



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 268 OF 2016

JOHN MWANIKI.....CLAIMANT

v

JOSHUA IRUNGU.....1ST RESPONDENT

LAIKIPIA COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. John Mwaniki (Claimant) was offered the position of County Secretary, County Government of Laikipia by Joshua Irungu (1st Respondent) who happens to be the Governor of the County Government of Laikipia (2nd Respondent). The appointment was for a 2 year term.
2. On 6 June 2016, the 1st Respondent authored a letter to the Claimant sending him on compulsory leave. The reasons given for the action included unbecoming conduct, discrediting the county government, integrity and conflict of interest.
3. The letter directed the Claimant to hand over to the County Director of Economic Planning.
4. The compulsory leave prompted the Claimant to move Court under certificate of urgency on 15 July 2016 seeking various restraining orders.
5. In the motion, the Claimant sought to impugn the action of the 1st Respondent sending him on compulsory leave and a declaration that it was unfair.
6. The motion was marked as abandoned on 8 September 2016 because it was overtaken by events in that the Claimant was dismissed from office in the interim (dismissal is the subject of another pending Cause, Nakuru Cause No. 298 of 2016, *John Mwaniki v Joshua Irungu & County Government of Laikipia*. An attempt by the Respondents to have this other Cause dismissed was declined by the Court).
7. On 15 September 2016, the Court gave directions as to the hearing and the directions included the filing of Agreed Issues.
8. It appears that the Issues were not agreed for on 28 October 2016 the Claimant filed his version of *List of Issues*, in which he identified some 4 issues as emerging for the Court's determination.
9. The Issues according to the Claimant were

1. Whether Compulsory Leave is provided for in the Employment Contract and relationship

between the Claimant and the 2nd Respondent.

2. Whether the 1st Respondent followed due process in sending the Claimant on Compulsory Leave.

3. Whether the 1st Respondent's action of sending the Claimant on Compulsory Leave was wrongful and amounted in breach of Contract between the Claimant and the 2nd Respondent.

4. Whether the Claimant has a sustainable claim against the Respondents and is entitled to the reliefs sought in the Statement of Claim.

10. The Cause was heard on 1 November 2016 when the Claimant and the Acting County Secretary of the 2nd Respondent testified.

11. The Claimant filed his written submissions on 1 December 2016 while the Respondents submissions which should have been filed on or before 30 December 2016 were not on file by this morning.

12. The Court has considered the evidence and submissions and come to the conclusion that the real issue in dispute is a narrow one, and it is *whether Governors have and or can exercise any direct disciplinary control over County Secretaries and appropriate remedies/orders to be made.*

Appointment of County Secretary

13. Section 44 of the County Governments Act provide for the appointment of a County Secretary. The qualifications and recruitment process are all provided for.

14. The role of the Governor is to nominate the person recruited by the County Public Service Board, and the County Assembly approves the nomination.

Disciplinary control

15. The power of dismissal of a County Secretary is given to the Governor by section 44(2)(c) of the County Governments Act, but subject to the terms and conditions of appointment.

16. The Claimant's offer of appointment letter did not make provision for disciplinary control, and therefore the Court ought to examine the legal and statutory architecture applicable to the county public service and public officers in general and the common law in determining where the power legally reposes.

Legal and statutory architecture

Constitutional protections

17. A County Secretary is a public officer in terms of Article 260 of the Constitution, and is therefore afforded the protection in Article 236 against dismissal, removal from office, demotion in rank or otherwise being subjected to **disciplinary** action without due process.

Statutory protections

18. In terms of section 56(2) of the County Governments Act, the County Secretary serves as the head of the county public service.

19. In terms of disciplinary control, section 59 of the Act provides as follows

Functions and powers of a County Public Service Board. 59. (1) The functions of the County Public Service Board shall be, on behalf of the county government, to—

(a) establish and abolish offices in the county public service;

(b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

(c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part

14. In my view, the statutory scheme mentioned above lead to the conclusion that by being the head of the public service, the County Secretary is susceptible to disciplinary control of the County Public Service Board.

15. In other words, allowing the Governor to be the *complainant, investigator and judge* would be contrary to the protections granted to all public officers in Article 236 of the Constitution, right to fair labour practices as envisaged under Article 41 and section 59 of the County Governments Act.

16. It may as well be an assault on the right to fair administrative action, but that is not a matter for debate in this case.

Common law

17. Under the common law, suspension of an employee without either a contractual or statutory basis has been held to be unlawful and in breach of contract (see the cases of *McKenzie v Smith* (1976) IRLR 345; *McClory v Post Office* (1993) IRLR 159; *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR among others).

18. In my view, because there is no contractual foundation to sending the Claimant herein on compulsory leave, the principles applicable to suspension under the common law would apply to sending a public official on compulsory leave.

19. The Court would therefore reach a conclusion that the action by the 1st Respondent either as a person or as a Governor in sending the Claimant on compulsory leave was devoid of legal and/or contractual basis and thus null and void.

Appropriate Orders/Costs

20. The Respondents and more so the 1st Respondent did not either in the pleadings or in evidence direct the attention of the Court and/or disclose the particular legal/statutory or contractual authority upon which he drew the power to exercise disciplinary control over the Claimant.

21. Therefore and in consideration of the national values of good governance, transparency and accountability and responsibilities of leadership and integrity, the Court would order that the 1st Respondent personally bear the damages to be awarded and costs of this Cause.

Conclusion and Orders

20. In lieu of the orders sought in the Statement of Claim and in consideration of the above, the Court would

(i) Declare that a Governor has no and cannot exercise direct disciplinary control over a County Secretary.

(ii) Declare that the sending of the Claimant on compulsory leave by the 1st Respondent had no legal or contractual basis.

21. As the Claimant was subsequently dismissed and the dismissal is the subject of another action, it would not be appropriate to quash the letter sending him on compulsory leave as sought.

22. In lieu of quashing the letter, the Court would order the 1st Respondent to pay the Claimant nominal damages of Kshs 1/-, personally.

23. 1st Respondent to bear the Claimant's costs.

Delivered, dated and signed in Nakuru on this 20th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Wanjala instructed by Gumbo & Associates

For Respondents Mr. Mwangi instructed by Wanjao & Wanjau Advocates

Court Assistants Nixon