



**REPUBLIC OF KENYA**

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

**PETITION NO. 11 OF 2016**

**DR. WOLDE JAMA WEISA.....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 20.12.2016 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 appointment of the petitioner as an interim chairperson of proposed Marsabit Town and in the matter of dissolution of the Town Caretaker Committee of the County Government of Marsabit. The petitioner prayed for orders:

- a) That a declaration be issued that the purported dissolution of the Caretaker Committee dated 31.10.2016 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 Interim Chairperson of the proposed Marsabit Town.
- c) That a declaration be issued to declare that the purported dissolution of the Caretaker Committee 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 31.10.2016 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 Interim Chairperson of Proposed Marsabit Town.

g) That an order of certiorari be issued to bring to the honourable court for purposes of being quashed, the letter of dissolution of the Caretaker from his position as the Interim Chairperson of the Proposed Marsabit Town.

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' County Attorney Godana Yatani Advocate entered appearance for the respondents on 14.03.2017 and the respondents changed advocates to MCM & Associates per notice of change of advocates filed 11.05.2017. The respondents opposed the petition by filing the replying affidavit of the 1<sup>st</sup> respondent's county secretary one Isacko G. Mamo. The parties filed final submissions based on pleadings and affidavits on record.

The petitioner has stated that he is the Interim Chairperson of the Proposed Marsabit Town as appointed by the Governor, the 2<sup>nd</sup> respondent by the letter dated 12.07.2013 and effective the same date. In that capacity he was the chairperson of the Caretaker Committee for the Proposed Marsabit Town and the letter enumerated the petitioner's duties. By the letter dated 31.10.2016 the 2<sup>nd</sup> respondent dissolved the Caretaker Committee to pave way for establishment of a substantive town committee. The letter was addressed to the petitioner and it wished the petitioner all the best in his future endeavours and thanked him for his services to the county. The petitioner's case is that the dissolution of the Caretaker Committee amounted to termination of his service without notice, without alleged breach of the contract of employment on the part of the petitioner as it was against principles of fair administrative justice. Further, the action was *ultra vires* the law as the action was illegal, unreasonable and extraneous consideration were taken into account other than the rule of law and was meant to deny the petitioner his rights under the law.

The respondent's case per the replying affidavit is that the prayers sought should be denied upon the following grounds:

- a) The petitioner has not established the fundamental rights or freedoms that have been violated.
- b) The caretaker committee was dissolved as conveyed in the letter dated 31.10.2016 and the petitioner's service as the interim chairperson of the proposed Marsabit Town Caretaker Committee thereby ended. The committee was dissolved so as to pave way for constituting of the management board as per the Urban Areas and Cities Act (No.13 of 2011). Upon dissolution of the caretaker committee, the office held by the petitioners and others in that committee stood dissolved or abolished. Under the said Act, the Marsabit Town is to be administered by a board constituted in accordance with the Act. It will be open for the petitioner to apply for any of the positions available in the board.
- c) Since the petitioner is not a member of the county public service board, section 58(5) of the County Government Act does not apply to the present case. On that ground, Article 251 (1) of the Constitution does not apply.

The parties filed their respective submissions though the respondent filed belatedly after the fixing of the judgment date. The court has considered the matters in dispute and the material on record and returns as follows:

- 1) The court returns that section 58(5) of the County Government Act and Article 251 of the Constitution did not apply to the petitioner as he was not a member of the county public service

board.

2) As urged for the respondents the petitioner has not demonstrated the fundamental rights and freedoms that the respondent violated in the instant case.

3) The court further finds that the petitioner has not shown the law the respondents violated in dissolving the Caretaker Committee and the court further returns that the effect was abolition of all the offices as had been established for the Caretaker Committee including the one held by the petitioner as the interim chairperson.

4) As for the effect and fate of the abolition of the office held by the petitioner, the court follows its holding in the judgment in **Geoffrey Makana Asanyo –Versus- Nakuru Water and Sanitation Services Company and 6 others [2014]eKLR** thus, “...The court holds that the power to abolish office supersedes the power to appoint a holder of office or the holder to continue in office. Thus, where the office is abolished, the holder of the office will invariably have the employment terminated in what is known as redundancy. Where the office is abolished, the holder cannot be heard to say that despite the valid or lawful abolition, he or she nevertheless is entitled to remain in employment in the same capacity because, in such a situation, there is no vacancy against which such person could continue in employment. The court holds that there cannot be an appointment or continued appointment unless the relevant position or office subject of the employment or appointment is subsisting. The court further holds that a person whose office is abolished is entitled to redundancy payments in accordance with the relevant statutory provisions and the provisions of the contract between the parties. In this case, the court has found that there was no abolition of the office held by the petitioner but the office was retained in the new structure of the composition of the 1<sup>st</sup> respondent’s board of directors so that a redundancy situation did not accrue.”

5) In view of the cited holding and the other findings by the court, the court returns that the petition will fail as the petitioner is not entitled to any of the remedies as prayed for. In any event, the petitioner did not urge remedies in view of and consequential to the abolition of the office he held but the court considers that the holding in the cited case would offer effective guidance in that regard. Further, it was not the petitioner’s case that the respondents had failed or refused to pay his due terminal dues consequential to the abolition of the office he held.

6) As the parties including the respondent failed to fully comply with the directions on attendance as scheduled, each party shall bear own costs of the suit.

In conclusion, the petition filed herein dated 20.12.2016 is hereby dismissed with orders that each party to bear own costs of the suit.

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

**BYRAM ONGAYA**

**JUDGE**