



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 4 OF 2016

1. PATRICK OYUGI WAKINE

2. MAURICE THOMAS CHACHA

3. PETER OMONDI OUMAPETITIONERS

-VS-

1. COUNTY ASSEMBLY OF MIGORI COUNTY

2. COUNTY ASSEMBLY SERVICE BOARD-MIGORI COUNTY

3. COUNTY PUBLIC SERVICE BOARD-MIGORI COUNTY

4. TOM ONYANGO OPERERESPONDENTS

J U D G M E N T

The petitioners are all engaged by the Migori County Government. The 1st Petitioner PATRICK OYUGI WAKIRE is the substantive clerk to the County Assembly of Migori, his office being in the Migori County Assembly Service Board. The 2nd Petitioner MAURICE THOMAS CHACHA is the Finance and Economic Planning Officer, an office within the Migori County Assembly Service Board. The 3rd Petitioner is an Accountant I in an office within the Migori County Public Service Board.

By virtue of his position as Clerk of the County Assembly, the 1st Petitioner is also the Secretary to Migori County Assembly Service Board pursuant to section 12 (4) of the County Government Act.

The Petitioners have filed this petition against the County Assembly of Migori County, the 1st Respondent, the County Assembly of Migori Service Board, the 2nd Respondent, the County of Migori Public Service Board, the 3rd Respondent and Tom Onyango Opera the Acting Clerk to the County Assembly of Migori County.

The petitioners are aggrieved by their interdiction by the interim County Assembly Service Board. The 1st Petitioner's letter of interdiction is dated 30th October, 2015 while the 2nd and 3rd Petitioners' letters of interdiction are dated 2nd November 2015.

The Petitioners allege that the interdictions are a violation of the provisions of the County Government Act, the Fair Administrative Actions Act and the Constitution of Kenya. They seek the following remedies.

- a) A Declaration be made and be issued that the Petitioners are entitled to protection under the

provisions of the Constitution 2010 and the Fair Administrative Actions Act 2015.

b) A declarations that the actions/omissions/Commissions of Respondents jointly and severally as regards creation of Interim Migori County Assembly Service Board, appointment of 4th Respondent as Acting Clerk to Migori County Assembly hence the interim Secretary of Migori County Assembly Interim Service Board and the Interdictions of the 1st, 2nd and 3rd Petitioners by 4th Respondent under purported authority of Migori County Assembly Interim Service Board were unprocedural, irregular, without jurisdiction, null and void and of no legal consequence.

c) Permanent injunction prohibiting and or restraining the Respondents jointly and severally either by themselves, Agents, Servants and or employees, from disciplinary action, disciplining, suspending, preventing, barring, restricting and interfering with the Petitioners performance discharge and or execution of their duties as Clerk, Finance and Economic Officer and Accountant 1 respectively whatsoever and howsoever, subject only to the observance of the provisions of the Constitution of Kenya 2010, the Fair Administrative Actions Act 2015, the County Government's Act 2012, the Public Finance Management Act and other relevant statutes.

d) Permanent injunction prohibiting and or restraining the Respondents either by themselves, Agents, Servants and or employees from appointing and or constituting or directing appointment or constitution of any other person (s) to act as the substantive Clerk, Finance and Planning Officer and Accountant 1 in place of 1st, 2nd and 3rd Petitioners respectively without regard to the due process of the law.

e) An order of Judicial Review in the nature of Certiorari bringing to the Court and quashing the decision to interdict the Petitioners vide letters dated 30th October 2015 and 2nd November 2015.

f) An order of Judicial Review in the nature of prohibition prohibiting the Respondents herein either jointly and severally from removing, suspending and or dismissing the Petitioners from their respective employment with the Respondents on the basis of the decision taken by the so called Migori County Assembly Interim Service Board and discussion in the County Assembly on 27th and 26th October 2015.

g) The Respondents be condemned to pay damages and compensate the petitioners for unlawful and/or wrongful interdiction.

h) The Honourable Court be pleased to issue Orders and Writs as the Court may deem fit and expedient

The Respondents oppose the petition through the replying affidavit of Christopher Odhiambo Rusana the Migori County Secretary sworn on 14th March 2016.

The Petition was filed together with a notice of motion seeking conservatory orders. When the application came up for inter parties hearing on 14th March 2016 the parties agreed to shelve the application and proceed to argue the petition as the prayers in the application were similar to those in the petition. The Parties agreed further to argue the petition by way of written submissions.

Factual background

The Petitioners are all holders of office in the Migori County Assembly Service Board as clerk, Finance and Economic Planning Officer and Accountant I.

Following the tabling of the report of the County Public Investments and Accounts Committee to the County Assembly of Migori (1st Respondent), the Assembly resolved on 13th and again on 27th October, 2015 by unanimous vote, that the entire membership of the County Assembly Service Board, the 2nd Respondent, should step aside so that investigations could be carried out by relevant independent institutions on improprieties raised in the report. The membership of the County Assembly Service Board

included the County Assembly Speaker as chairperson, the Leader of the Majority Party as vice chairperson, the leader of Minority Party as member, one elected member of the County Assembly, the Clerk to the County Assembly as Secretary, the Finance and Planning Officer and the Accountant 1. Petitioners are therefore all members of the Migori County Assembly Service Board which was required to step aside by resolution of the 1st Respondent.

On 29th October, 2015, the 1st Respondent instructed the 2nd Respondent to interdict the petitioners. The letters of interdiction were signed by the 4th Respondent who was on 30th October, 2015 deployed as Clerk to the County Assembly in acting capacity.

Petitioners case

The Petitioners are aggrieved by their interdiction which they argue was in violation of the County Government Act. According to the Petitioners, the offices of the Clerk to County Assembly and the County Assembly Service Board were not in place following the dissolution of the County Assembly Service Board by the 1st Respondent. They submit that the interim County Assembly Service Board that met on 30th October, 2015 and passed a resolution to interdict them as well as the interim Secretary to the interim County Assembly Service Board who signed the letters of interdiction are unknown to the law and had no authority to interdict them.

According to the Petitioners section 12 of the County Governments Act does not provide for interim County Assembly Service Board. They further urge that Tom Onyango Opere, the 4th Respondent was appointed as Acting Clerk to the County Assembly by the 3rd Respondent, the County Public Service Board which has no capacity to appoint a clerk to the County Assembly a reserve of the County Assembly Service Board which in any event, was not in place following the resolution of the 1st Respondent that the members step aside.

It is submitted that the 1st Petitioner is appointed by the 1st Respondent and it is only the 1st Respondent who can interdict him.

It is further contended that the interdiction for 60 days had been indefinitely extended in violation of fair labour practices and the fundamental rights of the 1st Petitioner who was never accorded any hearing.

It is the Petitioners argument that their interdiction was in excess of jurisdiction and violated section 12,13, and 14 of the County Government Act, section 4(3) of the Fair Administrative Actions Act, 2015 , Article 10(2) (c), 41,47 (1) and 236 of the Constitution and the Public Service Act 2012.

Respondents case

The Respondents filed a replying affidavit of **Christopher Odhiambo Rusana** in opposition to the Petition.

The Respondents argue that the interdiction of the petitioners was for valid reason having been implicated in improprieties in the report of the County Public Investments and Accounts Committee, that they participated in the meetings of the Public Investments Accounts Committee before the report was prepared and were aware of the issues raised touching on their conduct.

The Respondents further submit that both the Interim County Assembly Public Service Board and the Acting Clerk of the Assembly were properly in office.

The Respondents further submit that none of the fundamental right of the petitioners have been violated.

Determination

I have considered the pleadings and documents filed therewith as well as the written submissions. I must express my disappointment that parties made no attempt to set out the issues for determination and make

their submissions on the specific issues. The result is that all issues are jumbled all over the submissions making it difficult for the court to extract arguments of parties on each issue.

Be that as it may in my opinion the issues for determination are the following -

1. Whether the interim County Assembly Service Board was in office legally;
2. Whether the Acting Clerk of the County Assembly, the 4th Respondent was in office legally;
3. Whether the interdiction of the petitions are valid;
4. Whether the applicant were in court prematurely;
5. Whether the petitioners are entitled to the remedies sought;

Interim County Assembly Service Board

It is not in contention that the 1st Respondent, the County Assembly of Migori passed a resolution that the entire membership of the County Assembly Service Board steps aside. All 3 petitioners were members of the County Assembly Service Board and therefore the decision of the County Assembly requiring the members of the County Assembly Service Board to step aside affected them. During debate of the County Assembly a resolution was passed that the members of the County Assembly Service board who were officers of the County Assembly vacate their offices.

As can be ascertained from the proceedings of the County Assembly of 27th and 28th October, 2015 that have been annexed as Exhibit 5(a) and 5(b) to the Petition, the membership of the County Assembly Service Board was reconstituted. The speaker, was replaced by the Deputy Speaker an office that was already in existence in the County Assembly as reflected by the hansard.

The office of both the leader of majority and leader of minority were taken up by their deputies while the position of the member of County Assembly was also replaced by the County Assembly. The only persons who were not replaced are the 2nd and 3rd Petitioners who are not statutory members of the County Assembly Service Board and their absence in the County Assembly Service Board does not render the resolutions of the Board void.

The argument of the Petitioners on the existence of the County Assembly Service Board would also not be valid by virtue of section 12(2) of the County Governments Act which establishes the County Assembly Service Board as a body corporate with perpetual succession. This means that there can never be a vacuum as the service board is in existence perpetually.

Article 259(1) requires the courts to interpret the constitution in a manner that -

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance.

Article 259(3) further provides that -

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

(b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

(c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and

(d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

It is my finding that there was no vacuum in the Migori County Assembly Service Board as the County Assembly filled the positions of the members who stepped aside in interim capacity by their deputies or the persons carrying out the functions of those offices in line with the provisions of Article 259(3) of the Constitution. For these reasons, the meeting of the County Assembly Service Board held on 30th October 2015 was not unlawful nor the decisions made thereat a nullity.

Acting Clerk of County Assembly

The Petitioners have argued that the interim secretary of County Assembly Service Board was in office illegally on grounds that he was deployed to the County Assembly by the office of the County Public Service Board which has no authority to employ officers for the county Assembly.

The Respondents on the other hand have submitted that the 4th Respondent was deployed to the 1st Respondent on an interim basis to facilitate service delivery at the County Assembly and the County Assembly Service Board as his position was ratified by the County Assembly.

I have perused the letter deploying the 4th Respondent to be acting clerk of the 1st Respondent. The letter expressly states that he was deployed pursuant to a request from Migori County Assembly Service Board. The letter is reproduced below -

Migori County

P O Box 365-40400

MIGORI

30th October, 2015

Our Ref. MCPSB/CHR/CA/VOL.1(5)

The Vice Chair

Migori County Assembly Service Board

P O Box 985-40400

MIGORI

RE: DEPLOYMENT

Mr. Tom Onyango Opere

Following a request from Migori County Assembly Board vide a letter Ref; No.CPSB/01/15 Vol.1 dated 29th October, 2015.

I wish to communicate to you a decision of deploying Mr. Tom Onyango Opere in acting capacity as a clerk of the Migori County Assembly. The deployment takes effect immediately.

Thank you.

Peterlis Nyatuga

Chairman

Migori County Public Service Board.

cc. H. E. the Governor

Migori County Government

MIGORI

The County Government Act does not prohibit the County Assembly Service Board from requesting the County Public Service Board to temporarily deploy any of its officers to work in the County Assembly. Under section 69 and 72, the County Public Service has power to redesignate and redeploy its officers.

I therefore find that the 4th Respondent was redeployed to the County Assembly as clerk lawfully through the County Public Service Board at the request of the County Assembly Service Board. I further find that by virtue of such appointment he had authority to carry out all the functions of the office of clerk including acting as secretary to the County Assembly Service Board.

Whether the Interdiction of the Petitioners was unlawful

Apart from arguing that their interdiction was by an unauthorised body, the petitioners further argue that they were condemned unheard in contravention of Article 41 and 47(1) as well as section 4(3) of the Fair Administrative Actions Act. They further state that the Respondents did not comply with the Public Service Act and the Regulations made thereunder although no specific section or regulation is mentioned.

The Respondents submitted that the petitioners are subject to investigation following allegations of misconduct and abuse of office and that the action taken by the Respondents to interdict them is an interim cautionary measure subject to the outcome of investigations, and that further disciplinary process would be in accordance with the law.

Interdiction is an interim measure taken by employers in order to carry out investigations on alleged misconduct by an employee where it is not desirable for the employee to stay in office while the investigations are ongoing. In this case the County Assembly passed a resolution to refer suspected financial and management improprieties raised in the report of the Migori County Public Investments and Accounts Committee to appropriate bodies for further investigations. The County Assembly resolved that in the meantime all members of the County Public Service Board who were implicated in the alleged improprieties should step aside for 60 days to give way for the carrying out of the investigations.

None of the parties referred the court to any disciplinary regulations applicable to the Migori County

Assembly. In the absence of such regulations the court falls back on the Public Service Commission Disciplinary Manual which provides as follows with regard to interdiction.

(a) An officer may be interdicted where gross misconduct which is likely to lead to dismissal is reported and requires investigation or a report that an officer has been charged in criminal proceedings is received.

(b) If the case relates to a criminal charge, the officer is served with an interdiction letter, a sample of which is provided in Appendix I.

(c) If the misconduct is one which can lead to dismissal but is not of criminal nature the officer shall be served with a 'show cause letter' which shall also contain a communication on interdiction, a sample of which is provided in Appendix II.

(d) A public officer on interdiction shall be entitled to half of his basic salary, full house allowance and medical insurance cover.

(e) A public officer who is on interdiction should not leave the duty station without the permission of the Authorized Officer or any other public officer who is empowered to give such permission.

(f) A public officer whose interdiction has been lifted shall promptly be served with a decision letter, a sample of which is provided in Appendix III. Any withheld salary, allowances and benefits will be restored with effect from the date it was withheld.

The Petitioners did not refer to any specific provisions on interdiction that the Respondents failed to comply with or acted in contravention of. The argument that the Petitioners have been condemned without a hearing, or due process, or without being given an opportunity to react and respond to the allegations against them are not relevant at this stage of interdiction as no substantive disciplinary action has been taken against the petitioners. So are the arguments of persecution, or failure to observe Articles 41, 47 and 236 of the Constitution and section 4(3) of the Fair Administrative Actions Act. It is on record that the petitioners came to court through an application to stop further disciplinary action being taken against them when they were served with notices to show cause why disciplinary action should not be taken against them, which is proof that they will be required to respond to the charges against them before any further disciplinary action is taken.

I must also observe here that apart from contesting the process of their interdiction none of the petitioners has stated that they were not party to the commissions or omissions that were the subject of the County Public Investments and Accounts Report that precipitated their interdiction.

I find that the petitioners have not proved that any of their statutory or constitutional rights or freedoms have been infringed or threatened by the Respondents.

Whether the Petitioners came to court prematurely

The Respondents have submitted that where any officer is dissatisfied with action taken against him he is required to Appeal against the decision to the Public Service Commission before going to court. Section 77 of the County Governments Act provides that -

77. Appeals to the Public Service Commission

(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in

a county government including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) The Commission shall not entertain an appeal more than once in respect to the same decision.

(5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if—

(a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or

(b) there is an error apparent on record of either decision.

(6) An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.

I do not think that section is applicable to the petitioners who are all officers under the County Assembly Service Board while section 77 of the County Public Service Act is applicable to officers serving under the County Public Service Board. Be that as it may, the provisions of section 77 do not oust the jurisdiction of this court. Where the court is satisfied that there are flaws of procedure in the disciplinary process it will intervene to ensure that the employer complies with the law and fair procedure. The court will not otherwise intervene to interfere or take over the mandate of an employer to exercise disciplinary control over its employees. As was observed by **Wasilwa J** in **Nehemiah Nyabuto Nyakundi v Clerk County Assembly of Nyamira & 4 others (2014) eKLR**, it would be unfortunate if courts will be used to curtail due process.

In the present case I find that section 77 of the County Governments Act does not bar an officer of the County Assembly from seeking court intervention in appropriate cases without first having recourse to the appeal process provided therein.

Remedies

I have already found herein above that the interdiction of the Petitioners was not in contravention of any

statutory or constitutional provisions and further that the Migori County Assembly Service Board as constituted at the time of their interdiction was legally in office and had authority to interdict the petitioners as they did. I therefore find that the petition has no merit and the petitioners are not entitled to any of the remedies sought with the result that the petition is dismissed.

There shall be no orders for costs.

Dated, signed and delivered this 19th day of January, 2017

MAUREEN ONYANGO

JUDGE