



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

PETITION NO.2 OF 2017

- CHELIMO A ESTHER1ST PETITIONER
- MARTIN A LOTTE.....2ND PETITIONER
- LORENG PEITUM AMOS.....3RD PETITIONER
- DANIEL L PTIONY.....4TH PETITIONER
- JAMES LOKISINI PUSKELIEN.....5TH PETITIONER
- LAWRENCE ACHOTOMUK.....6TH PETITIONER
- LILIAN LIMASIA.....7TH PETITIONER
- KARIAKAMUR C CHRISTINE.....8TH PETITIONER
- SAMUEL PKEMOI TOROITICH.....9TH PETITIONER
- SELEMOI LABAN KIMOL.....10TH
PETITIONER
- WILLIAM R CHEMKENYANG.....11TH PETITIONER
- SAMWEL LONYANGO..... 12TH PETITIONER
- PKUMUN G FRANCIS.....13TH PETITIONER
- WILSON L CHENGORIS..... 14TH PETITIONER
- NICHOLAS MUKEYERA.....15TH PETITIONER
- PKORKOR JOSEPH LONGOROK.....16TH PETITIONER

VERSUS

- HON. PROF. JOHN LONYANGAPUO.....1ST RESPONDENT
- THE COUNTY GOVERNMENT OF WEST POKOT.....2ND RESPONDENT
- THE COUNTY PUBLIC SERVICE BOARD OF WEST POKOT..... 3RD RESPONDENT

JUDGEMENT

The petitioners filed the petition on 11th September, 2017. On 12th June, 2018 the 4th Petitioner, Daniel L Ptiony withdrew his petition against the respondents.

The petitioners are seeking for orders that;

(a) A declaration that the decision of the 1st respondent contained in an 'INTERNAL MEMO' dated-stamped 25th August 2017 purporting to send the petitioners on 'special leave' was made in excess of the 1st respondent's jurisdiction and therefore null and void.

(b) An order of certiorari to call the said INTERNAL MEMO into this court and quash the same.

(c) A declaration that the conduct of the respondents is a violation of the constitutional rights of the petitioners.

(d) An order of permanent injunction to restrain the 3rd respondent or anyone else claiming through the 3rd respondent from advertising, receiving application, hiring people to fill the respective dockets of any of the petitioners or doing anything to threaten the security of their jobs.

(e) An order that the petitioners do resume duty in their respective stations forthwith.

(f) Costs.

The Petition

1. The petitioners are sub-county and ward administrators in the employment of the County Government of West Pokot, the 2nd respondent and posted to various sub-counties and wards after being hired by the 3rd respondent, the County Public Service Board of West Pokot in March, 2015.

2. The 1st respondent took oath of office on 21st August, 2017 and upon commencing work, 3 days later he commenced a unilateral and unlawful process and issued an internal memo sending the petitioners among other 50 employees on compulsory leave which he termed to be 'special leave'. Such decision amounted to a violation of rights under articles 41, 57 and 236 of the constitution.

3. On 28th August, 2017 the 2nd respondent advertised vacancies in the office of the sub-county administrator (6) which dockets are held by Esther Chelimo – Pokot North Sub-county, Ambrose Lokwete – Pokot Central Sub-county, John Tinyang – West Pokot Sub-county and Nicholas Mukeyesa – Pokot South Sub-county. The other 2 sub-counties, Kipkpmo and Kacheliba were created in July, 2017.

4. The 3rd respondent in the same advertisement advertised 20 vacancies in the office Ward Administrator positions held by majority petitioners who are on suspension.

5. The 1st respondent in collusion with the 3rd respondent have maliciously threatened the security of the petitioners' jobs by disregarding the national values and principles of governance under article 10 of the constitution by sending the petitioner son compulsory leave.

6. In the internal memo issued by the 1st respondent, no reasons were given for sending the petitioners on compulsory leave or a chance given to them to say anything before the decision was taken. Such was in violation of rights under articles 41, 57 and 236 of the constitution. The respondents through the office of the 1st respondent are violating the right of the petitioner to a fair and administrative action. Actions taken are with intent to replace the petitioners and replace them with those who supported the 1st respondent campaigns. Such is an effort to terminate employment despite the petitioners being on permanent and pensionable terms.

7. The 1st respondent is illegally usurping the powers of the 3rd respondent in making decisions on which employees should go on compulsory leave. Such is without due process and contrary to section 50 and 51 of the County Governments Act.

1st respondent

8. The 1st respondent in reply avers that upon election as Governor of the 2nd respondent County he took oath of office on 21st August, 2017 and upon assuming office he found a county government with serious problems with the most public officers engaging in politics in contravention of the law, blotted workforce among others. These issues were discussed during a meeting held on 25th August, 2017 and it was resolved that the 1st respondent to release a press statement and for the Auditor General to conduct a special financial and human resource audit of all the county government departments with immediate effect. It was also resolved that to create a conducive environment for the audit, certain officers who had been internally identified by the office to proceed on special leave in line with code of regulations applicable to public servants. The petitioners were among the 77 employees that had been identified and asked to hand over their responsibilities with immediate effect.

9. The 1st respondent further response is that as the chief officer of the County Government he signed the internal memo to the 77 employees send on special leave as provided for under Section E of the Public Service Human Resource and Procedural Manual.

10. The acts of sending the petitioners on special leave do not remove them from employment. After the special audit they could be

terminated, re-deployed, interdicted or taken back. A decision will be based on the audit outcome and the petitioners shall be subjected to due process and thus premature for them to seek court intervention.

11. The positions held by the petitioners have not been advertised as alleged. The advertisement made is a routine county government advertisement for workers that are geared towards identifying requisite skills-base for possible employment by the respondents. Their positions have not been affected. There is no letter of termination of employment issued to the petitioners.

12. Being sent on leave is normal employment practice in human resource management and does not affect employment status. During such leave the respondents are entitled to appoint other staff to perform their functions on temporary basis. The petitioners are not faced with any disciplinary actions.

13. The 1st respondent is aware of a staff audit to remove abuse of systems that has created many ghost workers and putting a strain on the county government's wage bill. This is being done in the best interests of the public and the office of the Auditor General will carry out the audit. Such is lawful and not with malice and meant to secure public funds. From the Audit there will be a report to the DPP and Director of Criminal Investigations and the Ethics and Anti-Corruption Commission for appropriate action where there is a case for corruption. By taking such action, the 1st respondent has not usurped the powers of the 3rd responding under section 30(3) (f) of the County Governments Act.

14. The 1st respondent served as Senator for 2nd respondent before his current office and had the mandate to introduce bills before Senate for consideration. Such duties and functions were endorsed by citizens of West Pokot County. The petitioners shall not suffer any prejudice after being sent on leave. They are receiving full salary and benefits. The petition is thus premature and unfounded and should be dismissed with costs.

Submissions

15. The petitioner's submissions are that they are permanent and pensionable employee of the County Government of West Pokot and employed by the County Public Service Board established under section 57 of the County Government Act, 2012 and appointed by dint of sections 50 and 51 of the Act. The petition arose following an internal memo issued to the petitioners directing them to take special leave on 25th August, 2017 and which was indefinite and while taking such leave their positions were advertised in the press on 28th August, 2017. The response that the respondents were empowered under section 30(3) (f) of the County Government Act, 2012 and section E of the Public Service Human Resource Procedures Manual to suspend the petitioners is without due process and without any reasonable cause.

16. The petitioners also submit that the actions of the respondents violate article 10, 47, and 41 of the constitution. The principles of governance were not observed, there was no fair administrative action and this amounts to unfair labour practice. Section 76 of the County Government Act, 2012 requires the respondents while undertaking any disciplinary action against any of its employees to observe the principles of natural justice which they failed to do and also not to punish the petitioners unfairly. By advertising the positions held by the petitioners, there is an effort to replace them in clear violation of the law and article 41 and 47 of the constitution. Such is without giving the petitioners a fair chance to argue and defend themselves.

17. The petitioners have relied on the cases of **Joseph Giteru Njomo & 26 others versus Nyeri County Government & another [2017] eKLR; Narok County Government & Another versus Richard Bwogo Birir & Another** where the court held that disciplinary action taken against public servants was subject to due process in terms of section 76 of the CGA.

18. Section 30(3) (f) of the County Government Act, 2012 upon which the respondents have relied upon requires accountability in management of the county resources while Section E of the human resource manual does not give the respondents any powers to send employees and petitioners on special leave. The respondents are in breach of the law, the constitution and the applicable regulations in disciplining employees. He purported audit being conducted while the petitioners are on special leave has not been availed to them and the grounds or necessity for the same is not addressed. Such arbitrary action is unlawful and unreasonable as held in the case of **Nyeri County Government & Another versus Cecilia Wangechi Ndungu [2014] eKLR**.

19. On their part the respondents submits that on the orders sought by the petitioners they fail to satisfy the constitutional principles and requirements for a petition as held in the case of **Annarita Karimi Njeru versus Attorney General [1979] KLR**. The petitioners have rushed to court prematurely while internal mechanisms under the County Government Act, 2012 have not been exhausted. The jobs held by the petitioners have not been advertised and the respondents have acted within their mandate.

20. The petitioners have not particularised the allegations with regard to any violation of their constitutional rights. The petitioners fail to state how the decision taken by the respondents was in violation of article 41, 57 and 236 of the constitution. whereas article 41 relates to fair labour practices, there is no allegation as to how the respondents are in breach; where article 57 relates to the rights of older persons the petitioners have not demonstrated any violations thereof and also with regard to article 256 of the constitution the rights therein have not been related to the petition as to how such apply. The citation of constitutional provisions is not sufficient to warrant the orders sought by the petitioners as held in **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

21. The petitioners have not exhausted internal mechanisms within the respondents and under the County Government Act, 2012 set out under sections 72, 76, and 77. The petitioners were not suspended as alleged and have continued to earn their salary as they are on leave. By filing the petition herein the petitioners are in abuse of court process as the employer retains the prerogative to exercise managerial functions at the work place as held in **Thomson Kerongo & 2 others versus James Omariba Nyaoga & 3 others [2017] eKLR**. the memo issued to the petitioners does not relate to suspension as alleged and the pleadings made to this effect are meant to divert attention.

22. The 1st respondent exercised powers conferred on him lawfully. The action taken by the respondents is constitutional, lawful and allowed under the internal regulations.

Determination

Whether an order of certiorari should issue herein to recall the internal memo of the respondents issued on 25th August, 2017;

Whether there are violations of constitutional rights;

Whether an order of permanent injunction should issue against the 3rd respondent from advertising, receiving applications, hiring to fill the dockets held by the petitioners;

Whether the petitioners should resume duty forthwith.

23. The petitioners have opted to file a petition. Therein the orders sought relate to declarations, orders of certiorari and orders of injunction against the respondents.

Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow parties before this court to commence suit through Memorandum of Claim, Petition and Judicial review. However, Rule 7(3) provides that;

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court

24. Inherently therefore not all matters citing constitutional violations require to commence by way of a constitutional petition. The employment and labour relations Court Rules allow parties to approach the court through Memorandum of Claim and by stating in precise language what they are seeking from the court against the employer or the employee or as the case may be. Indeed as submitted by the respondents, not all matters citing constitutional provisions ought to follow the filing of a petition. As correctly held in the case of **Annarita Karimi Njeru versus Attorney General [1979] KLR**, a person alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat. The High Court in addressing the question of what constitutes a petition, made reference to the case cited above and held in the case of **Trusted Society of Human Rights Alliance versus AG & others [2012] eKLR** that;

We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.

25. The court reading of the cases cited above and Rule 7 of the Court Rules is that a litigant should take the easiest route in urging his/her case by filing a Memorandum of Claim where the issue(s) in dispute does not ordinarily direct such party to any constitutional provisions that is violated.

26. Under Rule 7 of the Court Rules, the court has powers to issue orders set out under section 12 of the Employment and Labour Relations Court Act, 2011 as appropriate. Such orders span as widely as possible and include declarations and any other order to meet the ends of justice.

(a) an injunctive order;

(b) a prohibitory order;

(c) a declaratory order;

(d) an order for specific performance;

(e) an order for payment of costs;

(f) an order for payment of interest on any principal sum awarded by the Court; or

(g) any other order to meet the ends of justice.

27. In this regard, orders of certiorari can only issue in specific circumstances as addressed by the Court of Appeal in the case of **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** that;

... Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is

made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

28. In this case, the 1st respondent by internal memo dated 25th August, 2017 directed as follows;

SPECIAL LEAVE

In line with the Code of Regulations, 2006 section N.18 the following employees are hereby sent on special leave with immediate effect until further notice to facilitate audit of their offices. Please ensue you hand over to your immediate junior officer. ...

29. There were 77 employees listed in the internal memo. The petitioners were part of those listed

30. The petitioners as public servants are governed by the County Government Act, 2012 and the Public Service Human Resource Policies and Procedures Manual for Public Service, 2016 (HR Manual). This is the framework under which the respondents address their human resource capital. Special leave *strictu sensu* is not contemplated therein.

31. Under Section E of the HR Manual, it contemplates employees taking leave for Annual rest, maternity, paternity, compassionate, special leave for sportspersons, sickness, and terminal leave.

32. The HR Manual contemplates interdiction or suspension of an employee to facilitate investigations in serious cases. In this regard, the 1st respondent issued a press statement on 25th August, 2017 stating that following serious audit questions, and the need to undertake a special financial and human resource audit, his government had invited the office of the Auditor General to carry out the same. To achieve the purpose of the audit, the 1st respondent had decided to send various officers of different ranks on special leave.

33. Section 28 of the Employment Act, 2007 allows an employee to take annual leave and sub-section (4) requires an employer to ensure the employee has taken such annual leave. There is however no provision for *special leaves*.

34. What is clear from the petition herein, the 1st respondent memo sending the petitioners on *special leave* from 25th August, 2017 is indefinite. What is also apparent is the purpose of sending the petitioners on leave was to allow for investigations and audit of both financial and human resources. Though taking of *special leave* is not specifically set out in law, taking of leave is a matter to be regulated by the employer. Equally sending employee on leave to allow for investigations is a matter lawful and within the powers of the respondents in managing its resources, human and financial.

35. It therefore goes that the respondents acted within their mandate to ensure the taking of leave by its employees and to allow for investigations. However, where such *special leave* is given to allow for such investigation, keeping the petitioners pending and for an indefinite period even where employment has not ceased and salaries are paid is putting into waste a key human resource available to the respondents. Such is not prudent use of such resources in terms of good governance and accountability for payments made over services not rendered.

36. Ultimately, the issue herein is the directions of the 1st respondent on sending the petitioners on leave. Such action is within his mandate.

37. The advertised positions within the respondent have not affected the employment of the petitioners. To seek orders to stop the respondents from placing such advertisements I find to have no justification on the face of existing employment for the petitioners.

38. As the petitioners remain on *special leave* on full pay and allowances sanctioned by the respondents, I wish to bring to the attention of the respondents the provisions of article 226(5) of the Constitution, 2010 as follows;

(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.

On the grounds set out above, the petition is found without merit and is hereby dismissed. As the parties are in an employment relationship, no orders as to costs.

Delivered in open court at Eldoret this 24th day of September, 2018.

M. MBARU JUDGE

In the presence of:

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