



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**PETITION NO 2 OF 2018**

**IN THE MATTER OF ALLEGED THREAT & CONTRAVENTION OF ARTICLES 22,**

**23(1) 27(1) & (2), 30, 40, 41, 47(1) & (2), 50(1), OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF LAMU COUNTY GOVERNMENT**

**AND**

**IN THE MATTER OF CONSTITUTIONALISM, RULE OF**

**LAW, NATURAL JUSTICE AND GOVERNANCE**

**BETWEEN**

**RAPHAEL MUNYUA NDUNG’U.....PETITIONER**

**AND**

**COUNTY GOVERNMENT OF LAMU.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, COUNTY GOVERNMENT OF LAMU....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Petition is brought by Raphael Munyua Ndung’u against the County Government of Lamu jointly with the County Governor. The matter first came to court by way of Notice of Motion under certificate of urgency on 17<sup>th</sup> April 2018 when my brother, **Ongaya J** who was the Vacation Duty Judge, issued interim orders restraining the Respondents from appointing a fresh nominee to the position of Lamu County Executive Committee Member in charge of Health Services and Environment.

2. When the parties came before me on 15<sup>th</sup> May 2018, they agreed to compromise the interlocutory application to pave way for disposal of the main Petition.

**The Petition**

3. By his Petition dated 16<sup>th</sup> April 2018 and filed in court even date, the Petitioner states that he was at all material times, a member of the County Executive Committee of Lamu County, in charge of Health Services and Environment. His appointment took effect from 12<sup>th</sup> October 2018 and was to run during the tenure of the Governor.

4. On 3<sup>rd</sup> April 2018, the Petitioner received a message sent on whatsapp social media platform, by the Lamu County Assembly Broadcasting Unit to the effect that the Lamu County Assembly had received communication from the Governor H.E Fahim Yasin Twaha vide letter of the same day, making the following changes in the County Executive Committee membership:

- a) Dr. Ann Gathoni Kabii had been nominated to the position of County Executive Member for Health Services, Environment, Natural Resources and Sanitation;
- b) Paul Kamau Thairu had been nominated to the position of County Executive Member for Agriculture and Water Development;
- c) Dr. Abubakar Badawy and Ms. Farida Abdullahi Hassan had been nominated as Chief Officers for Medical Services and Budgeting respectively.

5. Upon reporting for duty on 4<sup>th</sup> April 2018, the Petitioner received a letter dated 3<sup>rd</sup> April 2018 addressed to him by the Governor as follows:

*“Dear Raphael,*

*It is with a heavy heart that I have to notify you that your services as member of the County Executive Committee are no longer required.*

*I wish you all the best in your future endeavours.*

*Yours sincerely*

*(Signed)*

*Fahim Twaha*

*Governor”*

6. The Petitioner states that he was not aware of any grounds which would necessitate his removal as required under Section 40 of the County Governments Act, 2012. He adds that the 2<sup>nd</sup> Respondent had no right in law to exercise discretion over his appointment as the pleasure doctrine was no longer applicable.

7. The Petitioner maintains that the Respondents’ conduct was unconstitutional and cites the following particulars of breach:

- a) Failing to accord the Petitioner equal protection and benefit of the law contrary to Article 27(1) of the Constitution, 2010 by treating him in the most discriminative and casual manner not befitting the office held by him contrary to Article 10 of the Constitution;
- b) Subjecting the Petitioner to discrimination given that he is from the minority Kikuyu community in Lamu County, contrary to Article 27(1) and (2) of the Constitution;
- c) Subjecting the Petitioner to unfair termination contrary to Article 41(1) of the Constitution as read with Section 40 of the County Governments Act, 2012;
- d) Failing to accord the Petitioner a right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, contrary to Article 47(1) of the Constitution;
- e) Failing to accord the Petitioner a right to fair hearing before dismissal and failing to give him written reasons for their action, contrary to Article 47(2) of the Constitution;
- f) Failing to avail the Petitioner a fair and public hearing before taking an adverse decision against him, contrary to Article 50(1) of the Constitution;
- g) Failing to accord the Petitioner his inherent right to dignity and the right to have his dignity respected and protected by hounding him out of office in the most callous and casual manner without regard to his status, reputation and position;
- h) Resorting to draconian steps to circumvent Article 40(1) of the Constitution, contrary to the spirit of Articles 10(1)(a), (b) & (c), (2)(a), (b) & (c) of the Constitution;
- i) By first announcing the dismissal through the Broadcasting Unit without notice to the Petitioner thus exposing him to degrading and inhuman action contrary to Article 28 of the Constitution;
- j) By failing to disclose the reasons ,if any, for the dismissal thus violating the national values and principles of governance under Article 10 of the Constitution;
- k) By terminating the Petitioner in a capricious manner thus breaching Article 236 of the Constitution.

8. The Petitioner avers that his removal from the position of County Executive Committee Member in charge of Health Services and

Environment without following the procedure set out in Section 40 of the County Governments Act as read with Articles 200 (c) and 236 of the Constitution is unconstitutional, null and void.

9. The Petitioner adds that there was no motion in the County Assembly to form a select committee to investigate any allegations against him thus denying him the right to equality under the law as provided in Article 27 of the Constitution.

10. The Petitioner pleads that the Respondents have no right or power to dismiss public officers at their pleasure, arbitrarily, capriciously or whimsically. The Respondents can only exercise authority reasonably and in the public interest.

11. The Petitioner goes on to state that the Respondents are in breach of Articles 73(2)(d) and 174 as read with Section 3B of the County Governments Act by failing in their obligation to exercise authority vested in them in a manner consistent with the Constitution.

12. The Petitioner asks the Court to protect his rights and freedoms as required under Article 258 of the Constitution. The Petitioner prays for:

a) A declaration that the action of the Respondents in relieving the Petitioner of his duties is a breach of the Petitioner's constitutional rights under Articles 27(1), (2) & (3), 28, 41, 47, 50, 200 and 236 of the Constitution and that his removal is null and void for all intents and purposes;

b) An order of certiorari to remove into this Court and quash the decision of the Respondents relieving the Petitioner of his duties as Member of the County Executive Committee in charge of Health Services and Environment;

c) An order of prohibition barring the Respondents from appointing any fresh nominee for the position of Lamu County Executive Member in charge of Health Services and Environment;

d) A declaration that the Petitioner is entitled to remain in service of the Respondents as the Lamu County Executive Member in charge of Health Services and Environment and to perform the attached duties in accordance with the relevant provisions of the Constitution and statutes or as lawfully assigned, unless the Petitioner otherwise lawfully ceases to hold office;

13. In the alternative and without prejudice to the foregoing, the Petitioner prays for an order of payment of all dues to him in the period he would have served up to the end of his term.

14. The Petitioner asks that the Respondents bear the costs of the Petition.

### **The Respondents' Response**

15. The Respondents' Response is contained in a replying affidavit sworn by the Acting County Secretary, Julius Matusia Okindo on 14<sup>th</sup> May 2018. He concedes that the Petitioner was appointed as Member of Lamu County Executive Committee in charge of Health Services and Environment effective 12<sup>th</sup> October 2017.

16. Okindo depones that the Petitioner's employment was for a contractual term of five (5) years or the Governor's term of service whichever comes first. The Petitioner was entitled to a monthly gross salary of Kshs. 259,875 plus a commuter allowance of Kshs. 20,000.

17. It is further deponed that upon being appointed as a Member of the County Executive Committee in charge of Health Services and Environment, the Petitioner failed to take charge of his docket resulting to disquiet among the County health workers. This in turn affected service delivery in the Health Department.

18. Okindo states that numerous complaints of humiliation, threats, harassment, coercion and victimization had been made to the 2<sup>nd</sup> Respondent by the County health workers. He accuses the Petitioner of uncontrolled transfer of staff, stoppage and dissolution of the County Health Management Team, inciting members of the public against health workers and ignoring protocol in issuance of duties or directives.

19. It is further deponed that the County health workers had, on 29<sup>th</sup> January 2018, written to the County Commissioner raising concerns and complaints against the Petitioner. The health workers had also petitioned the 2<sup>nd</sup> Respondent for the immediate removal of the Petitioner as Member of County Executive Committee in charge of Health Services and Environment on account of incompetence, abuse of office and gross misconduct.

20. Further, by letter dated 22<sup>nd</sup> March 2018, the County health workers had issued a notice of boycott of their duties as they had no confidence in the Petitioner.

21. Okindo states that in dismissing the Petitioner, the 2<sup>nd</sup> Respondent exercised his discretion pursuant to Section 31(1) of the County Governments Act as he considered it appropriate and necessary to do so. This was to forestall a boycott by the County health workers which would adversely affect the delivery of health services to the people of Lamu.

22. The Respondents maintain that Section 31(1) of the County Governments Act gives discretion to the Governor to dismiss a Member of the County Executive Committee. There is no provision for any disciplinary process to be undertaken.

23. The Respondents add that it was well within the mandate of the 2<sup>nd</sup> Respondent to summarily dismiss the Petitioner as a Member of

County Executive Committee in charge of Health Services and Environment owing to the fact that he was unable to execute his duties diligently.

24. The Respondents deny the Petitioner's averment that he was discriminated against on the basis of his being from the minority Kikuyu Community in Lamu.

### **Finding and Determination**

25. There are two (2) issues for determination in this Petition:

- a) Whether the decision by the 2<sup>nd</sup> Respondent to dismiss the Petitioner from employment was lawful;
- b) Whether the Petitioner is entitled to the remedies sought.

### **The Dismissal**

26. The Petitioner's dismissal was officially communicated by a brief unreferenced letter dated 3<sup>rd</sup> April 2018, which I have reproduced in the foregoing portion of this ruling.

27. The Court was referred to Section 40 of the County Governments Act which provides the following:

***40.(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds-***

***a) incompetence;***

***b) abuse of office;***

***c) gross misconduct;***

***d) failure, without reasonable excuse, or written authority of the Governor, to attend three consecutive meetings of the county executive committee;***

***e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or***

***f) gross violation of the Constitution or any other law.***

***(2) A member of the county assembly supported by at least one-third of all the members of the county assembly, may propose a motion requiring the Governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).***

***(3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly-the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and the select committee shall report within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.***

28. Section 40(4) confers the right to be heard on any executive committee member facing removal proceedings.

29. It was however urged by Counsel for the Respondents that the termination of the Petitioner's employment was undertaken within the provisions of the Section 31 of the County Governments Act. The relevant part of this provision states the following:

### **31. Powers of the Governor**

***The Governor-***

***a) may, despite section 40, dismiss a county executive committee member at any time, if the Governor considers it appropriate or necessary to do so;***

***b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;***

30. Counsel for the Respondents conceded that the twin doctrines of servants of the crown and pleasure by which an appointing authority retains unfettered power and discretion to dismiss their appointees is no longer applicable in our jurisdiction. Regarding the relationship between members of the County Executive Committee and the Governor, it is now clear that both are servants of the people with clear responsibilities. None is a servant of the other. Instead, both exercise delegated authority flowing from the sovereign power of the people of Kenya as declared in Article 1 of the said Constitution.

31. While holding that the appointment of members of County Executive Committees is not governed by the dictates of the Employment Act, 2007 the Court of Appeal in *County Government of Nyeri & another v Cecilia Wangechi Ndungu & another [2015] eKLR* nevertheless held that the appointing authority is not at liberty to terminate the appointment without reasonable cause. In that case the learned Judges of Appeal stated the following:

***“...the Governor’s contention that his power to dismiss can be exercised without any reasons being advanced has no basis in law. It is the reasons for dismissal that determine whether a dismissal has been exercised reasonably, and the reasons ought to be valid and compelling.”***

32. In *Narok County Government & another v Richard Birir & another [2015] eKLR* the Court of Appeal confirmed that the pleasure doctrine is not applicable in Kenya under the current Constitution.

33. It was submitted on behalf of the Respondents that the powers of the Governor to dismiss a Member of the County Executive Committee under Section 31(a) of the County Governments Act are not subject to the elaborate procedure set out under Section 40 of the Act. This may very well be the case. However, it does not mean that the power granted to the Governor under Section 31(a) is to be exercised capriciously. In the words of the Court of Appeal in the *Cecilia Wangechi Ndungu Case* (supra):

***“the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously.....by virtue of the fact that a governor ought to exercise his powers for the public good, he should not act on selfish motives but for the benefit of his/her county. We find that the reason for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case.”***

34. The Court of Appeal went further to hold:

***“Section 31(a) of the County Governments Act does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he can only dismiss if he considers it appropriate or necessary. Appropriateness or necessity is not arbitrariness or whimsical. Appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power exercised under Section 31(a) of the County Governments Act is reasonable or not.”***

35. In *Stephen Orotu & 4 others v Jacktone N Ranguma [2016] eKLR* my sister **Maureen Onyango J** held that the Governor’s discretion to hire and fire under Section 31(a) must be exercised with reason not at the fancy or whim of the Governor. The learned Judge stated the following:

***“.....the discretion given under Section 31(a) is not absolute. The governor is under duty to act reasonably and for the benefit of the public... The Governor is not allowed to act whimsically in exercise of his discretion. He is obliged to give reasons for his actions and to act with utmost candour and not for his selfish reasons.”***

36. The Petitioner’s dismissal letter dated 3<sup>rd</sup> April 2018, which I have reproduced in the foregoing parts of this judgment, discloses no reason for the dismissal. It is therefore safe to conclude that at the time of his dismissal, the Petitioner did not know the reason for dismissal. The accusations of incompetence, abuse of office and gross misconduct were made in the replying affidavit in response to the Petition.

37. To my mind, disclosure of the reason(s) for dismissal which has a bearing on the reasonableness of the decision to dismiss is for the benefit of the affected Member of County Executive Committee. It is not for the benefit of the Court sitting to review the decision by the Governor. It follows therefore that if no reason is disclosed at the time of dismissal, the decision to dismiss cannot be said to be reasonable, appropriate or necessary.

38. In the circumstances of this case, it would appear that the Governor made the decision to dismiss the Petitioner without any known reason. The attempt to introduce reasons in pleadings could not cure this irregularity and the Court finds that the Petitioner’s dismissal was unlawful, null and void.

## **Remedies**

39. In light of the forgoing findings and taking into account the blatant violation of the law by the Respondents, coupled with the fact that it is near impossible for the Petitioner to find a similar job within the Republic, the Court finds that the only viable remedy is reinstatement of the Petitioner.

40. The Respondents are therefore directed to reinstate the Petitioner to the position held by him prior to the impugned termination. The reinstatement is without loss of any salaries and/or benefits.

41. The Respondents will meet the costs of this Petition.

42. These are the orders of the Court.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2018**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Magare for the Petitioner

Miss Obura for the Respondents