



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO. 39 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

BERNARD OCHIENG MUSULA.....CLAIMANT

-VERSUS-

THE GOVERNOR, COUNTY GOVERNMENT OF KISUMU

H. E PROF. PETER ANYANG NYONG'O....1ST RESPONDENT

DR. CHARLES OLANG'O ONUDI.....2ND RESPONDENT

JUDGMENT

The Petitioner is a member of the public who has filed this petition in public interest by dint of Article 22(2) (c) of the constitution of Kenya 2010. The 1st Respondent is the Governor of Kisumu County while the 2nd Respondent occupies the position of the Acting County Secretary, Kisumu County.

The Petitioner avers that at all material times before the last general election, the position of County Secretary was occupied by one Humphrey O. Nakitari who resigned to join elective politics. Thereafter one Dr Ojwang Lusi assumed office of the County Secretary in acting capacity in accordance with the protocol of public service succession.

It is contended that on or about 23rd August 2017, the 1st Respondent by a letter of even date appointed the 2nd Respondent as the Acting County Secretary and the same letter instructed Dr.Ojwang Lusi to hand over immediately without stipulating the position of Dr. Ojwang Lusi would take.

It is the Petitioner's contention that prior to appointment the 2nd Respondent was a state officer occupying the position of member of county executive in charge of Health Siaya County. That the position of County Secretary Kisumu is a senior public position that would only be filled through adherence with the principles and values of governance enshrined under Article 10 of the Constitution and the provisions of the County Governments Act.

The Petitioner argues that the power that the 1st Respondent possess should be exercised reasonably to serve the public good. That good policy dictates that whenever a position in public service falls vacant, an immediate junior is appointed in an acting capacity and at the time of making the substantive appointment, those in acting capacity are given priority to participate competitively to ensure that there is equity and inclusiveness in sharing of positions in public service.

The petitioner avers that the appointment of the 1st Respondent defies the principles of participation of the people, equity, inclusiveness, non-discrimination, transparency and accountability. That in view of this the appointment of the 2nd Respondent by the 1st Respondent was arbitrary and whimsical and hence an abuse of public trust.

He further raises concern over the content of the appointment letter, that it does not contain the period which the 2nd Respondent is to serve in an acting capacity and does not also stipulate his duties and as such the Petitioner is apprehensive that the 2nd Respondent will be misused by the 1st Respondent to advance his selfish ends.

That on 24th August 2017, the 1st Respondent sent all the chief officers of the county on compulsory leave on the letterhead of the 2nd Respondent. Further on 26th September 2017, the 2nd Respondent gave the County Chief Officers termination notices which raises the

question whether a person in an acting capacity can terminate services of a substantive officer without due process.

It is further contended that the 2nd Respondent advertised for the positions of County Officers without the approval of the public service board and using his own funds as opposed to funds allocated to the County Public Service Board.

The Petitioner alleges that the 2nd Respondent has commissioned haphazard dismissal of workers, that he has dismissed 7 drivers and replaced them with goons, has created 6 task forces each consisting of 20 members who were in the campaign trail of the 1st Respondent whereas the said task forces had not been budgeted for in the 2017/2018 budget.

Furthermore, the Petitioner alleges that the 2nd Respondent does not qualify to hold public office being over 62 years of age contrary to the labour policy of the Country. That the actions of the Respondents have threatened the rights and expectations of all the people of Kisumu and are contrary to Article 10 and 47 of the constitution.

That Dr. Ojwang has suffered great discrimination from the actions of the 1st Respondent who has failed to give reasons for the appointment of the 2nd respondent to replace Dr Ojwang breaching his right to fair administrative action under Article 47.

In the undated petition filed on 5th October 2017, the Petitioner seeks the protection of the following fundamental constitutional principles:

- a. Article 20(1) (2) and (3) (b) on protection of fundamental rights to be mandatorily protected by the Court by adopting the interpretation that mostly favours the enforcement of a right or fundamental freedom.
- b. Article 22(1) on the right to institute proceedings in private and public interest. It is in the public interest that all people exercising trust power observe the principles set out in Article 10 of the constitution and in accordance with the principles of fair hearing and fair administrative action that is in strict compliance with the values of good governance enshrined at Article 10 of the constitution. That the Court must uphold the sanctity of the constitution.
- c. Article 23(1), (3) – the right to declaratory orders.
- d. The 1st Respondent has violated Articles 1, 10, 28, 41, 47 and 50 of the constitution of Kenya 2010.
- e. The junior officer's legitimate expectation to natural justice, due process and fair administrative action and fair labour practice has been infringed by the 1st Respondent.

The Petitioner prays for:

1. A declaration that the actions of the 1st Respondent of appointing the 2nd Respondent to the position of acting County Secretary Kisumu and relieving a junior officer of that duty in breach of the constitution and in particular Articles 1,3,10, 28, 35, 41, 47 and 50 of the Constitution of Kenya 2010 and the same is null and void for all intents and purposes.
2. Damages, exemplary damages and costs of and incidental to this suit.

The 1st Respondent filed grounds of opposition against the Notice of Motion dated 4th October 2017 and the Petition as follows:

1. The entire Application and Petition violates Article 165(5)(b) as read together with Article 162(2) (a) of the constitution of Kenya, section 12 of the Employment and Labour Relations Court Act, 2011 and section 87 (1) & (2) of the Employment Act, 2007. Accordingly the Honourable Court lacks substantive jurisdiction to hear and determine this application and petition.
2. The Applicant's prayer in sum is in fact a mandatory injunction compelling the 1st Respondent to re-appoint and/or reinstate the immediate acting county secretary, one Dr. Ojwang Lusi.
3. In making the impugned appointment the 1st Respondent did not violate any provision of the constitution, the County Government Act or any law at all.
4. An appointment to the office of the county secretary under section 44 (2) (c) and (4) of the County Governments Act is an appointment on contract terms and is accordingly not within the 60 years age limit.
5. The process of appointment of County Secretary is provided for under section 44 (2) of the County Governments Act and does not require approval of the County Public Service Board.
6. The powers and responsibilities of County secretary are provided for under Section 44(3) of the County Governments Act.
7. The instant application is misconceive, bereft of any legal, factual and evidential foundation and is thus incapable of securing the orders sought.
8. The applicant has failed in *toto* to establish the grounds for grant of a temporary injunction and/or permanent injunction or at all.

9. The entire application and petition is too convoluted to make sense of, all over the place, lacks particularity and specificity attendant to a constitutional petition hence incompetent.

10. When looked at critically it readily becomes apparent that the instant petition and application is frivolous surrogate litigation premised on a political foundation, made in bad faith to vex the 1st Respondent, constitutes unmitigated abuse of the Court process thus deserves to be dismissed with costs to the 1st Respondent.

The 2nd respondent filed a Response to the Petition dated 9th October 2017, through the firm of Amondi and Company Advocates wherein he states that the Governor enjoys executive authority in accordance with Articles 1, 179 and 180 of the Constitution. That the Governor is responsible for exercising executive functions under Articles 183, 186 and 187 of the Constitution and section 5 of the County Governments Act which he does through the public servants and offices established and staffed as contemplated under Article 235 of the Constitution and section 5 (2) of the County Governments Act.

He further depones that under Section 64(2) of the County Governments Act 2012, the 1st Respondent is empowered to appoint a person to act in the same capacity until a substantive office holder is duly appointed. He avers that he meets the prescribed qualifications for holding that office as captured under section 44(2) County Governments Act in terms of education and years of experience which has spanned more than 30 years in high calibre employment in the civil service.

The 2nd respondent depones that he was appointed by the 1st Respondent through the exercise of his executive authority and by virtue of the delegated authority he carried out the duties pertaining to that office including terminating the services of chief officers, the deployment of certain staff within the county public service and other duties.

He states that it is the prerogative of the Governor to terminate at will by virtue of the pleasure doctrine enforced by Article 47 of the Constitution. That the 1st Respondent in making appointments must appoint persons who care about his policy goals as they are critical in both administrative policy outputs and executive-legislative politics in the country.

The 2nd Respondent avers that the Petition is pegged on the misguided notion that an appointment must be made from amongst persons within the county Public Service which position is not supported in law. Further that the orders sought are for reinstatement of a former employee of the County Government of Kisumu and as such the Court lacks jurisdiction pursuant under Section 12 of the Employment and Labour Relations Court Act and Article 162(2) (a) of the Constitution of Kenya.

Further that it has not been demonstrated that the 1st Respondent lacked the constitutional and statutory power to appoint the 2nd Respondent as an acting County Secretary from outside the Public Service.

That the powers vested in the 1st Respondent include the constituting and restructuring of the Government by virtue of being its head pursuant to Article 176 of the Constitution with the executive authority vested in the county executive committee appointed by him. Further that the petitioner has not demonstrated that the 2nd Respondent does not meet the prescribed qualifications for holding public office of the County Secretary as enshrined in Section 44(2) of the County Government Act 2012.

It is also the 2nd Respondent's contention that the petition amounts to the violation of the doctrine of separation of powers by requiring the Court to interfere with the powers, functions and discretion vested in the 1st respondent by constituting and configuring for him a government as presented by the petitioners contrary to Articles 176 and 179 of the constitution.

That the orders sought by the Petitioner and the *ex parte* order granted by the Court has resulted in unjust limitation of the 1st Respondent's managerial prerogative contrary to the principle of non-justiciability of political decision left to the Executive's discretion as was held in the case of **Marbury v Madison** and as provided for in section 34 of the County Government Act. The 2nd Respondent prays for the Petition to be dismissed with costs.

Submissions

Mr Nyamweya for the Petitioner submitted that section 64 of the County Governments Act stipulates how persons in the County Government are to be appointed. It provides that a person in an acting capacity must have qualifications of substantive post and must hold office for a specific period. That under section 44, that person must be competitively sought, must be a graduate and must meet standards and values of Article 10, 56 and 124(4) .

Counsel also submitted that the Public Service Board must be involved whether the appointment is in acting capacity or substantive so that there is transparency and openness in recruitment of public servants. That the acting County Secretary is 61 years old which is above retirement age and the position was not advertised. Further the letter of appointment does not state the period to be served and as such it does not meet the requirements of section 64 of the County Governments Act. Counsel was of the view that had the 1st Respondent applied the law, he would not have appointed the 2nd Respondent. He prays for the Petition to be allowed.

On behalf of the Respondents it was submitted that the office of County Secretary does not fall within the County Public Service and that the principles of retirement age do not apply in the instant case. Counsel states that Section 45(2) of the County Governments Act provides for Chief Officer as an office in the County Public Service and is silent on the office of the County Secretary for good reason.

That the office of the County Secretary is established under section 44 of the County Governments Act and the office holder is the secretary to the County Executive Committee. Mr Amondi cited the ruling in Nairobi Industrial Cause 103 of 2014 **Tom Luusa Munyasya & John**

Kennedy Muteti Vs the Governor Makueni County where it was held:

“Member of the Executive at both National and County levels are political appointees, whose assumption of tenure and removal from office hinges on the political mandate granted to the appointing authorities by the people.... CEC members cannot validly challenge the decision of the Governor to remove them under section 31(a) of the County Governments Act 2012. The President and the Governor retain the prerogative.”

Mr. Amondi submitted that the Governor is primarily guided by the needs of the people who voted for him based on his/her pre-election manifesto in exercising discretion in establishing and organising the county pursuant to section 46(2) of the County Governments Act. Further that under his role as head of the executive branch as envisaged under article 179 of the Constitution it behoves him to exercise his powers of appointment and removal in a way that would guarantee delivery of results.

Counsel referred to the American Presidential system where the president has to consider certain yardsticks when making appointments as captured in a paper titled ‘**The Tenure of Political appointees**’ by **Kelly Chang, David Lewis and Nolan McCarty delivered** at the 2001 Annual Meeting of the Midwest Political Science Association, Palmer House Hilton, April 19-22, 2001:

“The President must identify, recruit and retain talented individuals committed to his programmatic and political goals, he must accommodate his partisan and electoral coalitions, because of the confirmation process he must take account of the preference of senators and he must retain appointees once appointed to ensure they stay long enough to transmit the president’s program competently into the bureaucracy. Often the failure to achieve this final imperative most undermines presidential leadership in the bureaucracy.”

On whether the Governor can appoint an acting county secretary from outside the public service it was submitted that the qualifications of the office of County Secretary are set out in section 44 of the County Governments Act which are that he must be a university graduate with at least ten years’ experience in administration and management and shall be nominated from persons competitively sourced by the Governor and with the approval of the County Assembly.

That the County Governments Act is silent on whether the person to be appointed on acting capacity must come from within the public service and no basis in law was laid by the Petitioner to demonstrate their claim on appointments in acting capacity.

Mr Amondi further submitted that the cause is non-justiciable for the reason that the expected end result is that one Dr. Ojwang Lusi who is not a party to the suit and who by an affidavit sworn by him has indicated lack of interest in enjoying fruits of such a favourable judgment would be restored to his previous office as acting county secretary.

That such a move would force the 1st Respondent to proceed with a government structure crafted by his predecessor which is not in keeping with his manifesto which formed the basis of his campaign and election. That the 1st Respondent has already restructured his Government by creating new departments with fundamentally different duties and responsibilities for which advertisement for competitive recruitment has been posted and the said Dr. Ojwang Lusi is an applicant.

That to grant the Orders sought would mean that the Court will have amended Article 179 of the Constitution without going through a popular referendum and re-written Section 46(1) of the County Government Act contrary to the doctrine of separation of powers. Counsel submits that the Petition lacks merit and should be dismissed with costs.

Determination

I have considered the petition, the affidavit and grounds in opposition thereto and the submissions made by counsel on behalf of the parties. The issues arising for determination are the following –

1. Whether or not the office of the County Secretary is in the County Public Service.
2. Whether or not the Governor can appoint an acting County Secretary without compliance with Section 44(1) of the County Governments Act.
3. Whether the appointment of the 2nd respondent offends Articles 1, 10, 28, 41, 47 and 50 of the Constitution.
4. Whether the petitioner is entitled to the orders sought.

1. Whether office of County Secretary is in the County Public Service

Section 2 of the County Government Act defines county public service as –

“county public office” means an office in the county public service or an office in a public body but does not include any office specifically exempted by the Constitution from the powers of the county government;

That definition excludes the Governor, Deputy Governor, Members of the County Executive Committee and Members of the County Assembly. The County Secretary is appointed by the Governor under Section 44 of County Governments Act. The Section provides that he shall be Secretary to the County Executive Committee and Head of the County Public Service. As Head of County Public Service and

Secretary to the County Executive Committee, the office of the County Secretary is not an office in the County Public Service.

2. Whether the appointment of the 2nd respondent was contrary to Section 44(1) of the County Government's Act or Articles 1, 10, 28, 41, 47 and 50 of the Constitution

The 2nd respondent was appointed in an acting capacity. Acting capacity means temporary. After the 3rd respondent removed the immediate former holder of office of the County Secretary he appointed the 2nd respondent to replace him, albeit, in a temporary or acting capacity.

In the case of **GENEROSO R. SEVILLA -V- THE HON. COURT OF APPEALS AND NERITO L SANTIOS**, the Supreme Court of Manila stated as follows in respect of acting appointments –

“An ‘acting’ appointment is merely temporary, one which is good only until another appointment is made to take the place (AUSTRIA -V- AMANTE 79 PHIL. 784)

The power of appointment is essentially discretionary, its exercise may not be controlled by the courts. The choice of an appointee from among qualified candidates or applicants is a political and administrative decision calling for considerations of wisdom, convenience, utility and the interests of the service which can best be made by the head of office concerned for he is familiar with the organizational structure and environmental circumstances within which the appointee must function. (**LUSTERIO –V- INTERMEDIATE APPELLATE COURT, 199 SCRA 255**).”

Section 44(1) of County Governments Act provides for substantive filling of the position of County Secretary. The process as provided for would entail advertising for the position, filtering the applications, interviewing the qualified applicants then presenting the name of the appointee to the county assembly for approval. This is a process that of necessity would take a while, a couple of months in the least.

The position of County Secretary as provided for is very crucial to the running of the County Executive Committee and the County Public Service. Without a county secretary, there can be no meetings of the county executive committee. The role of the county secretary is so crucial that its vacancy would bring the operations of the county executive committee to a standstill. It is therefore necessary to fill the position in temporary capacity to ensure continuity of services whenever the office becomes vacant for any reason.

The reason for vacation of office by the immediate further county secretary is not the business of the petitioner as the former secretary is capable of pursuing any issues arising out of his removal from office, if any. The petitioner has no capacity to speak for him or file suit on his behalf under Article 22(2) of the Constitution. In the instant petition Dr. Ojwang Lusi has indeed sworn two affidavits supporting the appointment of the 2nd respondent by the 1st respondent. This also applies to the officers sent on compulsory leave who have capacity to act in their own interest should they find the action of the 2nd respondent to infringe on their rights.

Further, the office of county secretary is not subject to Section 65 of the County Government Act. Section 44 does not prescribe the age of the County Secretary which as already pointed out, is not an office in the county public service. It has not been alluded that the 2nd respondent does not meet the minimum qualifications for appointment under Section 44 of the County Governments Act to bar him from taking up the position in acting capacity pending the appointment of a substantive county secretary. Filling of the position of county secretary does not require direct public participation. Only the County Assembly is required to approve the appointment.

I do not find the appointment of the 2nd respondent by the 1st respondent to be in conflict with Article 1 as the 1st respondent was exercising his powers as an elected officer under the said article. It is further not in conflict with Articles 10, 28, 41, 47 and 50 of the Constitution. I further do not find any conflict in the 2nd respondent's letter of appointment not setting out his responsibilities as these are set out in Section 44 of the County Governments Act.

The averments about dismissal of drivers and their replacement with persons the petitioner refers to as ‘goons’, constitution of task forces and mass transfers are not backed by any evidence. The petitioner has further not proved that the 2nd respondent was not acting within his mandate as set out in Section 44(3)(c) and (d) when taking the impugned actions.

3. Whether the petitioner is entitled to the prayers sought

The petitioner prayed for a declaration that the actions of the 1st respondent in appointing the 2nd respondent to the position of acting County Secretary Kisumu and relieving a junior officer of that duty is a breach of the constitution and is null and void for all intents and purposes. As I have found above, I do not find the actions of the 1st respondent to be contrary to the constitution.

The petitioner further prayed for damages, exemplary damages and costs of and incidental to this suit. Having failed to establish violation of the constitution, the petitioner is not entitled to the reliefs sought.

For the foregoing reasons I find no merit in the petition and dismiss it. In view of the fact that the petition has been brought under Article 22 of the constitution in the realm of public interest litigation, I order that each party bears its costs.

DATED AND SIGNED AT NAIROBI ON THIS 22ND DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE

**DATED AND DELIVERED AT KISUMU ON THIS 31ST DAY OF OCTOBER
2018**

MATHEWS NDERI NDUMA

JUDGE