KITUI COUNTY AND THREE OTHERS** the hearing was concluded on 16<sup>th</sup> November 2017 and is pending judgment.

(c) In **PETITION NO. 3 OF 2016 - STANLUS MUSYOKA NYAMAI VERSUS THE GOVERNOR OF KITUI COUNTY AND THREE OTHERS** - the hearing was also concluded on 16<sup>th</sup> November 2017 and is pending judgment.

(d) In **PETITION NO. 4 OF 2016 - EMMA KAMENE KITEMANGE VERSUS THE GOVERNOR OF THE COUNTY OF KITUI AND THREE OTHERS** - pleadings are yet to be closed.

He deposes that the findings of the Investigation Committee appointed vide Gazette Notice No. 386 of 29<sup>th</sup> January 2016 were submitted to the Governor who noted the following –

(a) On the Petitioner's relationship with her County Executive Committee Member (CECM).

*“The relationship between the Chief Officer and the CECM was so constrained that they would communicate through SMS not even through telephone calls. However, the Chief Officer appears to have a good working relationship with her juniors who also have high regard for her performance.*

*The constrained relationship caused a last minute cancellation of a staff workshop planned to take place in Mwingi in November/December, 2015 with the objective of familiarizing the staff with the Performance Contract appraisal system, the Ministerial Service Charter and wealth declaration. The Minister complained that he had not been briefed about the workshop while Chief Officer said that the workshop had been agreed upon at the management meeting a week before and the Minister briefed accordingly, of course through SMS.”*

(i) The above findings confirmed that the Petitioner had very poor working relationship with her immediate superior, the CECM for Finance and Economic Planning for the County Government.

(ii) It is not feasible that an officer should communicate to her boss via SMS on official routine issues. Such constrained relationship only ended up prejudicing service delivery to the public whose complaints led to the appointment of the committee.

(b) On the failure to streamline revenue collection procedure leading to loss of money by the County Government the 1<sup>st</sup> Respondent considered the following paragraphs:

*“With the coming into being of county governments revenue collection improved from about Kshs.200 to Kshs.323 Million. With the inclusion of collection from the hospital, the revenue collection was about Kshs.400 Million. Despite this improvement, there are still leakages in revenue collection. The CECM was not happy that these leakages continued even after the Chief Officer reported.*

*The proposed e-revenue had not been implemented due to poor connectivity and low levels of literacy among revenue clerks.*

*The Mwingi Town business community held a demonstration over the proposed 2014/2015 Finance Bill. According to them, the Bill would make them pay more taxes than Kitui Town business community. They produced CGoK bus park fees receipt No. 8524 which showed vehicle registration KBY 945G was charged Kshs.150/= at Kitui Town on 24<sup>th</sup> February 2015; receipt No. 20712 showed that the same vehicle was charged Kshs.200/= for parking in Mwingi Town on the same day. The same case was justified with receipt Nos. 40925 for Kshs.100/= and 17990 for Kshs.70/= issued to vehicle KBZ 390Y on 11<sup>th</sup> February 2015 and Mwingi and Kitui Towns respectively. The CGoK accounts department confirmed the receipts are genuine; Because of the controversy over the proposed 2014/2015 Bill CGoK resolved to drop it and continue using the 2013/2014 Finance Act.”*

It is deposed that the 1<sup>st</sup> Respondent considered the above findings and noted the failure by the Petitioner to justify:

(i) Continued leakages in revenue collection.

(ii) Lack of poor connectivity in revenue collection and failure to employ literate revenue collectors.

(iii) Lack of prior information and education of members of the public before legislation affecting their taxation was introduced.

(iv) Variance in charges of levy for the same services rendered leading to protests by business community.

(c) On abuse of office through misinformation, collusion, coercion, intimidation and fraudulent alteration of record to irregularly acquire public land for personal gain and benefit the 1<sup>st</sup> Respondent considered the Petitioner's integrity based on the following findings:

*“Building plans for the CO's hotel in Mwingi were duly approved by District Public Health Officer of P. O Box 16, Mwingi on 6<sup>th</sup>*

May 2014 and by District Physical Planning Officer, Mwingi on 16<sup>th</sup> October 2014. An environmental impact assessment was carried out and Certificate Registration No. 0026272 dated 26<sup>th</sup> November 2014 issued. Construction of the hotel started around February 2014.

While the hotel building sits on plot No. Mwingi/Mwingi 2291, the parking and the front of the perimeter wall have encroached on the road reserve from about six (6) metres up to eight (8) metres at the wide end.

Ms. Grace Kavinya Muimi is the registered absolute proprietor of the land No. Mwingi/Mwingi 2291 on which the hotel is constructed, the Title Deed was issued on 12<sup>th</sup> September 2013.

The area in which the hotel is built is zoned "1" industrial. The classification does not include a hotel (hotels fall under zone "5" commercial). Change of user has not been sought despite the fact that technical drawings have been approved."

(i) Investigations at the Physical Planning Department of County Government as confirmed by CHRISTOPHER KITONGA who has sworn the 2<sup>nd</sup> Supplementary Replying Affidavit in these proceedings confirmed that even though the Petitioner's building plans were approved that approval was subject to the Petitioner obtaining a change of use before proceeding with the construction work.

(ii) The approval by the National Environmental Management Authority was also subject to the Petitioner obtaining a change of user for the plot in question. That was not obtained prior to the commencement of the construction work.

(iii) While constructing the perimeter wall for the hotel she deliberately encroached on a road reserve.

(iv) There was no doubt in the judgment of the 1<sup>st</sup> Respondent that the Petitioner used her position as a senior officer in the county government and proceeded with the construction work in violation of standing regulations and procedure.

(d) On general integrity and values of a public office the 1<sup>st</sup> Respondent considered the following findings:

*"Bank statements presented by Ms. Muimi show that as at 31<sup>st</sup> December 2013, the day before she joined CGoK the CO had a total of Kshs.29,901,543 in her bank accounts in KCB and Equity banks. This included Kshs.16,810,818 in the Continental Guest House (Mwingi) account, Kshs.12,151,931 in the Best Lodge/Grace House (Chumvi) account and Kshs.938,789 in the salary account. In addition the Chief Officer had an average cash flow of Kshs.672,775 per month from her investment and salary."*

(i) There was no evidence that the Petitioner had declared such substantial amount of wealth upon recruitment as a public officer.

(ii) Given her wealth the Petitioner life style was a matter of concern in the public domain and associated her with corrupt practices.

(iii) There was obviously a conflict of interest between her business interest and her service to the public.

That in considering what action to take against the Petitioner in the light of the findings of the investigation committee the 1<sup>st</sup> Respondent took note of the positive comments the committee had in favour of the Petitioner particularly that she had a good working relationship with her subordinates but the crucial issue was public perception towards her given the fact that she had no respect for her Minister; constructed a hotel on land zoned to be for industrial purposes; encroached on the road reserve in the process; had not perfected the revenue collection procedure; and could not in the eyes of the public explain the source of her wealth. Because of these fundamental negative findings against the Petitioner, her service were terminated by a letter dated 19<sup>th</sup> May 2016.

JOSEPH NZUNGI NGWELE deposes in his affidavit that he was aware of complaints raised against the petitioner while she was District Development Officer stationed at Mwingi from 2006, which he raised during her vetting, that he was threatened by the petitioner's relatives for raising the issues and persuaded by another relative of the petitioner so he did not report the threats to the Speaker of the Kitui County Assembly.

CHRISTOPHER KITONGA deposes in his affidavit that the petitioner's hotel was contracted in the zone of industrial development without a change of user, that the NEMA approval was subject to adherence with zonal regulations which the petitioner did not adhere to and further that the hotel encroached on a road reserve.

### **Petitioner's Submissions**

In the written submissions filed on behalf of the petitioner it is submitted that under Section 45(1) of the County Government Act, Chief Officers are to be sourced competitively that the position is in the County Public Service that the Governor has no powers to dismiss a Chief Officer, as the pleasure doctrine does not apply to Chief Officer. The petitioner relied on the case of **DAVID OGEKA KEBIRO & ANOTHER -V- KISII COUNTY PUBLIC SERVICE BOARD ^& ANOTHER [2017] eKLR.**

It is further the petitioner's submissions that the termination violated Sections 41, 43 and 45 of the Employment Act and Article 41 of the Constitution. It is submitted that the petitioner was not subjected to any disciplinary process as envisaged by law and that none of the persons involved in the petitioner's alleged disciplinary process had powers to do so. That the position being in the public service as provided under Section 45(1) and (2) of the County Government Act the disciplinary process ought to have been carried out by the Public Service Board under its powers donated by Section 59(1) of the County Government Act.

It is submitted for the petitioner that Gazette Notice No. 386 of 29<sup>th</sup> January 2016 that purported to establish the disciplinary committee was made pursuant to Articles 10, 47, Chapter six (76), Article 75 (1), (2) and (3) and 232 of the Constitution, Sections 30(1) and (2) and 40 of the County Government Act, Section K5 and K6 of the Human Resource Policies and Procedures Manual 2015, that the committee had no authority to undertake disciplinary action against the petitioner as no such power was delegated by the County Public Service Board.

It is further submitted that Section 86(1) of the County Governments Act provides that the County Public Service Board may delegate its powers in unity to one or more of its members, the County Secretary, County Chief Officer, Sub-County officer or Ward Administrator, Village Administrator, City or Municipal Manager and Town Administrators only and no other body could be delegated the authority other than those set out under the Section. The petitioner relied on the case of **EVANS MUMO MWANGANGI -V- KITUI COUNTY PUBLIC SERVICE BOARD & ANOTHER [2016]** in which Ndolo J. considered whether the same committee that interdicted the petitioner had authority to do so and held that there was no instrument delegating powers of the Public Service Board to the Committee. That the court quashed the interdictio and reinstated the claimants.

The petitioner further submitted that the disciplinary process against the petitioner having been fraught with illegalities, the court would have reason to intervene as was held in the case of **JOSEPH MUTUURA MBERIA & ANOTHER -V- THE COUNCIL JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY (JKUAT)** and **FREDERICK OWEGI -V- CFC LIFE ASSURANCE**. It was submitted that the petitioner's right to fair labour practice and due process under Articles 41 and 47 were violated relying on the case of **ELIZABETH WASHEKE AND OTHERS -V- AIRTEL (K) LIMITED & ANOTHER** and the case of **MARY CHEMWENO KIPTUI -V- KENYA PIPELINE COMPANY LIMITED**. It was submitted that public interest is a ground unknown under the Employment Act, the County Government's Act, Public Service Commission Human Resource Policy Manual and County Public Service Human Resource Manual. The petitioner relied on the case of **KIZITO M. LUBANO -V- KEMRI BOARD OF MANAGEMENT & 8 OTHERS** and **D. K. NJAGI MARETE -V- TEACHERS SERVICE COMMISSION**.

### **Respondent's Submissions**

It is the respondent's submission that the respondents have been misjoined to the petition as the 1<sup>st</sup> and 2<sup>nd</sup> respondents are Officers within the County Government while the 3<sup>rd</sup> respondent is a body corporate established under Section 57 of the County Government Act. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents are agents of a disclosed Principal being the County Government of Kitui. They relied on the case of **VICTOR MABACHI -V- DAVID OLIWA [2013] eKLR**, **VALENTINE OPIYO -V- GENERAL AGENCIES LIMITED [2014] eKLR** and **CITY COUNCIL OF NAIROBI -V- WILFRED GITUA [2016] eKLR**.

It is further the respondent's submission that the termination of the petitioner's employment was fair and she is therefore not entitled to the prayers sought.

### **Issues for Determination**

Having considered the pleadings and submissions of the parties together with the authorities cited, the issues arising for determination are the following –

1. Whether the respondents are misjoined and whether the petitioner should fail for misjoinder of respondents
2. Whether the termination of the petitioner was unfair and
3. Whether the petitioner is entitled to the remedies sought

Before I consider the issues for determination, I would like to comment on the issues set out in the petitioner's submissions. In the submissions for the petitioner the issues are set out as follows –

- a. Deliberate acts of commission and omission including connivance and collusion with revenue payers and collectors resulting in revenue loss to the Respondent.
- b. Demanding bribes from contractors and suppliers as a condition for the processing and signing of Local Service Orders (LSOs) and contracts.
- c. Engaging in rent seeking and corrupt practices in collusion with suppliers and contractors.
- d. Abuse of office through misinformation, collusion, coercion, intimidation and fraudulent alteration of records to irregularly acquire public land for personal gain and benefit.
- e. Disrespect, insubordination and lack of consultation.
- f. Wilful disregard of rules and regulations in the performance of duty.

From the facts of this case, the petitioner's contract was terminated by letter dated 20<sup>th</sup> June 2016 during the term of the 1<sup>st</sup> Governor of Kitui County. The issue whether the term of a Chief Officer comes to an end with the term of the County Governor does not therefore arise as this was not the reason for termination of her employment.

The issue whether she served at the pleasure of the Governor is also not valid as the termination was by the County Secretary who is by

statute the Head of the County Public Service Board.

Further, the issue whether Sections 41, 43 and 45 of the Employment Act was adhered to is also not relevant as the terms of service of a Chief Officer are not government by the Employment Act but rather the Constitution, their contracts and the Public Service Regulations relating to discipline and removal from office.

Section K of the Human Resource Policies and Procedures Manual for the Public Service provides for disciplinary control as follows –

## **SECTION K DISCIPLINARY CONTROL**

### **K.1 Introduction**

**The objective of disciplinary control is to create a motivated and dedicated Public Service, which upholds the rules of conduct and work ethics for optimal service delivery. It is expected that public officers will maintain integrity and uphold the dignity of the office to which they are appointed. Further, discipline cases shall be dealt with expeditiously, efficiently, lawfully and in a procedurally fair manner.**

### **K.2 Disciplinary Powers**

#### **(1) The power to exercise disciplinary control and removal of Public**

**Officers are vested in the Public Service Commission as stipulated in the Constitution and the Public Service Commission Act and regulations.**

#### **(2) The Public Service Commission has delegated the following disciplinary powers to Authorized Officers as per the Public Service Commission regulations and instructions issued to the service from time to time:-**

**(i) Interdiction of officers in Job Group 'T' and below;**

**(ii) Suspension of officers in Job Group 'T' and below**

**(iii) Reprimand (including severe reprimand) of any officer;**

**(iv) Recovery of the cost or part of the cost of any loss or breakage caused by default or negligence, provided no such cost has been recovered by surcharge action under the appropriate financial instructions or regulations;**

**(v) Withholding, deferment and stoppage of salary increment; and**

**(vi) Dismissal and reduction in rank in respect of officers in Job Groups 'P' and below, with the exemption of all officers who have qualified for pension.**

### **K.5 Conduct of Investigations**

#### **(1) While carrying out investigations, the Authorized Officer shall observe the following conditions:-**

**(i) Constitute a team of not less than three (3) officers to investigate the matter (where the team is more than three members, the team shall consist of an odd number).**

**(ii) The officers conducting the investigation shall be senior to the accused officer and should not have dealt with the case before.**

#### **(2) The report of the investigation shall be submitted to the Commission and shall contain:**

**(i) evidence collected by the team, including any statements by witnesses;**

**(ii) analysis of the evidence and statements;**

**(iii) a statement on whether the charges against the officer have been proved; and**

**(iv) details on any matter that may affect the gravity of the case, if any.**

#### **(3) The report shall not contain any recommendation on the form of punishment to be inflicted on the accused officer.**

#### **(4) .....**

The petitioner having been in Job Group S, her disciplinary control fell under the “*authorised officer*” in this case, the County Secretary.

For the foregoing reasons the case of **DAVID OGEKA KEBIRO & ANOTHER -V- KISII COUNTY PUBLIC SERVICE BOARD & ANOTHER** in which the issue was whether the term of office of a Chief Officer came to an end with the term of the Governor and whether the pleasure doctrine applied to the office of a chief officer in relation to the Governor, is not relevant to this case.

In the same breath the case of **MARY CHEMWENO KIPTUI -V- KENYA PIPELINE COMPANY LIMITED** in which the issue in dispute was compliance with the Employment Act is also not relevant to this petition.

#### **Whether there is misjoinder of the respondents**

The respondents have submitted that the suit herein is not competent as there is no respondent, as there is a misjoinder of all the respondents.

The respondents have referred to paragraph 1 of the petition in which the petitioner describes herself as “*former employee of the County Government of Kisii seeking enforcement, implementation and upholding of the Constitution of Kenya and her rights and remedies under the Employment Act 2007.*” The respondents further refer to paragraph 4 of the petitioner’s further affidavit sworn on 29<sup>th</sup> November 2017 in which she deposes that she was employed by the County Government of Kitui and to paragraph 11 where she deposes that even though the County Government is her employer, she did not find it fit to sue her employer because she did not want to engage in a legal battle with the employer.

I find this reasoning not sufficient to warrant the drastic action of dismissal of the petition as proposed by the respondents. In my opinion, suing the office of the Governor as Head of the County Government, the County Secretary as Head of the County Public Service and the County Public Service Board is sufficiently representative of the County Government. The respondents have themselves argued that “*the Governor is the Head of the County Government who bears the responsibility to steer the County Government in accordance with Article 10, 232, Chapter six of the Constitution and generally in accordance with statute...*” (per paragraph 4 of the replying affidavit of ALEXANDER N. KIMANZI sworn on 28<sup>th</sup> June 2018). They cannot with the same breath argue that the Governor is non-suited. I find that the respondents as named in the petition were necessary parties in the determination of the issues raised in the petition.

The second issue for determination is whether termination of the petitioner’s employment is unfair.

Unfair termination of employment would constitute failure to give an employee a hearing before termination or termination that is lacking fair and valid reasons.

In the present suit, the petitioner was first interdicted, then summoned to appear before the Investigation Committee to defend herself against the allegations levelled against her. After appearing before the committee she was served with a letter of termination of her contract.

The Public Service Commission of Kenya – County Public Service Human Resource Manual 2013, provides at Regulation L4 for termination of appointment as follows –

***“The employment of an officer serving on contract or probationary terms may be terminated by the appointing authority in accordance with the provisions of the officer’s agreement or by giving appropriate notice on salary in lieu of notice.”***

The Human Resource Policies and procedures Manual for the Public Service, May 2016 provides for the disciplinary procedure as already outlined herein above. The disciplinary committee is not supposed to make recommendation on the form of punishment to be inflicted on the accused officer. Refer to Regulation K5(3).

The petitioner has submitted that the committee established to investigate her, had no authority to undertake disciplinary process against her as this power had not been delegated to the committee and further that the 3<sup>rd</sup> respondent failed to use its mandate under Section 45(2), 59 and 75 of the County Government Act to ensure her protection afforded by Article 1236 of the Constitution.

As has been submitted for the respondents, the petitioner’s appointment being under Section 45 of the County Government Act, she was not subject to disciplinary control by the County Public Service Board, which had disciplinary control over, officers appointed under Part VIII of the Act only.

I agree with the decision of Ndolo J. in **STANSLUS NYAMAI -V- THE GOVERNOR OF THE COUNTY OF KITUI** in which she stated that the County Public Service Board had disciplinary control of offices it established under Section 57 and not over offices already created under the Act which include the office of the County Secretary, County Executive Committee Member and office of Chief Officer of the County.

The procedure for discipline of the petitioner is therefore that set out under the Human Resource policies and Procedures Manual for officers in Job Group Q and above: Regulation K5 provides for a constitution of a special committee to investigate and submit a report of its findings to the Authorised Officer but is specific that “*The report shall not contain any recommendation on the form of punishment to be inflicted on the accused officer.*” Refer to K5(3). Being in Job S the Authorised Officer being the County Secretary had delegated power to exercise disciplinary control over the petitioner as provided under Regulation K(1) as read with K(2).

On whether there was valid grounds for the termination, the report of the investigation Committee made specific findings that the petitioner had poor working relations with her County Executive Member, that she had built a hotel on land zoned for industrial purposes without a change of user and that the hotel encroached on a road reserve. These were sufficient grounds for the termination.

The petitioner further raised the issue about termination in the public interest not being anchored on any regulations or law relying on the case of KIZITO MULUBANO and D. K. NJAGI MARETE. Both cases were on retirement in public interest and therefore distinguishable from the present case which is termination in public interest.

A termination of employment in the public interest in my opinion is just a normal termination where the reason for termination gravitate around protection of the public interest like in the present case. The fact that the letter was referred to as termination in public interest does not affect its validity as it was a normal termination of employment on the grounds in the investigation report, a copy of which had been availed to the petitioner.

For the foregoing reasons I find the termination of the petitioner to have been fair procedurally and for valid reason.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF AUGUST 2018**

**MAUREEN ONYANGO**

**JUDGE**