



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 10 OF 2018

(Formerly Nairobi ELRC Petition No. 78 of 2018)

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 10, 21, 22, 23(1), 27(4), (6) & (3), 56, 232, AND 258(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 11, 12, 13, 20, AND 21 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTIONS 8 AND 45 OF THE COUNTY GOVERNMENTS ACT, ACT 17 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 2, 3, 10(1), (2)(c), 22(1), 25(c), 28, 41(1), 47(1), 50, 159(2) and (e), (a) AND 258(1) OF THE CONSTITUTION OF KENYA, 2010

YUSSUF DAUD ADAN.....PETITIONER

VERSUS

THE GOVERNOR ISIOLO COUNTY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF ISIOLO.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF ISIOLO.....3RD RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF ISIOLO..4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The Petitioner is the former County Executive Committee member for Water, Energy, Environment, Natural Resource and Climate Change for Isiolo County. He filed his petition on 30th July 2018 seeking to stop the vetting process on 2nd August 2018 of the nominee for his position that had been sent to the 3rd and 4th Respondent. It emerges that the name that had been forwarded for approval is that of his brother Abdi Haji Daud. The 1st and 2nd Respondent made some minor effort to challenge the Petition while the 3rd and 4th Respondent did not appear even once. The parties even attempted settlement after the matter was referred to Nyeri upon its transfer from Nairobi where it had been filed as Petition No. 73 of 2018. The court heard the Petitioner on 31st October 2018 the Respondents having refused to file any papers in opposition to the Petition. It was alleged the Governor had been too busy attending to other matters alleged to be more important such as visiting State House Nairobi to launch universal health care in Isiolo County. Ruling was reserved to today.

2. The Petitioner submitted that he held a crucial docket being the Water, Energy, Environment, Natural Resource and Climate Change in the

county. He had a problem with the manner of his replacement. His contract entered into on 9th October 2017 was for 3 years and the same was vitiated and breached on 22nd July 2018 shortly after he had signed an annual performance contract, a demonstration of a fair working condition and evidence of the good working relations that was in existence at the time. The dismissal was communicated vide press conference and communication via social media, in particular Facebook. The Petitioner sought reasons for the termination and to date, no reasons had been elicited. He was entitled to a salary of Kshs. 259,875/- a month plus gratuity calculated at the rate of 31% of the annual basic salary for each year worked. He wished to conclude his contract but the Governor communicated the removal of the Petitioner with the 3rd and 4th Respondent who caused a notice to issue in the Daily Nation for the vetting of his brother to replace him as the County Executive Committee member for Water, Energy, Environment, Natural Resource and Climate Change. The vetting was to be commenced by the County Government of Isiolo 4 days after the Petitioner's ouster. The Petitioner submitted that the Constitution was violated and cited Articles 1, 10, 22 and 27. Out of the 6 dockets, the Petitioner's docket was the only one targeted for this move despite there being no reasons for his removal. He was not given any opportunity to be heard before his removal and therefore Article 28 was breached. He was not given the information but learnt of it from the media and his rights under the law were breached in particular the rights under Article 41. He asserts that there was no inquiry and no reasons were advanced for the action of the Governor to replace him. He cited the cases of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu [2018] eKLR** and submitted that the pleasure doctrine is invalid and a basis must be laid. Pleasure cannot be arbitrarily executed. He also relied on the case of **Narok County v Birir [2017] eKLR** and the case of **Stephen Orotu v Jacktone Ranguma**. It was submitted that the Petitioner held 5 crucial dockets in the County of Isiolo and had a pivotal role in the county. The Petitioner sought an order of prohibition and specifically an order barring the appointment of Abdi Haji Daud, an order for compensation and the orders of mandamus and *certiorari* to issue quashing the decision of the Governor. He sought reinstatement and points out that the balance of his contract would entitle him to salaries and health cover and there being no cause against him, he sought costs as the decision to replace him was actuated by malice. The counsel for the 1st and 2nd Respondent indicated that he was handicapped as he had not filed any papers and submitted that the Petitioner seeks compensation and urged the court to go that way as the matter was political and reinstatement was untenable. In reply, counsel for the Petitioner asserted that they had conceded that compensation was available but politics do not operate in a vacuum. He submitted that politicians should operate within the law. He conceded that there is someone in that position.

3. In this case, yet again, a Governor has ridden roughshod over constitutional rights of a citizen. In the matter before me, the 1st Respondent embarked on a Machiavellian exercise replacing the Petitioner with his brother. The Petition in a way now pits two blood brothers against each other. The Petitioner concedes there is someone in place though he was seeking reinstatement as a remedy. The 1st and 2nd Respondent's counsel Mr. Thurairaja urged the court to consider compensation. This was despite the hobbling of his defence by his client who had been uncooperative as far as availing the documentation for the response or being available to execute court papers. The cases cited by the Petitioner are relevant and on fours with the present position he is in. Whereas the law contemplates the removal of County Executive Committee members, the Courts have time and time again reiterated that the removal cannot be done without regard to the basic tenets of the law. Article 47 of the Constitution provides in part:-

47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

4. The Constitution provides the standard Kenyans have chosen as their collective expectation in the public discourse. In this Article, there is clearly set out the expectation in any administrative action such as that meted out against the Petitioner. In the case of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu (supra)** the Court of Appeal held:-

We are of the considered view that the Section 31(a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously.

5. I am entirely in agreement with the Court of Appeal that the action of the Governor Isiolo County was arbitrary and there is no evidence that he acted reasonably in dismissing the Petitioner. This is not to say he could not dismiss the Petitioner. He could do so but the failure to accord the appointee the reason for the action he took is untenable in my view. It is common ground that there is an occupant of the office presently. As the Petitioner's brother was appointed to the position in an office where the Governor has some degree of latitude in appointment, the best order to make would not be reinstatement or an order of *certiorari* to quash his decision, but an order for compensation.

6. In the final analysis the Petitioner is entitled for the breach of his constitutional rights to the following relief as against the 1st and 2nd Respondents jointly and severally:-

- a. Kshs. 1,000,000/- as compensation
- b. Costs of the suit.
- c. Interest at court rates on the sums above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 12th day of November 2018

Nzioki wa Makau

JUDGE