



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KISUMU

INDUSTRIAL CAUSE NO. 354 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS OKUMU NGESA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF SIAYA.....RESPONDENT

JUDGMENT

By a Statement of Claim dated 18th December 2014 the Claimant states that he was employed as a member of the Executive of Siaya County Government on a fixed term contract of 5 years. That on 21st October 2014 the Respondent unlawfully dismissed the Claimant from service without a hearing or lawful cause. The Claimant prays for the following remedies.

- a. A declaration to the effect that the purported dismissal of the Claimant on the 23rd October, 2014 is a nullity in law in the light of Articles 10 and 47 of the constitution.
- b. An Order do issue quashing the decision of the Respondent of 21st October, 2014 dismissing the claimant pending the hearing and determination of the suit.
- c. A declaration that the letter dated 21st October, 2014 is in contravention of Articles 10 and 47 and 50 of the Constitution.
- d. An order of Prohibiting restraining the Respondents from suspending interdicting, termination or otherwise howsoever interfering with the Contract of employment of the Claimant pending the hearing and determination of this suit.
- e. In the alternative payment of 4 years salary being Kshs.15,703,125 together with gratuity of 31% gratuity of basic salary.
- f. Costs and interest.

The Respondent filed a Statement of Defence to the Claim denying the allegations by the Claimant. The Respondent avers in the Defence that the Claimant's contract was lawfully terminated and his position had already been lawfully filled by **CHERO ODUOR OMONDI** and/or **GONDI HESBON OLUM**. The Respondent prayed that the Claim be dismissed with costs.

The Claimant filed a Reply to the Statement of Defence in which it reiterated the contents of the Memorandum of Claim and put the Respondent to strict proof of the averments in the defence.

At the hearing the Claimant testified in support of his case while the Respondent called one witness **JOSEPH OMONDI ONYANGO**, the Deputy County Secretary. Parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was employed as Executive Committee Member of Siaya County Government by letter dated 21st November 2013 initially to the docket of Trade, Industry, Labour and Co-operative Development. On 31st March 2014 he was moved to the docket of Public Works, Roads and Transport, the position he held until 21st October 2014 when he was dismissed. His initial salary was Shs.225,000. By the time of termination he was earning Shs.287,000.

The Claimant testified that on 25th September 2014 there was an advertisement in the Standard Newspaper requiring him and 3 other Executive Committee Members to appear before the County Assembly for reconsideration. The Claimant and the other 3 Executive Committee Members wrote to the Governor on the same day and at the same time filed Petition No. 21 of 2014 and obtained an order on 1st October 2014 staying the decision of the County Assembly and the Speaker of Siaya County Assembly to vet them again. On 22nd October 2014 the Claimant received the letter of dismissal dated 21st October 2014. The letter did not state the reasons for his dismissal. He was never given an opportunity to be heard before the dismissal.

On cross-examination the Claimant stated that he is an economist by profession and applied for the position of County Executive Committee Member following an advertisement for the position of Finance, Planning and Vision 2030 but was eventually employed to the position of Trade, Industry and Co-operatives. He stated that there was a reshuffle on 31st March 2014 when he was transferred to Public Works, Roads, Transport and Communication. He stated that he moved to Court when his position was advertised after failing to get a response from the Governor. He stated that he was vetted and found suitable at the time of recruitment.

In the written submissions filed on behalf of the Claimant it is submitted that the Claimant was dismissed in a summary manner without valid reason, that the dismissal contravened Articles 10, 47 and 50 of the Constitution as well as Section 41 of the Employment Act. It was submitted that the Respondent is guilty of procedural impropriety and failure to state reasons for dismissal and further that the dismissal was actuated by malice and witch-hunting.

The Claimant relied on the Case of **ABBOT AND SULLIVAN (1952) IKB 189** at Page 198 in which Lord Denning observed:-

"...bodies which exercise monopoly in important sphere of human activity with power of depriving a man of his livelihood must act in accordance with elementary rules of natural justice. They must not condemn a man without giving an opportunity to be heard in his own defence and any agreement or practice to the contrary would be invalid."

The Claimant further relied on the case of **GRACE KAZUNGU AND ANOTHER -VS- NSSF CAUSE NO.703 OF 2010** in which the Court held as follows:-

"The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be provided with the opportunity to make submissions to the case."

It was submitted that the dismissal letter handed over to the Claimant read in part as follows:-

"You are dismissed from the service with immediate effect."

It was submitted that the grounds for dismissal were not set out in the letter nor in any other document given to the Claimant and that no Show Cause letter was issued to him warning him of the possible dismissal action that was being contemplated.

The Claimant further relied on **MISC. CIVIL APPLICATION 282 OF 1982 (NAI) J.C. OYIENG V PERMANENT SECRETARY MINISTRY OF ECONOMIC PLANNING AND DEVELOPMENT** wherein it was held by Okubasu J. and Aluoch J. that:-

"In the case of disciplinary proceedings the correct procedure must be followed ... if there are prescribed procedures laid down in the statute they must be followed strictly. If there is no strict application of correct procedure, then the protection given or intended to be given by Parliament is lost."

The Claimant further relied on that decision in the case of **J.M. OCHEYO V THE ATTORNEY GENERAL CIVIL CASE NO.4559 OF 1988**, in which Nambuye J. stated that:-

'Failure to comply with laid down procedures renders the quashing of defendant's decision necessary, which I hereby do.'

The Claimant prays for reinstatement to his previous job without the loss of benefits as his termination was unfair and he is jobless. The Claimant further prays that the court should be guided by the provisions of section 17 of the Employment Act as well as Article 47 of the Constitution as read together with Article 10 and 50 which give the reasons for which an employee can be dismissed. It is submitted that the Claimant was an outstanding employee/professional to the Respondent who was recruited competitively but was dropped like a hot potato 1 year into the employment.

The Claimant prayed for reinstatement without loss of benefits and relied on the following other cases:-

- a) **ELRC CAUSE NO.665 OF 2011 BEATRICE ACHIENG OSIR -VS- BOARD OF TRUSTEE TELEPOSTA PENSION SCHEME** in which the Court awarded the Claimant the sum of Kshs.9,573,624/- as prospective future earnings following her unlawful and unfair dismissal from employment.
- b) **ELRC CAUSE NO.354 OF 2014- HENRY MURWA MUSEMATE -VS- THE PUBLIC SERVICE COMMISSION & ANOTHER.** The Honourable Court awarded compensation 6 Million as damages for unfair dismissal.
- c) **J.R. NO. 4 OF 2016 - NAIROBI. HON. EVANS ODHIAMBO KIDERO -VS- NAIROBI COUNTY GOVERNMENT.** The Honourable Court held that the Governor ought to exercise his power to dismiss a member of a County Executive Commander under Section 31(a) of the County Government Act reasonably and for the public good. The Court further held that no charge of misconduct, negligence not non-performance had been laid against the Applicant prior to the summary removal from office or during his tenure in office. The Court ordered that the Claimant was to be paid for the unserved term of the Contract between the Applicant and the employer.
- d) **C.A. NO.2 OF 2015 - AT NYERI THE COUNTY GOVERNMENT OF NYERI & ANOTHER -VS- CECILIA WANGECHI NDUNG'U.** The Court of Appeal dismissed an Appeal that the County Government of Nyeri had lodged against a member of its County Government for lacking in merit as the Employment Court had rightly quashed the decision of the County Government of Nyeri which had been exercised unreasonably and without valid reasons.

Respondent's Case

The Respondent's witness **JOSEPH OMONDI ONYANGO** testified that the Claimant was appointed following a competitive process, was vetted and found suitable before being recruited. He further testified that the Claimant was moved to a new docket in a reshuffle. He stated that he was not aware

why the Claimant was required to undergo a re-vetting or whether the Respondent had legal mandate to re-vet. He stated he was aware the Court ruled against the re-vetting and the Claimant continued working until 21st October 2014 when the Governor exercised his right under Section 31(a) of the County Governments Act to remove the Claimant from office. He testified that he was not aware if the governor involved the County Assembly in the removal of the Claimant from office. He testified that no reason for removal was mentioned in the letter removing the Claimant from office and further that Section 31(a) does not provide for such reason to be given. He testified that the Claimant's position had been filled by 19th December 2014. He stated the Claimant was not informed of any complaints against him. He stated he was not aware if the County Government had any reason to stop the Claimant from resuming office.

In the written submissions filed on behalf of the Respondent it is contended that the dismissal of the Claimant was well intended, and without malice, that the action was in line with powers conferred on the governor by the law. It is submitted that the Claimant is not subject to the provisions of the Employment Act as was stated by the Court of Appeal in the case of **COUNTY GOVERNMENT OF NYERI & ANOTHER V. CECILIA WANGECHI NDUNGU [2015]eKLR**.

It is further submitted that by dint of Article 179(1) of the Constitution and Section 34 of the County Governments Act executive authority of a county is vested in the County Executive Committee and the Governor assigns duties to every member of the County Executive Committee who are individually and collectively responsible to the Governor. It is submitted that under Section 30(a) the Governor may despite Section 40, dismiss a County Executive Committee Member at any time if the Governor considers that it is appropriate or necessary to do so.

It is further submitted that the governor has discretion to dismiss a member of the County Executive Committee based on the reason that the governor deems it fit and appropriate to do so. It is further submitted that nothing would have been easier for the legislator to include in Section 30 grounds for dismissal as outlined in Section 40. That it was left to the wisdom of the governor to do so when he deems it fit and the governor is not under any obligation to outline to the Claimant any reason for the dismissal or to have the Claimant undergo a hearing before being dismissed.

The Respondent draws a parallel between the provisions of Article 132(2)(a) of the Constitution as read with Article 152(5) which give the President powers to dismiss cabinet secretaries without going through any dismissal process. It is submitted that such powers of the President are replicated in Section 30 of the County Government Act which gives the governor unfettered discretion to remove from office or dismiss a County Executive Committee member.

On the remedies sought by the Claimant it is submitted for the Respondent that his position has since been filled and the remedy of reinstatement cannot lie as such order would imply the termination of employment of the person currently holding the position who has not been joined to and is not a party to this suit.

On compensation it is submitted that although the County Government Act supersedes the Employment Act on the issue of dismissal, it is silent on remedies. It is submitted that the Employment Act can therefore be a guide on compensation and provides for a maximum of 12 months' salary. The Respondent offers to pay 6 months as appropriate remedy should the Court find that the governor's powers as conferred by Section 30 call for natural justice.

Determination

Upon consideration of the facts and submissions, the following issues arise for determination.

- 1. What is the prescribed mode of dismissal of a member of the County Executive Committee?*
- 2. Whether Section 31(a) gives the governor unfettered powers to dismiss a member of the County Executive Committee from office.*

3. *Whether Section 41 of the Employment Act is applicable to the removal of the Claimant from office.*

4. *Whether the dismissal of the Claimant was unlawful.*

5. *Whether the Claimant is entitled to the remedies sought.*

Dismissal Of A Member Of County Executive Committee

As was stated by the Court of Appeal in the case of **COUNTY GOVERNMENT OF NYERI & ANOTHER V. CECILIA WANGECHI NDUNGU** (hereinafter referred to as the **CECILIA WANGECHI CASE**) in determining how a member of a County Executive Committee can be removed from office the court has to consider the relevant Constitutional and Statutory provisions. The Court observed that:-

“The County Government's Act was enacted pursuant to Article 200 of the Constitution to give effect to Chapter 11 of the Constitution which provides for devolved government. In particular Article 200(c) placed an obligation on parliament to enact legislation which would provide:-

“the manner of election on appointment of persons to, and their removal from offices in the County Governments”

The Court further observed that the relevant provisions are Section 40 and 31(a) of the County Governments Act which provide as follows:-

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 that it is appropriate or necessary to do so;

40. Removal of member of executive committee

(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—

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) 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.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations—

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5)(b) is supported by a majority of the members of the county assembly—

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member.

The position is therefore that the law provides for two different modes of removal of a County Executive Committee member from office, one being through a motion passed by the County Assembly as provided in Section 40 and the other being by the governor's own initiative as provided under Section 31(a). In the present case the Claimant's removal was under Section 31(a) as stated in the Claimant's letter of dismissal which is produced below:-

21st October, 2014

Hon. Francis O. Ngesa.

P O Box 803-40600

SIAYA

RE: DISMISSAL FROM COUNTY GOVERNMENT OF SIAYA AS COUNTY EXECUTIVE COMMITTEE MEMBER

Pursuant to the Powers conferred upon me by the County Government Act, 2012 in particular sections 31(a), I remove you from office as an Executive County Committee member with immediate effect. I therefore direct that you surrender formally all the County Government property, tools and equipment that were issued to you as an Executive Committee Member to the County Secretary before you leave office. This should be done before Friday, 25th October, 2014.

Thank you for the time you have served in my Government as an Executive Committee Member.

Yours sincerely

H.E. Hon. Cornel Rasanga

Governor.

COUNTY GOVERNMENT OF SIAYA

According to the Respondent, the powers of the governor under Section 31(a) are unfettered. In other words, the Respondent's argument is that members of the County Executive Committee serve at the pleasure of the governor under what in legal parlance is referred to as "the pleasure doctrine".

The issue of pleasure doctrine as relates to the removal from office of a member of the County Executive Committee was discussed extensively by the Court of Appeal in the case of **CECILIA WANGECHI** and I do not need to belabour the issue any further. As was held by the Court of Appeal, executive power is vested by the Constitution in the people and any person, body or authority exercising such power does so on behalf of the people of Kenya. For this reason the pleasure doctrine has no place under the new Constitutional dispensation of Kenya.

Furthermore, as was stated in the **CECILIA WANGECHI** case, the members of County Executive Committees are state officers and their terms and conditions of service are regulated by the Constitution or relevant statute, principles of fair administrative action and rules of natural justice.

In the present case, it is not denied that the Claimant was never subjected to either the principles of fair administrative action or rules of natural justice. Up to the date of hearing, the Claimant was not aware of the grounds for which he was dismissed by the Governor. The Respondent's witness Mr. Onyango alluded to some complaints having been received against the Claimant from members of the public but none was produced in Court. The witness was not able to even mention any specific complaint.

From the foregoing, the only conclusion the Court can come to is that the Claimant's dismissal was unfair for failure to observe the principles of fair administrative action and the rules of natural justice.

Section 41 of the Employment Act is however not applicable to the Claimant as observed by the Court of Appeal in **CECILIA WANGECHI** case although I must mention here that the section encompasses the principles of both fair administrative action and natural justice.

Remedies

Having come to the conclusion that the dismissal of the Claimant by the Respondent was in violation of both the principles of fair administrative action and natural justice, he is entitled to remedies for breach of his constitutional rights as provided under Article 23(3).

The Claimant prayed for reinstatement or in the alternative payment for the remainder of the contract term.

The prayer for reinstatement is in the opinion of the Court not appropriate in the circumstances of this case as the Claimant's position was filled in December 2014. The Claimant did not controvert the evidence by the Respondent that the County Assembly approved replacements for his position and two others on 19th December 2014, the very date on which he filed this suit. He did not take any steps to enjoin the person who was offered his position. Consequently the Court cannot make orders that would adversely affect such person without having given the person the opportunity to defend their position.

The alternative prayer is for payment of salary for the unexpired term of the contract. The Claimant has brought to my attention the recent decision in **REPUBLIC V. EVANS KIDERO (GOVERNOR NAIROBI COUNTY) & ANOTHER EX PARTE EVANS ONDIEKI 2016(eKLR)** in which the Court awarded the ex parte applicant full gross salary for the unexpired term of his contract together with gratuity. It is however my opinion that payment for the unexpired term of the contract to a healthy person who is expected to move on with his life and to mitigate his losses is unjust enrichment, against public interest and is not supported by any law as the only legislation that provides for payment of compensation for loss of employment is the Employment Act which provides for a maximum of 12 months gross salary. Other or further payments may be ordered on account of damages where there is a prayer for the same and evidence is adduced supporting such payment as was the case in **INDUSTRIAL COURT**

(NAIROBI) CAUSE NO. 354 OF 2014. In the present case there was no such prayer.

In the case of **MARETE V. TSC** Rika J. referring to the case of **MENGINYA S. SALIM V. CENTRAL BANK OF KENYA** held that

"... it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The court observed that the plaintiff was able bodied, intellectually and professionally well endowed man, likely to find occupational engagement outside the defendant's employ. The court applied for principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration. The Claimant has moved on, and that he is serving as a Judge, attests to his sharp intellect, professionalism and high level of employability. The question whether he is likely to find occupational engagement outside the TSC Outfit, is spent. The High Court observed that the breach of the employment contract coalesced into one broad damage, and went on to award damages under one head. This High Court decision, agrees with the decision of this court in the case of Maria Kagai Ligaga, where the Court upheld the principle of fair go all round; refused to grant anticipatory salaries and allowances; and declined to award multiple damages. The rationale was that employees must not be encouraged to replicate injuries, and multiply remedies. To his credit, the Claimant prays for general damages as an alternative to statutory compensation."

I ascribe to the same position and therefore award the Claimant compensation equivalent to 12 months salary together with 31% gratuity for the period served from 21st November 2013 to 21st October 2014 being 11 months. The Respondent will also pay the Claimant's costs of this suit.

The decretal sum will attract interest at court rates from date of judgment.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE