



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**PETITION NO. 3 OF 2018**

*(Before D. K. N. Marete)*

**HELLEN CHEPKIRUI RONO.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF KERICHO.....1ST RESPONDENT**

**PAUL KIPRONO CHEPKWONY – GOVERNOR, COUNTY**

**GOVERNMENT OF KERICHO.....2ND RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a petition dated 29th June, 2018.

The 1st respondent in a Replying Affidavit sworn on 9th July, 2018 denies the petition and prays that the same be dismissed with costs.

The other respondents have not filed their respective replies, or at all.

The petitioner however files a Replying Affidavit sworn on 7th August, 2018 in answer to the 1st Respondents Replying Affidavit above cited.

The petitioner's case is phrased as follows;

19. On 24<sup>th</sup> June, 2013, the petitioner was appointed as the Executive Committee Member, County Government of Kericho in charge of Health Services.

20. On 9<sup>th</sup> December, 2016, the Petitioner was redeployed to be the County

Executive Member in charge of Information, Communication, E-Government, Sports and Youth Affairs.

21. After the 8<sup>th</sup> August, 2017 General Elections which included the elections for County Government, the 2<sup>nd</sup> Respondent was dully elected as the Governor, County Government of Kericho.

22. Within 21 days of the swearing in of the Members of the County Assembly of Kericho, the petitioner was constituted as the new executive committee, County Government of Kericho retaining her previous docket of information, Communication, and E-Government.

23. On 4<sup>th</sup> May, 2018, the Respondent wrote to the petitioner a letter dated the same day notifying her to hand over her docket, action that is tantamount to technically removing the petitioner out of office.

The petitioner pleads violations of the constitution and therefore a curtailment of her fundamental rights and freedoms in contravention of Articles 2(1), 3, 10, 232, 236, 41(1), 41 (2) (b), 47 and Article 50 – unfair resolution of disputes.

Further, the letter of 4th May, 2018 by the 2nd respondent has no iota of reasons for the purported removal of the petitioner from office. It only comes out as follows;

*“This is to notify you that I have appointed, Hon. Barnabas Ngeno as the Acting CEC, Information, Communication, E-Government, Sports and Youth Affairs with immediate effect.*

*I wish to thank you most sincerely for the efforts you put on your work to make Kericho County a better County for all. I take this opportunity to wish you well in your future endeavors.*

*On receipt of this letter, make arrangements to hand over to the Acting CEC,*

*Information, Communication, E-Government, Sports and Youth Affairs on or before 4<sup>th</sup> May, 2018.*

*Yours sincerely*

*Prof. Paul Kiprono Chepkwony*

*Governor*

It is also inconsistent with the grounds set out under Section 40 of the County Governments Act, 2012,

She prays as follows;

- a. A declaration to issue to declare that the removal and dismissal of the petitioner as the Executive Committee member for information, Communication, E-Government, Sports and Youth Affairs vide the 2<sup>nd</sup> respondent’s letter dated 4<sup>th</sup> May, 2018 is unconstitutional and therefore unlawful on account of violation of sections 31 and 40 of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and section 41 of the Employment Act.*
- b. An order of certiorari to issue to bring into the Honourable court for purposes of being quashed the decision of the 2<sup>nd</sup> respondent removing and dismissing the petitioner as the Executive Committee member for information, Communication, E-Government, Sports and Youth Affairs vide the 2<sup>nd</sup> respondent’s letter dated 4<sup>th</sup> May, 2018 for being in contravention of sections 31 and 40 of the County Government Act, 2012 as read together with Articles 47 and 236 of the Constitution, 2010 as well as the section 41 of the Employment Act.*
- c. A declaration to issue to declare that under sections 31 and 40 of the County Governments Act, 2012 as read with Article 236 of the Constitution of Kenya, the petitioner remains the lawful holder of the position of the Executive Committee member for Information, Communication, E-Government, Sports and Youth Affairs of the County Government of Kericho.*
- d. This Honourable court do find and uphold that the decisions, actions and omissions of the 2<sup>nd</sup> respondent in respect of the removal and dismissal of petitioner from her position constitute conduct that violates Articles, 10, 41 and 236 of the Constitution.*
- e. This Honourable court be pleased to order for compensation to issue for violation of the petitioner’s rights and an inquiry into quantum be gone into.*
- f. Costs of this Petition.*
- g. Or that such other Orders as this Honourable Court shall deem just.*

The respondent’s case is that the Petition is fatally defective. This is as follows;

- 3. THAT I know if my own knowledge that the petition is fatally defective and the claim against the respondents is not sustainable as it is not backed by facts and it fails miserably to meet the threshold capable of being entertained.*

She further support her case vide the following averments;

- 6. THAT it is true that the petitioner had served as the CEC Medical, Public Health and Pharmaceutical Services from the year 2013. However the petitioner had not been successful in her application for a CEC post for the second time as per the annexed county assembly report.*
- 7. THAT in reply to paragraph 5 of the petitioner’s supporting affidavit, the petitioner was only appointed the CEC Information, Communication, E-Government, Sports and Youth affairs on an acting capacity.*
- 10. THAT in reply to paragraph 7 of the petitioner’s supporting affidavit I wish to state as follows;*

a) *The petitioner did not apply for the position of CEC Information, Communication, Youth, Sports and E-Government.*

b) *The petitioner applied for the position of CEC Trade, Industrialization, Cooperative Management, Tourism and Wildlife.*

c) *The petitioner was unsuccessful in her application for the said post aforementioned as per the vetting report from the County Assembly of Kericho. (annexed hereto and marked JB1 is a copy of the said report)*

11. *THAT the petitioner has had several integrity issues and conflict of interests issues when she was the CEC, Health Service contrary to Chapter 6 of the Constitution of Kenya 2010 and the Leadership and Integrity Act.*

12. *THAT a report of Kericho County Referral Hospital dated 7<sup>th</sup> June 2018 pointed out that the petitioner (former CEC Health Services) had an agent agreement with Kenya Commercial Bank where the petitioner's point of sale terminal machine was being used in the hospital resulting to conflict of interest hence contradicting section 16(1) and (2) of the Leadership and Integrity Act. (annexed hereto and marked JB2 is a copy of the report on the Kericho County Referral Hospital)*

13. *THAT during her tenure as CEC Health Services, it was reported that Kenya Commercial Bank Agents remitted less money to the hospital account amounting to Kshs.10.1 million shillings.*

This was in contravention of subsection 12 (5) of regulation 11 of the Public Officer Ethics Regulations, 2003 which provides as follows;

a. *The personal interests of the public officer are not specific to the public officer but arise from the public officer being a member of a class of persons who all have personal interests in the matter.*

b. *It would be impractical for the public officer and all other public officers who have personal interest in the matter to refrain from participating in deliberations with respect to the matter; and*

c. *Either the personal interests of the public officer are obvious or the public officer declares his personal interests to his superior or other appropriate body or person."*

The matter came to court variously until 19th July, 2018 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether there was a removal and or dismissal of the petitioner as the Executive Committee member for information, Communication, E-Government, Sports and Youth Affairs vide the 2nd respondent's letter dated 4th May, 2018?
2. Whether the removal and dismissal of the petitioner, if at all, as the Executive Committee member for information, Communication, E-Government, Sports and Youth Affairs vide the 2nd respondent's letter dated 4th May, 2018 is unconstitutional and therefore unlawful?
3. Whether the petitioner is entitled to the relief sought?
4. Who bears the cost of this petition?

The 1st issue for determination is whether there was a removal and or dismissal of the petitioner as the Executive Committee member for information, Communication, E-Government, Sports and Youth Affairs vide the 2nd respondent's letter dated 4th May, 2018. The petitioner in her written submissions dated 7th August, 2018 submits a case of unlawful and unconstitutional dismissal from her position as a CEC member for Information, Communication, E-Government, Sports and Youth Affairs.

The petitioner further submits that the County Government Act, 2012 at sections 40 and 31 provides for removal of a member of the County CEC. It is only section 31 (a) of the Act, which gives lee way to a Governor to remove a CEC member as follows;

- By dint of section 40(1) and (2) whereby a member of the County Assembly, supported by at least one third of all the members of the county assembly may prompt the Governor to dismiss a County Executive Member for any of the reasons set out under section 40 (1.) Again, section 31(a) which empowers the Governor to dismiss a County Executive Member at any time if (s)he considers that it is appropriate or necessary so to do.

This is not in issue. It is not disputed by the parties.

The petitioner however, submits a case of unfair dismissal of the petitioner on grounds of section 42 of the County Governments Act, 2012 which provides as follows;

*42 (1) When a general election is held for a county government, the outgoing county executive committee shall remain in office until a new executive committee is constituted after the election.*

(2) The constitution of a new executive after an election under subsection (1) shall be finalized within twenty-one days of the swearing in of the members of the county assembly.

It is her submission that section 42 (2) is coached in mandatory terms. That the petitioner served as a CEC member for Information, Communication, E-Government, Sports and Youth Affairs after this mandatory twenty-one days of the constitution of the county assembly of Kericho automatically made her a CEC member to whom sections 31 and 40 on removal applied. The respondent's cannot be heard to shout otherwise and therefore paragraphs 6 – 10 of the affidavit of Gideon Mutai sworn on 9th July, 2018 are unmerited.

The petitioner further sought to rely on the authority of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu, [2015] eKLR** and **Richard Bwogo Birir vs Narok County Government & 2 Others, (2014) eKLR** where the Court of Appeal upheld the finding of Ongaya, J. at Nyeri and Nakuru respectively that the pleasure doctrine is not applicable in Kenya under the current constitution. Instead, public servants are servants of the people and their dismissal is subject to and amenable to the rule of law and its due process. This is expressed as follows;

*· The above learning leads us to the finding that 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 the power was exercised reasonably, and the reasons ought to be valid and compelling.*

Further,

*· We find and hold the Governor was entitled to invoke section 31(a) but the manner of exercise of his discretion under that section did not accord with the law as earlier adumbrated.*

The 1st and 2nd respondent's in their written submissions dated 11th September, 2018 also seek to answer as to whether the removal of the petitioner was lawful. It is their submission that Article 200 (c) of the Constitution of Kenya, 2010 obligates parliament to enact legislation as follows;

*c) The manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates;*

This is one of the objectives of the County Governments Act and is in the circumstances of this case actuated by the provisions of section 40 and 31 of the Act.

The respondents' further submit that in the circumstances of this case, the 2nd respondent applied the provisions of section 31 (a) of the County Governments Act, 2012, which vests discretion on the part of the Governor, to remove the petitioner. In any event, the petitioner was at no one time appointed a member of the County Executive Committee of Kericho. They put it thus;

*The Assembly's appointment committee tabled, discussed and passed the report on the vetting of nominees for the positions of county executive committee members on 18<sup>th</sup> October, 2017 where the petitioner was not approved as a nominee of the county executive committee members. She had applied for the position of CEC Member for Trade, Industrialization, Cooperative Management, Tourism and Wildlife.*

The respondents' further submit that the petitioner was removed for justifiable cause. This was due to her integrity issues relating to a conflict of interest involving the Kenya Commercial Bank and herself where the petitioner's sale terminal machine was being used at the county hospital in contravention of sections 16 (1) and (2) of the Leadership and Integrity Act. Secondly, the 2nd respondent was duty bound and guided by the provisions of section 52(b) of the Interpretations and General Provisions Act to appoint a qualified and competent person to head the portfolio in issue herein. This in all justifies the action of the 2nd respondent.

The respondents' in finality submits a case of compliance with the rationale in the authority of the **County Government of Nyeri & Another v Cecilia Wangechi Ndungu, [2015] eKLR** whose holding that the Act does not require the Governor to give reasons for dismissal and the petitioner has no grounds to challenge the decision of the Governor in the circumstances. Here, the Court of Appeal on section 31 (a) expressed itself thus;

*We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the Count and in accordance to the principles of devolution...*

The petitioner in support of the petition annexed, *inter alia*, the following documents;

1. A Copy of an Internal Memo dated 5th July, 2015 annexing a copy of the Kenya Gazette Vol. CXV – No. 99 NAIROBI, 5th July, 2013 in which the petitioner was Health Services, Kericho County.
2. A letter dated 24th June, 2013 by the 2nd respondent appointing the petitioner to the office of CEC Health Services with effect from 7th June, 2013.
3. A letter dated 9th December, 2016 appointing the petitioner to take charge of the department of Information, Communication, E-Government with effect from 9th December, 2016.
4. A letter referenced HANDING OVER dated 4th May, 2018 requiring the petitioner to hand over her responsibilities to the

newly appointed Acting CEC Information, Communication, E-Government, Sports and Youth Affairs.

The petitioner has not annexed any document in support of any appointment to the portfolio of CEC Information, Communication, E-Government, Sports and Youth Affairs she alleges to have been dismissed from or removed. This leads credence to the respondents' case that the petitioner was never an appointee to this position in the first place.

Overall, the respondent at paragraph 7 of her Replying Affidavit sworn on 9th July, 2018, avers as follows;

*7. THAT in reply to paragraph 5 of the petitioner's supporting affidavit, the petitioner was only appointed the CEC Information, Communication, E-Government, Sports and Youth affairs on an acting capacity.*

The petitioner pegs her removal on the provisions of section 42 of the County Governments Act, 2012 which at the risk of repetition basically provides thus;

*42 (1) When a general election is held for a county government, the outgoing county executive committee shall remain in office until a new executive committee is constituted after the election.*

*(2) The constitution of a new executive after an election under subsection (1) shall be finalized within twenty-one days of the swearing in of the members of the county assembly.*

This agrees with the respondent's case that the petitioner was never an appointee to the position of CEC Information, Communication, E-Government, Sports and Youth Affairs as claimed. She was in an acting capacity by dint of section 42 (1) of the Act. The timeline for such appointments as provided by section 42 (2) would not by automation of the law award the petitioner a place in the CEC - Kericho County or any other place.

Even in the event that the petitioner was lawfully appointed to the contested position of CEC Information, Communication, E-Government, Sports and Youth Affairs, the 2nd respondent can be said to have prudently and lawfully exercised her powers under section 31 (a) of the County Governments Act, 2012 in removing or dismissing the respondent as is eloquently expressed and demonstrated in the respondents case and submissions.

This court finds that the letter dated 4th May, 2018 was a proper executive action geared at appropriate management of her functions as dictated by the law. It cannot be faulted in the circumstances of this case. If so, malafides should be established by the contesting party. The petitioner has not met this. Firstly, the argument by the parties on the validity of the removal/dismissal of the petitioner by the 2nd respondent *in toto* fall by the way side. So is their emphatic justification of and against a case of removal or dismissal in the circumstances. This is because the circumstances of this case do not arouse a case of removal or dismissal, or at all. The petitioner only had an elongated stint at this portfolio in an acting capacity. She was never an appointee as such.

Again, their reference to the authorities of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu, [2015] eKLR** and **Richard Bwogo Birir vs Narok County Government & 2 Others, (2014) eKLR** become ousted by the facts of this case. They do not apply.

Where does this leave the court? A big question that requires a big answer.

The petitioner's case fails for want of proof and merit. As observed above, no case of removal or dismissal arose. I therefore find that the action of the 2nd respondent as dictated by the letter dated 4th May, 2018 was constitutional and lawful. It did not constitute any removal or dismissal. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the removal and dismissal of the petitioner, if at all, as the Executive Committee member for information, Communication, E-Government, Sports and Youth Affairs vide the 2nd respondent's letter dated 4th May, 2018 is unconstitutional and therefore unlawful. The respondent's case has established that there was no removal of the petitioner from her position in the first place. This then becomes a non issue and is not worthy of consideration.

The 3rd issue for determination is whether the petitioner is entitled to the relief sought. She is not. Having lost on a case of unconstitutional and unlawful dismissal or removal from the position of CEC Information, Communication, E-Government, Sports and Youth Affairs, she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the petition with orders that each party bears their costs of the same.

Delivered, dated and signed this 9th day of October, 2018.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Ochang holding brief Abobo instructed b y Josiah Abobo & Company Advocate for the claimant.

2. Mr.Sambu instructed by Seth & Wathigo Company for the respondent.