



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**PETITION NO. 12 OF 2016**

**UMURO ROBA GODANA.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF MARSABIT.....1<sup>ST</sup> RESPONDENT**

**AMBASSADOR UKUR K. YATANI.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 23<sup>rd</sup> June, 2017)

**JUDGMENT**

The petition was dated 16.12.2016 and filed through Biwott Korir & Co. Advocates. The petition was in the matter of Articles 1 (1), (2), (3b) & (4b), 2, 3, 10, 19, 20, 21, 22, 23, 73, 75, 159, 174, 175, 251, 258, and 259 of the Constitution of Kenya, 2010. It alleged contravention of the fundamental rights and freedoms under Articles 27, 28, 41, 47, and 50(1) of the Constitution of Kenya, 2010. It was also said to be in the matter of the purported dismissal of the petitioner from the office of county executive committee member for education, skill development, youth and sports. The petitioner prayed for orders:

- a) That a declaration be issued that the purported dismissal of the petitioner from the office of the County Executive, Education, Skills Development, Youth, and Sports by the letter dated 08.12.2016 is null and void, unlawful and violates sections 58(5) of the County Government Act, 2012 as read with Article 47 and 251 (1) of the Constitution of Kenya, 2010.
- b) That a declaration be issued that the petitioner is the legitimate holder and remains the legitimate holder of the office of the County Executive, Education, Skills Development, Youth, and Sports.
- c) That a declaration be issued to declare that the purported dismissal by the 2<sup>nd</sup> Respondent constituted a violation of the petitioner's rights under Articles 27(1), 28, 41 (1), 47 and 50 of the Constitution of Kenya, 2010.
- d) That a declaration be issued to declare that all decisions, actions, and the letter dated 08.12.2016 delivered to the petitioner are or is null and void.
- e) That a declaration be issued that the petitioner is still entitled to his salaries, benefits and other emoluments as per the terms and conditions of his service.
- f) That the honourable court be pleased to issue a permanent order of injunction directed at the respondents jointly and severally by themselves, their servants, agents, officers or whomsoever else is acting on their behalf from preventing or in any other manner whatsoever or howsoever from

interfering with the petitioner in discharging or performance of his duties and functions as County Executive, Education, Skills Development, Youth, and Sports.

g) That an order of certiorari be issued to bring to the honourable court for purposes of being quashed, the letter of dismissal of the petitioner from the position as the County Executive Member for Education, Skills Development, Youth, and Sports.

h) That the honourable court be pleased to make any other orders it deems fit and just to grant.

i) That costs of the petition be provided for.

The petition was supported with the petitioner's affidavit attached thereto.

The respondents filed the replying affidavit of Isacko Galgalo Mamo on 06.02.2017 to oppose the petition. The respondents appointed Okong'o Omogeni & Company Advocates to act in the matter.

The petitioner was at all material times serving as the respondents' County Executive Member for Education, Skills Development, Youth, and Sports. The 2<sup>nd</sup> respondent dismissed the petitioner by the letter dated 5.04.2016. The letter was addressed to the petitioner by the 2<sup>nd</sup> respondent and it stated as follows:

**“RE: DISMISSAL AS CEC MEMBER**

**In exercise of the powers bestowed upon me by the County Government Act, 2012 section 31 and 40, I hereby today the 8<sup>th</sup> December, 2016 relieve you of your responsibilities as the Executive Committee Member for Education, Skill Development, Youth and Sports.**

**You are directed to handover the duties and responsibilities of the said office with immediate effect to Mr. Allo Ibrahim, the Executive Member for Administration who shall be taking over in acting capacity.**

**I wish you well in your future endeavours.**

**Signed**

**Amb. Ukur K. Yatani**

**Governor, Marsabit County”**

It is the petitioner's case that the dismissal violated his fundamental rights and freedoms as he had not violated or breached the terms of his employment and he was not given a notice of any looming termination that came suddenly. It is his case that the principles of fair administrative justice were violated. Thus the petition should be allowed as prayed for.

The respondents opposed the petition upon the following grounds:

a) The main reason why the petitioner was dismissed from office was that he actively campaigned for and was subsequently elected as the chairman of the Jubilee Party Campaign Team in Marsabit County, a political office that the petitioner held at the time of hearing of the petition. The respondent relied on the press reports in the print media which were filed in court as exhibits on the replying affidavit published on 18.12.2016. It was reported that the petitioner had been elected as chairman of the Jubilee Party Campaign Team in Marsabit County as per the Sunday Nation of 18.12.2016 at page 24.

b) By reason of the petitioner's said political position, the petitioner had taken a public position in

line with his political party affiliation in contravention of his oath of office and contrary to the views of the 2<sup>nd</sup> respondent, the Governor. For that purpose the respondents relied upon a video record exhibited as “**IGM 2**”. The clip is a news item by NTV about process for determining Jubilee Party Campaign Team in Marsabit County.

c) The respondent’s case is that the petitioner’s said political involvement was in contravention of section 12 of the Political Parties Act, Cap.7B; section 23(2) of the Leadership and Integrity Act, Cap 182; and section 16 of the Public Officer Ethics Act, 2003 all of which preclude an appointed state or public officer from engaging in any political activity that may compromise or may be seen to compromise the neutrality of the office they hold.

d) The petitioner by reason of being a county executive committee member at all material time, he was answerable to the 2<sup>nd</sup> respondent under Article 179 (6) of the Constitution as 2<sup>nd</sup> respondent was the chief executive of the county government of Marsabit.

e) The 2<sup>nd</sup> respondent was entitled to dismiss the petitioner at any time under section 31(a) of the County Government Act if the 2<sup>nd</sup> respondent considered that the dismissal was appropriate or necessary and in the present case, it was necessary that the claimant was dismissed.

f) The petitioner was aware of the reasons for the dismissal but by concealing that fact, he had moved the court in the present proceedings. It was known that the petitioner made a rigorous campaign of another person for the office of the governor inconsistent with the petitioner being answerable to the 2<sup>nd</sup> respondent, the prevailing holder of the governor’s office.

g) The petitioner had failed to establish the constitutional provisions that the respondents violated in arriving at the dismissal decision.

h) Thus the petition must be dismissed.

The court has considered the parties’ respective positions in the case and the material on record. The following are the issues for determination.

a) Whether the 2<sup>nd</sup> respondent enjoyed the power to dismiss the petitioner under section 31(a) of the County Government Act.

b) Whether the petitioner publicly engaged in partisan politics as was alleged for the respondents.

c) If (b) is in the affirmative, whether such involvement was inconsistent with the code of conduct attached to the office the petitioner held.

d) Whether the dismissal of the petitioner was unlawful.

e) Whether the petitioner is entitled to the remedies as prayed for.

The court makes findings as follows.

The 1<sup>st</sup> issue for determination is whether the 2<sup>nd</sup> respondent enjoyed the power to dismiss the petitioner under section 31(a) of the County Government Act.

In **Narok County Government & Another –Versus- Richard Bwongo Birir & Another[2015]eKLR (Waki JA, Nambuye JA and Kiage JA)**, the Court of Appeal recognized that a member of the county executive committee was removable from office under section 31(a) or section 40 of the County Government Act, 2012. The Court of Appeal in that case at paragraph 48 of the judgment stated that the County Governments Act, 2012 was enacted pursuant to Article 200 of the Constitution to give effect to Chapter 11 of the Constitution which provides for devolved Government. The court further stated that in

particular and with regard to the members of the County Executive Committee, sections 31(a) and 40 of the County Governments Act were enacted to give effect to Article 200(2) which provides the manner of election or appointment of persons to, and their removal from offices in the county governments. The Court of Appeal in that case proceeded to concur with its earlier decision of 18.03.2015( court differently constituted) in **County Government of Nyeri & Another –Versus- Cecilia Wangechi Ndungu [2015]eKLR(Visram JA, Koome JA and Otieno-Odek JA)** on the construction of sections 31(a) and section 40 of the Act, thus, **“From the language adopted by the legislator in enacting Section 40 & 31(a) we discern two methods through which a member of a County Executive Committee can be dismissed. Firstly, under section 40 a Governor can dismiss a County Executive Member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal is initiated by the County Assembly. Secondly, under section 31(a) a governor can dismiss a County Executive Member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second mode that appears to vest an element of discretion on the part of the Governor and which is the subject of interpretation in this appeal.”**

The court has followed the cited decision by the Court of Appeal and returns that the 2<sup>nd</sup> respondent enjoyed statutory power to dismiss the petitioner under section 31(a) of the Act but, subject to relevant legal parameters as will be examined later in this judgment.

The 2<sup>nd</sup> issue for determination is whether the petitioner publicly engaged in partisan politics as was alleged for the respondents. In the testimony, the petitioner stated that he was not a member of any political party and that he was not aware that he had been reported in the press as being a member of the Jubilee Party in Marsabit County.

He stated that he had seen the documents filed for the respondents showing press reports that he campaigned and won as the chairperson of Jubilee Party in Marsabit County. The petitioner testified that he knew that public officers must maintain political neutrality and should not publicly engage in political party politics as to publicly display lack of political neutrality. It was his position that he had championed those values. The petitioner’s case was that the termination letter had not stated that the reason for the termination had been his political involvement and it was his case that he had been dismissed without notice or warning.

The respondent’s witness (RW), the county secretary, testified that the petitioner was dismissed for involvement in active politics because he campaigned all around the Marsabit County for a Jubilee Party candidate. The further testimony was that the petitioner’s political campaigns were public and were known by everybody as of common knowledge to all county executive committee members and the general public. It was testified by RW that during the campaigns, the petitioner publicly criticised the 2<sup>nd</sup> respondent and thereby, he ceased to remain an impartial and objective county executive committee member. It was the evidence by RW that in the process, the petitioner grossly undermined the 2<sup>nd</sup> respondent and was not neutral and objective because he publicly talked ill about the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent, the government he was supposed to be serving. The ill talk as per RW’s testimony included blackmailing the 2<sup>nd</sup> respondent such as alleging that the 2<sup>nd</sup> respondent had **“eaten”** people’s money, that the government was allegedly corrupt, or that the 2<sup>nd</sup> respondent had favoured this or that party or favouritism during the political party’s campaigns.

RW testified that the petitioner was actively involved in politics and he was subsequently appointed the chairman of the Jubilee political party. RW stated that in the on-going political campaigns leading to 08.08.2017 general elections, the petitioner was campaigning against the 2<sup>nd</sup> respondent, the current governor, and who belonged to the Frontier Alliance Party. RW stated that the petitioner and the 2<sup>nd</sup> respondent did not see eye to eye as the gap between them was indeed very wide; thus they could not sit together in the county executive committee meetings to transact business as expected and required by law. RW concluded that it was not in the best interest of the people of Marsabit and the running of the 1<sup>st</sup> respondent for the dismissal to be set aside because the petitioner was not neutral as a member of the county executive committee.

The court has considered the evidence by RW together with the press reports on record and returns that the petitioner was actively and publicly involved in political party activities. There is no reason to doubt the account by RW especially in view of the numerous press reports that are on record and implicating the petitioner in public and active political party activities.

To answer the 2<sup>nd</sup> issue for determination, the court returns that the petitioner publicly engaged in partisan politics as was alleged for the respondents.

The 3<sup>rd</sup> issue for determination is whether such active and public political involvement by the petitioner was inconsistent with the code of conduct attached to the office the petitioner held, the office of the county executive member. The respondent's case is that the petitioner's said active and public political involvement was in contravention of section 12 of the Political Parties Act, Cap.7B; section 23(2) of the Leadership and Integrity Act, Cap 182; and section 16 of the Public Officer Ethics Act, 2003 all of which preclude an appointed state or public officer from engaging in any political activity that may compromise or may be seen to compromise the neutrality of the office they hold.

Section 12 of the Political Parties Act on restrictions of public officers in political party states as follows:

**“12. Restrictions on public officers in a political party:**

**1) A public officer shall not-**

- a) be eligible to be a founding member of a political party;**
- b) be eligible to hold office in a political party;**
- c) engage in political activity that may compromise or be seen to compromise the political neutrality of that person's officer; or**
- d) publicly indicate support for or opposition to any political party or candidate in an election.**

**2) Subsection (1) shall not apply to the President, Deputy President, a Member of Parliament, Governor, Deputy Governor or a member of a County Assembly.**

**3) Until after the first elections under the constitution, subsection (2) shall apply to the Prime Minister.”**

The court has considered the provision and finds that taking the evidence on record into account, the petitioner contravened the section by engage in political activity that compromised or was seen to compromise the political neutrality of the office he held. The court further returns that the petitioner contravened the section by publicly indicating support for or opposition to a political party or candidate in an election.

Section 23(2) of the Leadership and Integrity Act provides as follows:

**“23. Political neutrality:**

**1) An appointed State officer, other than a Cabinet Secretary or member of County executive committee shall not, in the performance of their duties:**

- a) act as an agent for, or further the interests of a political party or candidate in an election; or**
- b) manifest support for or opposition to any political party or candidate in an election.**

**2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.**

**3) Without prejudice to the generality of subsection (2) a public officer shall not:**

**a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;**

**b) publicly indicate support for or opposition against any political party or candidate participating in an election.”**

The court has considered the material on record. The evidence on record is that the petitioner publicly criticised the 2<sup>nd</sup> respondent in furtherance of the interests of the political party the petitioner was a member or was supporting and in opposition to the 2<sup>nd</sup> respondent who belonged to a different political party. To that extent and as urged for the respondents, the court returns that the petitioner contravened the said section 23 (2) of the Act especially that as a member of the county executive committee, the petitioner was accountable to the 2<sup>nd</sup> respondent in the performance of his functions and exercise of his powers as provided under Article 179 (6) of the Constitution.

Section 16 of the Public Officer Ethics Act, 2003 provides as follows:

**“16. Political neutrality**

**1) A public officer shall not, in or in connection with the performance of his duties as such –**

**a) act as an agent for, or so as to further the interest of, a political party; or**

**b) indicate support for or opposition to any political party or candidate in an election.**

**2) A public officer shall not engage in political activity that may compromise or be seen to compromise the political neutrality of his office.**

**3) This section does not apply to a member of the National Assembly or a councillor of a local authority”**

The court has revisited the evidence. It is that the petitioner indicated support for the Jubilee party and opposition to the Frontier Alliance Party. It has been shown that his political involvement undermined the 2<sup>nd</sup> respondent as the chief executive officer and the authority to which the petitioner was answerable. Thus the court returns that the petitioner contravened section 16 (1) (b) and (2) as urged for the respondents.

To answer the 3<sup>rd</sup> issue for determination, the court returns that the petitioner’s active and public political involvement was inconsistent with the code of conduct attached or applicable to the office the petitioner held, the office of the county executive member.

The 4<sup>th</sup> issue for determination is whether the dismissal of the petitioner was unlawful. It is submitted for the petitioner that there were no valid reasons leading to his dismissal by the 2<sup>nd</sup> respondent. It was submitted that the 2<sup>nd</sup> respondent had violated the rules of natural justice as no notice was issued to the petitioner and there were no disciplinary proceedings commenced to give the petitioner an opportunity to defend him-self. It was submitted that it was a cardinal rule of law that due process is followed by persons bestowed with authority and in the present case the respondents had violated every rule in the book.

For the respondents, RW testified that during the executive committee meetings, the 2<sup>nd</sup> respondent had warned members not to get involved in politics and that any member who wished to run for political

office had to resign and since the petitioner served at the discretion of the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent did not need to give reasons for the termination. Further, RW stated that the reasons were not stated in the dismissal letter because everybody knew that the petitioner was publicly and actively involved in politics. Thus, RW testified that there was no show-cause letter or warning issued against the petitioner. Since the petitioner had undermined the governor's position and the petitioner was actively and publicly involved in party politics, RW stated that the dismissal had served a good purpose.

It is clear that the petitioner was not given a notice and a disciplinary or other hearing prior to the dismissal. It is also clear that the termination letter did not set out the reason for termination. Nevertheless, in the court proceedings, it has been returned that the respondents have established the reason that led to the dismissal of the petitioner by the 2<sup>nd</sup> respondent. Under section 31(a) of the County Governments Act, 2012, 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.

The emerging and pertinent question is whether, in exercise of that power to dismiss as prescribed under the section, the governor must accord the county executive member in issue due process of a hearing and a notice, and whether, prior to the dismissal or in the dismissal letter, the governor must convey to the member the reason for the termination. In alternative, is it that the governor need not accord the member due process or give reasons and that in event of a dispute, like the present petition, challenging the dismissal, it is sufficient for the governor to show the matters he considered or the reasons for the dismissal that made the dismissal to be, **“appropriate or necessary.”**

In the judgment in **Partrisio Njeru Njiru –Versus- Embu County Government and Another [2016]eKLR** the court affirmed that the governor was entitled to remove an executive committee member under section 31(a) of the County Governments Act, 2012 and the court stated thus, **“The 1<sup>st</sup> issue for determination is whether the 2<sup>nd</sup> respondent was entitled to remove the petitioner from the office (by way of initiating disciplinary process) of the county executive member under section 31 (a) of the County Government Act, 2012, being an independent process from that under section 40 of the Act which involves the county Assembly in the disciplinary process. The court finds that the procedure under section 31(a) is initiated by the governor and concluded by the governor and is independent from a removal under section 40 of the Act. For that finding the court follows its holding in Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR that the removal under the two sections is independent and separable. Thus, the court finds that the 2<sup>nd</sup> respondent acted within the law to issue the show-cause notice as was done for disciplinary action to be initiated against the petitioner on account of alleged poor performance or misconduct as was envisaged in Article 236 of the Constitution, section 31 (1) (a) of the County Governments Act, 2012 and section 41 of the Employment Act, 2007 prescribing notice and hearing in event of such disciplinary action. The court has found that the 2<sup>nd</sup> respondent, notwithstanding the provisions of section 40 of the County Governments Act, 2012, was entitled to dismiss the petitioner if the 2<sup>nd</sup> respondent considered it appropriate or necessary to do so per section 31(1) (a) of the County Governments Act, 2012. The court's opinion is that if a member of the county executive is dissatisfied with the disciplinary procedure as initiated, then the court would intervene only if the procedure as invoked is shown to be in contravention of the Constitution, statute or other law. If at the end of the process the punishment of removal is imposed by the governor under section 31(1) (a) of the County Government Act, 2012, it could be that the member may question the removal on account that the reason as advanced towards removal was not genuine or valid as envisaged in section 43 and of the Employment Act, 2007. Such is not the case in the present case and the court returns that the petitioner is not entitled as prayed for.”**

The court further considers that public service is governed by constitutional and statutory provisions whose purpose is to protect the good delivery of the service and the rights and obligations of the individual public officer or state officer. The court upholds its opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** thus **“Prior to the new Republic, the relationship that accrues when a person is engaged in the public service in Kenya's circumstances was considered in the case of Mburugu Muguna Geoffrey – Vs- Attorney General Civil case No.**

**3472 of 1994 at Nairobi Ojwang J** stated that employment in the public service both provides a machinery of serving the public interest and benefits the individual employee who is compensated by approved methods, for work done. The employee thus acquires an interest that evolves into a legal right, within the terms of employment. That it is in the interest both of the public, to whom services are rendered and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office be fulfilled. In that case, the court stated that the law will be in the form of statutory enactments, subsidiary legislation, judicial precedents and administrative practices. Further, purpose of the law was to ensure a correct delivery of a good public service. In that case, the court found that it would be a distortion of the quality of public service when self-interested individuals, purportedly in the name of public interest, jettison the law to the four winds and impose their subjective inclinations to the delivery process. ”

The court upholds its opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** thus, “To answer the 1<sup>st</sup> issue for determination being whether the pleasure doctrine applies in Kenya’s public service and particularly in this case, the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010. The court further finds that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the petitioner by the 2<sup>nd</sup> respondent as was purportedly advanced for the respondents. Finally, the court holds that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The court further holds that it is through the application of the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subdued by the people who are the holders of sovereign power in the new Republic.”

Further,

“The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.”

And again the court upholds the opinion in **Birir’s case** on the demise of the pleasure doctrine and the doctrine of the servants of the crown, thus,

“...In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic’s constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.”

In **Narok County Government and Another –Versus- Richard Bwongo Birir and Another[2015]eKLR**, the Court of Appeal held that the use of the words “appropriate” and “necessary” connoted that the decision to dismiss ought to be based on reasonable grounds. The Court of Appeal further stated thus, “46. 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.”** The court has further considered the affirmation and holding by the Court of Appeal in that case thus, **“...Consequently, we find and hold that the pleasure doctrine is not applicable in Kenya under the current constitution.”**

The court has also reconsidered and followed the binding guidance by the Court of Appeal and further considered the previous judicial pronouncements in the cited cases. The court has also considered the provisions of Article 236 (b) that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. Accordingly, the court holds that the reasons for the dismissal shall be valid and compelling if they are shown to have existed and conveyed to the person dismissed as such before or at the time of the dismissal. The court further holds that in absence of due process by the governor to establish the reasons for dismissal prior to dismissing the executive committee member under the said section 31(a), it cannot be said that the reasons are valid even if established before the court at the hearing as it happened in the instant case – because in the opinion of this court, the governor is bound to adopt such fair procedure that confers the affected county executive member an opportunity to know the reasons and to defend himself prior to making of the dismissal decision. The court is persuaded that under section 43 of the Employment Act, 2007, reasons for terminating employment are valid or genuine if it is shown that the employer had reason to believe that the reasons existed as at the time of the termination. It is the opinion of the court that existence of the reasons can only be revealed through due process prior to making the dismissal decision such as a notice or a hearing, say, as prescribed in section 41 of the Employment Act, 2007 and upheld in Article 236(b) of the Constitution.

Thus to answer the 4<sup>th</sup> issue for determination, the court returns that the dismissal of the petitioner by the 2<sup>nd</sup> respondent was unlawful for want of due process and establishment of the valid and compelling reasons prior to the termination.

The 5<sup>th</sup> issue for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The petitioner prayed for a declaration to be issued that the purported dismissal of the petitioner from the office of the County Executive, Education, Skills Development, Youth, and Sports by the letter dated 08.12.2016 is null and void, unlawful and violates sections 58(5) of the County Government Act, 2012 as read with Article 47 and 251 (1) of the Constitution of Kenya, 2010. As urged for the respondents, section 58(5) of the County Government Act, 2012 did not apply because the petitioner was not a member of the county public service board that are affected by the section. The petitioner has established that the dismissal contravened Article 47 of the Constitution that protected his right to fair administrative action for want of due process and valid reasons as at the time of termination. The declaration will be allowed to that extent.
- b) The petitioner prayed for a declaration to be issued that the petitioner is the legitimate holder and remains the legitimate holder of the office of the County Executive, Education, Skills Development, Youth, and Sports. The court has considered the balancing of justice in view of the established reason for termination during the hearing of this case. It is clear that the petitioner has diminished his neutrality and objectivity to work with the respondent within the clear provisions of Article 179 of the Constitution. In such circumstances the court returns that the declaration will issue with modification that he remains in office with full pay and terminal benefits only up to 30.06.2017 with the view that he will wind up and clear his service with the respondents by that date.
- c) The court returns that the petitioner is entitled to the declaration to be issued to declare that the purported dismissal by the 2<sup>nd</sup> Respondent constituted a violation of the petitioner’s rights under Articles 41 (1) and 47 of the Constitution of Kenya, 2010.
- d) The court returns that the petitioner is entitled to a declaration to be issued that the petitioner is

still entitled to his salaries, benefits and other emoluments as per the terms and conditions of his service but only up to 30.06.2017.

e) The petitioner is entitled to the declaration that his dismissal as conveyed in the letter dated 08.12.2016 is null and void.

f) The petitioner prayed for an order of certiorari to be issued to bring to the honourable court for purposes of being quashed, the letter of dismissal of the petitioner from the position as the County Executive Member for Education, Skills Development, Youth, and Sports. The court returns that as the dismissal has been declared to be null and void, it will be superfluous to grant an order of certiorari as prayed for and the same is declined.

g) The court has considered all the circumstances of the case and returns that each party shall bear own costs of the petition.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

a) The declaration that the purported dismissal of the petitioner from the office of the County Executive, Education, Skills Development, Youth, and Sports by the letter dated 08.12.2016 is null and void, unlawful and violates Article 47 and 236(b) of the Constitution of Kenya, 2010.

b) The declaration that the petitioner is the legitimate holder and remains the legitimate holder of the office of the County Executive, Education, Skills Development, Youth, and Sports until 30.06.2017 with full pay and with agreed terminal benefits subject to the petitioner formally clearing and handing over with the respondents by that date and as per Article 179(6) of the Constitution.

c) The declaration that the purported dismissal by the 2<sup>nd</sup> Respondent constituted a violation of the petitioner's rights under Articles 41 (1) and 47 of the Constitution of Kenya, 2010.

d) The declaration that the petitioner is still entitled to his salaries, benefits and other emoluments as per the terms and conditions of his service only up to 30.06.2017.

e) The declaration that the petitioner's dismissal as conveyed in the letter dated 08.12.2016 is null and void.

f) The parties to bear own costs of the petition.

**Signed, dated and delivered in court at Nyeri this Friday, 23<sup>rd</sup> June, 2017.**

**BYRAM ONGAYA**

**JUDGE**