



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**PETITION NO 1 OF 2017**

**[FORMERLY MALINDI HIGH COURT PETITION NO 25 OF 2016]**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 23, 25(C), 47 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 (ACT NO 17 OF 2012)**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION, 2015 (ACT NO 4 OF 2015)**

**AND**

**IN THE MATTER OF INTERPRETATION OF ARTICLE 179(B) OF THE CONSTITUTION OF KENYA, 2010 AND SECTIONS 40,45 AND 59 OF THE COUNTY GOVERNMENTS ACT, 2012 AND STANDING ORDERS NO 63 AND 153(3) AND (4) OF THE COUNTY ASSEMBLY OF KILIFI**

**BETWEEN**

**BEN KAI CHILUMO.....PETITIONER**

**VERSUS**

**THE COUNTY ASSEMBLY OF KILIFI.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF THE COUNTY ASSEMBLY OF KILIFI.....2<sup>ND</sup> RESPONDENT**

**THE GOVERNOR OF KILIFI COUNTY.....3<sup>RD</sup> RESPONDENT**

**THE KILIFI COUNTY PUBLIC SERVICE BOARD.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

## **INTRODUCTION**

1. This Petition was initially filed in the High Court at Malindi as Petition No 25 of 2016. Pursuant to a ruling delivered by **Weldon Korir J** on 24<sup>th</sup> July 2017, it was transferred to this Court on the ground that the issues raised therein are employment in nature.
2. The Petitioner, Ben Kai Chilumo was appointed to the position of Chief Officer-Finance in the Department of Finance & Economic Planning of the County Government of Kilifi on 1<sup>st</sup> October 2013.

3. By letter dated 2<sup>nd</sup> November 2016, the 1<sup>st</sup> Respondent invited the County Executive Committee Member-Finance & Economic Planning, the County Executive Committee Member-Health Services and the County Secretary to appear before its Committee on General Oversight on 10<sup>th</sup> November 2016.
4. By letter dated 7<sup>th</sup> November 2016, the Petitioner, on behalf of the County Executive Member-Finance & Economic Planning responded to the invitation by the 1<sup>st</sup> Respondent.
5. On 21<sup>st</sup> November 2016, the 1<sup>st</sup> Respondent invited the Petitioner, the County Executive Committee Member-Finance & Economic Planning, the County Secretary and the Director in charge of Revenue, Finance and Economic Planning to appear before the 1<sup>st</sup> Respondent's Committee on General Oversight on 24<sup>th</sup> November 2016.
6. The Petitioner appeared before the said Committee on 24<sup>th</sup> and 29<sup>th</sup> November 2016.
7. A report by the 1<sup>st</sup> Respondent's Committee on General Oversight stated that the conduct of the Petitioner and the County Secretary was not in sync with holders of public office. The Committee recommended that the relevant authorities should take disciplinary action against the Petitioner and the County Secretary.
8. In its sitting held on 6<sup>th</sup> December 2016, the 1<sup>st</sup> Respondent adopted the report by the Committee on General Oversight and recommended that the Petitioner and the County Secretary step aside to pave way for investigations.
9. The Petitioner states that findings against him contained in the report are unlawful as the procedure adopted by the 1<sup>st</sup> Respondent offends the provisions of Articles 47, 235(1)(c) and 236(b) of the Constitution of Kenya, 2010, Section 4 of the Fair Administrative Action Act, 2015, Section 59(1)(c) of the County Governments Act, 2012 and Standing Orders 63 and 153(4)&(5) of the County Assembly of Kilifi.
10. The Petitioner pleads that the 1<sup>st</sup> Respondent, being aware that its recommendations if implemented, would lead to the removal of the Petitioner from public office, the 1<sup>st</sup> Respondent failed to issue prior adequate notice on the nature and reasons for the disciplinary action taken against the Petitioner. Further, the Petitioner was not given an opportunity to be heard and make representations in that regard.
11. It is the Petitioner's position that there are no provisions either in his letter of appointment dated 1<sup>st</sup> October 2013 or the corrigendum thereon dated 22<sup>nd</sup> September 2015 for him to step aside from office.
12. The Petitioner further contends that neither the 1<sup>st</sup> Respondent nor the 3<sup>rd</sup> Respondent has authority to require him to step aside. He adds that the scope, meaning and effect of stepping aside is not provided for in law and it was arbitrary to subject the Petitioner to a disciplinary process which is alien to the provisions of law governing his appointment.
13. According to the Petitioner, the 1<sup>st</sup> Respondent's report and recommendations ran contrary to the provisions of the County Governments Act and as such its action was unreasonable, *ultra vires*, null and void.
14. The Petitioner maintains that under Article 235(1)(c) of the Constitution of Kenya, 2010 and Section 59(1)(c) of the County Governments Act disciplinary powers over him are vested in the Kilifi County Government Service Board. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents therefore have no constitutional or statutory power to exercise disciplinary control over him.
15. The Petitioner seeks the following remedies:
  - a) A declaration that the 1<sup>st</sup> Respondent's second report of the Committee on General Oversight on the conduct of the County Secretary and the Chief Officer-Finance and the decision or resolution adopting the motion passed by the 1<sup>st</sup> Respondent on 6<sup>th</sup> December 2016 is unlawful, null and void;
  - b) An order of certiorari to bring to this Court for purposes of being quashed, the 1<sup>st</sup> Respondent's Second Report of the Committee on General Oversight on the Conduct of the County Secretary and the Chief Officer-Finance and the decision or resolution adopting the motion passed by the 1<sup>st</sup> Respondent on 6<sup>th</sup> December 2016;
  - c) A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, from in any manner whatsoever, whether by themselves, their servants and/or agents from effecting, implementing or enforcing the 1<sup>st</sup> Respondent's Second Report of the Committee on General Oversight on the Conduct of the County Secretary and the Chief Officer-Finance and the decision or resolution adopting the motion passed by the 1<sup>st</sup> Respondent on 6<sup>th</sup> December 2016.
16. The Petitioner also seeks costs of the Petition.

### **The Respondents' Response**

17. Curiously, the Respondents did not file any affidavit in reply to the Petition. The 4<sup>th</sup> Respondent however filed a Statement of Grounds of Opposition as well as written submissions.

18. In the Grounds of Opposition dated 15<sup>th</sup> March 2017 and filed in court on 18<sup>th</sup> March 2017, the 4<sup>th</sup> Respondent states that the Petition does not disclose a reasonable cause of action against it. The 4<sup>th</sup> Respondent further states that the Petition is bad in law and incurably defective.

19. In its written submissions, the 4<sup>th</sup> Respondent maintains that it is unsuited in this matter.

### **Findings and Determination**

20. From the pleadings and submission filed by the parties, I have distilled the following issues for determination:

- a) Whether the Petitioner has demonstrated violation of his constitutional rights;
- b) Whether the Petitioner is entitled to the remedies sought.

### **The Petitioner's Rights**

21. The Petitioner complains that the report by the 1<sup>st</sup> Respondent, through its Committee on General Oversight is unconstitutional. He submits that whereas Section 45 of the County Governments Act provides for appointment of Chief Officers, there is no provision for their removal. He relies on the decision by **Maureen Onyango J** in **Samuel Okuro & 7 others v Kisumu County Public Service Board the Government Kisumu County & another [2017] eKLR** where my sister Judge stated the following:

***“Section 45 of the County Governments Act provides for appointment of chief officers but does not provide for their removal from office. This was not an oversight by the legislature. The section clearly states the office of county chief officer is in the public service and there is no provision within the Act for removal from office of public officers. Neither the Governor nor the County Secretary have powers to remove chief officers from office.”***

22. A similar finding was made in **David Ogega Kebiro & another v Kisii County Public Service Board [2017] eKLR** where it was affirmed that Section 45 of the County Governments Act which empowers the Governor to appoint and/or reassign a county chief officer does not give corresponding power to dismiss.

23. In the **Samuel Okuro Case** (supra) it was further held:

***“A county public officer being an office within the county public service is protected by Article 236 of the Constitution from arbitrary removal from office.”***

24. Article 236 of the Constitution provides as follows:

***236. A public officer shall not be-***

***(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or***

***(b) be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.***

25. In similar fashion, Section 76(1) and (2) of the County Governments Act, 2012 provides:

***76(1) In exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice;***

***(2) No public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament.***

26. The Petitioner submits that the motion passed by the 1<sup>st</sup> Respondent on 6<sup>th</sup> December 2016 adopting the second report of the Committee on General Oversight is unconstitutional for the reason that adverse findings were made against him without the benefit of due process.

27. I agree. Looked at cumulatively, the Respondents' actions amount to removal of the Petitioner from office without the benefit of due process as required in law.

### **Remedies**

28. For the foregoing reasons I make the following orders:

- a) The second report of the Committee on General Oversight and all consequential actions taken by the Respondents and/or their agents are hereby quashed;
- b) The Respondents are restrained from taking any further action against the Petitioner on the basis of the impugned report;

c) The Respondents will meet the costs of the Petition.

29. These are the orders of the Court.

**DATED SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Binyenya for the Petitioner

No appearance for the 1<sup>st</sup>-3<sup>rd</sup> Respondent

Mr. Njoroge for the 4<sup>th</sup> Respondent