



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 33 OF 2016

(Originally Nairobi Petition No. 113 of 2016)

**IN THE MATTER OF ARTICLES 2, 3,10,41,47,174,179,185,224,226 AND 236 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RIGHT TO FAIR ADMINISTRATIVE ACTION AND A FAIR HEARING
PROVIDED UNDER ARTICLES 47 AND 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 13 OF THE COUNTY GOVERNMENTS ACT, 2012 AND THE
RIGHT TO FAIR LABOUR PRACTICES UNDER ARTICLE 41 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE UNFAIR, UNPROCEDURAL AND UNLAWFUL PROCESS OF
REMOVAL FROM THE OFFICE OF THE CLERK OF THE COUNTY ASSEMBLY OF
NYANDARUA**

BETWEEN

PURITY MWONJORIA KAMURUCI

PETITIONER

v

NYANDARUA COUNTY ASSEMBLY SERVICE BOARD

RESPONDENT

JUDGMENT

1. The Petitioner was offered the position of the Clerk, County Assembly of Nyandarua by the Respondent through a letter dated 17 January 2014. She was confirmed into the position through a letter dated 14 October 2014.
2. On 29 April 2016, the Petitioner was sent on *compulsory leave* and she challenged the same in Nakuru Cause No. 19 of 2016, *Purity Mwonjoria Kamuruci v Nyandarua County Assembly Service Board*. The Court declined to grant the interim injunctive relief sought.
3. Come 5 May 2016, the Respondent issued a *show cause notice* to the Petitioner to show cause why a disciplinary action could not be taken against her on account of alleged gross misconduct.

4. The Petitioner responded to the notice through a letter dated 9 May 2016. The response in substance requested for documents/records to enable her make a substantive response.
5. The Respondent through a letter dated 12 May 2016 informed the Petitioner that the request for records would be considered once the Respondent's Board returned from an overseas trip.
6. On 17 May 2016, the Petitioner responded substantively to the *show cause notice*, and also sought formalisation of the allegations against her, and this prompted the Respondent on 20 June 2016 to ask the Petitioner to respond within 7 days.
7. The Respondent thereafter through a letter dated 14 July 2016 invited the Petitioner to a disciplinary hearing on 25 July 2016, and this was followed with a dismissal letter dated 1 August 2016.
8. The dismissal aggrieved the Petitioner and on 9 August 2016 she moved the Court in Nairobi, and on the same day, Abuodha J granted an order staying the decision to dismiss her.
9. The interim order of stay was extended by Wasilwa J on 25 August 2016 and on 30 August 2016, Ndolo J directed that the file be placed before Abuodha J.
10. When the matter was placed before Abuodha J on 1 September 2016, he directed that the file be transferred to the Court sitting in Nakuru, being the Court with territorial jurisdiction.
11. This Court dealt with the motion(s) which were on file and in a ruling delivered on 25 November 2016, the application seeking confirmation of an interim conservatory order staying the dismissal of the Petitioner or recruitment of the Clerk to the County Assembly of Nyandarua was dismissed.
12. The Court thereafter gave directions as to the hearing of the Petition on the merits and towards this end, the Petitioner filed her written submissions on 27 February 2017 while the Respondent filed its submissions on 13 March 2017.
13. The Petitioner in her written submissions has raised some 4 issues to wit, *whether the dismissal of the Petitioner from office was justified, whether the Petitioner's constitutional rights were violated, whether the Petitioner should be reinstated to the position of Clerk and whether the Petitioner is entitled to an award of general damages.*
14. The Respondent on the other hand raised in its written submissions identified the issues for determination as, *whether the Petitioner was accorded a fair hearing, whether the Petitioner exhausted other avenues for redress and whether the Petitioner is entitled to the reliefs sought.*
15. In the view of the Court, the identified issues can be condensed into 3 and these are, *whether the Petition was presented prematurely, whether the dismissal of the Petitioner was unfair/violated her rights and appropriate remedies/orders.*

Prematurity of Petition

16. According to the Respondent, the Petitioner should have addressed an appeal to the Public Service Commission of Kenya as envisaged under section 77 of the County Governments Act as read with Article 234(2)(b) of the Constitution.
17. The Respondent asked the Court to adopt the holding in *Speaker of the National Assembly v Njenga Karume* (2008) 1 KLR 425 that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed.
18. The Respondent therefore urged that this Court lacked jurisdiction to entertain the Petition.
19. In terms of section 13(5) of the County Governments Act, the office of Clerk of a County Assembly is

an office in the *County Assembly Service Board*. The Clerk is appointed by the *County Assembly Service Board* with the approval of the County Assembly.

20. Section 57 of the County Governments Act on the other hand establishes the *County Public Service Board* while section 59 thereof provides for its powers and functions.

21. Section 59(1)(c) of the County Governments Act mandates a *County Public Service Board* to exercise disciplinary control over persons holding office under Part VII of the Act (County Public Service) while section 77 provides for appeals to the Public Service Commission from decisions of the *County Public Service Board*.

22. The decision being challenged by the Petitioner was not a decision of the *County Public Service Board* but rather a decision of the *County Assembly Service Board*.

23. In the view of the Court, therefore the avenue provided for under section 77 of the County Governments Act does not apply in the case of the Petitioner and other Clerks of the County Assemblies.

24. Further, the Public Service Commission of Kenya and indeed *County Public Service Boards* are organs of the executive and it would be an unacceptable encroachment on the doctrine of separation of powers for these organs to intrude into the functions and powers which properly belong to the *legislative authorities and their organs*.

25. In any case, in the Court's view, the Court's jurisdiction cannot be ousted where there are allegations of violation of constitutional rights or procedural impropriety, especially in circumstances where the first line organs cannot issue orders to preserve the constitutional rights and/or freedoms which are threatened with violation.

26. The Court therefore finds no merit on the prematurity objection.

Whether dismissal was unfair Procedural fairness

27. The County Governments Act has not provided for any procedures to be followed in the removal of a Clerk of a county assembly from office.

28. The procedural fairness of such removal therefore falls for determination based on the general protections afforded all public officers by the constitution, the primary statute governing employment, the Employment Act, 2007 and the contract document.

29. The Respondent sent the Petitioner on *compulsory leave* through a letter dated 29 April 2016. The reason given was *gross misconduct and other pending disciplinary issues*. The letter also advised the Petitioner that formal charges would be communicated to her in 7 days.

30. On 5 May 2016, the Respondent formally laid the allegations it had against the Petitioner in a *show cause notice* for disciplinary action. Some 6 broad areas of concern were detailed in the notice and the Petitioner was given 14 days within which to respond.

31. The Petitioner replied to the show cause on 9 May 2016 and she requested for certain documents to enable her respond effectively.

32. The Respondent through its letter of 12 May 2016 informed the Petitioner that the documents would be supplied to her once the Board returned from an official trip out of the country.

33. Although it is not clear from the Petitioner's documents whether the documents she had sought were supplied to her, she wrote a lengthy response to the *show cause* on 17 May 2016 and the Respondent reverted back on 20 June 2016 indicating that the requested documents had been forwarded to her through an office in Nairobi, at her request.

34. On 14 July 2016, the Respondent invited the Petitioner for an oral hearing which was scheduled for 25 July 2016. The hearing proceeded and on 1 August 2016, the Respondent dismissed the Petitioner.

35. From the foregoing, the Court is satisfied that the Petitioner was informed of the allegations to confront and that she was given an opportunity to make written as well as oral representations, and therefore the Respondent was in compliance with the procedural fairness requirements/protections afforded employees by Article 236 of the Constitution as well as section 41 of the Employment Act, 2007.

Substantive fairness

36. The Petitioner's dismissal letter dated 1 August 2016 gave the ground(s) for dismissal as *incompetence and gross misconduct*.

37. As to the particulars, the dismissal letter referred to the *show cause notice* dated 5 May 2016 and disciplinary proceedings by the Respondent.

38. The show cause notice categorised the allegations against the Petitioner into 6, and in terms of sections 43 and 45 of the Employment Act, 2007, these 6 reasons are the ones the Respondent was expected to prove, but not only prove but demonstrate as valid and fair reasons to warrant a dismissal.

39. The Court will examine each of the 6 allegations

Letter dated 11 April 2016 to Respondent's Chairperson in personal capacity that caused discontent

40. The Petitioner exhibited the said Memo as one of her documents.

41. The Memo was addressed to the Chairperson, Nyandarua County Assembly Service Board and the contention that it was addressed to the Chairperson in a personal capacity holds no water.

42. As regards the allegations that the Memo caused discontent, distrust and suspicion among the Board members, it was incumbent upon the Respondent to place before Court factual material upon which it could be surmised that there was discontent, distrust or suspicion.

43. The Respondent did not place any material before Court to prove in terms of section 43 of the Employment Act, 2007 that the Memo caused any discontent, distrust or suspicion among the membership.

44. The second limb of the allegation regarding the Memo was that the Petitioner had failed to advise the Respondent concerning the correct legal position regarding contracts.

45. The Memo on the face of it advised the Respondent that the funds which had been budgeted for the tender for construction of county assembly premises had been exhausted and that in terms of the provisions of the Public Procurement and Asset Disposal Act, 2015, further budgeting was necessary to carry the contract forward. The Memo also mentioned the risks of continuing with the tender before further budgeting.

46. The Court can find no elements of misadvice or lack of willingness by the Petitioner to carry out her statutory duties in the Memo.

Memo dated 18 April 2016 to members of the County Assembly

47. The second reason for citing the Petitioner related to a Memo she sent to the members of the County Assembly on 18 April 2016.

48. In the Memo, the Petitioner had recommended that the procurement be terminated due to inadequate

budgetary allocations and that a review be done to align the tender within available budgetary estimates.

49. In simple terms, the Petitioner was requesting the members to arbitrate between her and the Respondent.

50. According to the Respondent, it was not open to the Petitioner to communicate with the members of the county assembly directly without its (Board) authority. It also alleged the Memo misrepresented facts.

51. The Petitioner did not deny writing the Memo to the members of the County Assembly, but as to whether she was estopped from communicating directly with the members in the manner she did, the Respondent did not disclose to Court whether such conduct was embedded in any statutory framework or Rules of the County Assembly.

52. The Court also notes that although section 13(3) of the County Governments Act provide that the functions and powers of a clerk of a county assembly shall with necessary modifications be equivalent to those of the Clerk of Parliament, the Respondent did not take/develop the *direct communication* with members contention any further than just to assert so in the papers.

53. The Court is therefore unable to find that the Petitioner in writing a Memo to the members of the county assembly was exceeding her statutory powers and functions.

Incompetence

54. The third category of allegations against the Petitioner included unrelated particulars such as unprocedural recruitment of staff, failure to ensure proper management and control of accounts, failure to report regularly to the County Assembly on implementation of the budget, irresponsible behaviour and lack of integrity, abdication of duty and poor interpersonal relationships.

55. These allegations if proved would form valid and fair reasons to dismiss the Petitioner from her position.

56. The Court has therefore perused the material on record and has not found any evidence in the form of an affidavit in which the Respondent attempted to prove that the Petitioner was guilty of incompetence in her duties.

57. The Court in this regard will dismiss the *incompetence* allegations on the basis that the Respondent failed to satisfy both the evidential and legal burden of proof.

Misrepresentation through letter dated 20 April 2016 to the Procurement Officer.

58. It is not in dispute that the Petitioner was an authorised and Chief Accounting Officer of the County Assembly. She had the authority to incur expenditure.

59. It appears that the Procurement Officer placed a tender advert in the Standard and Star newspapers of 4 April 2016 and 5 April 2016.

60. On 20 April 2016, the Petitioner addressed a letter to the Procurement Officer to explain why the advert was placed in the newspapers without her authority as the chief accounting officer.

61. The Procurement Officer in his explanation attempted to urge that an *ad hoc committee* on construction had directed that the tender be advertised.

62. In view of that role of the Petitioner as chief accounting officer and AIE holder, it was not only logical but a statutory requirement that the advertisement for the tenders in the newspapers should have had her go ahead, even after a directive by an *ad hoc committee*. In any case the statutory anchor to the existence and functions of the *ad hoc committee* was not revealed to the Court.

63. evidence that the Procurement Officer had the Petitioner's authority to advertise, the Court cannot concede to the contention by the Respondent that she misrepresented facts through the letter dated 20 April 2016.

Disrespect to Board on 26 April 2016 at Utalii Hotel

64. The Respondent did not discharge the evidential burden of demonstrating the nature and circumstances of what transpired during the meeting at Utalii Hotel to prove any disrespect which would amount to insubordination or the like transgression by the Petitioner. This allegation was not proved.

Lack of professionalism and confidentiality

65. This was a generic allegation alleged to flow from all the other allegations. The Court reaches a conclusion that the Respondent did not discharge the burden of proving this as a valid or fair ground for dismissing the Petitioner.

66. Before concluding, the Court wishes to observe that a keen perusal of the material in Court indicate that there were subterranean forces eager to remove the Petitioner from office due to the tender for the construction of the county assembly without due consideration of the financial laws of the country.

Conclusion and Orders

67. The Petitioner sought some 4 substantive orders to wit, a declaration that her removal from office on 1 August 2016 was unconstitutional and therefore null and void; an order of reinstatement; declaration that her removal from office constituted unfair dismissal and general damages.

68. The cause of action presented by the Petitioner, though commenced as a Petition did not principally involve interpretation or application of the Constitution. It could have **been appropriately have been** presented and determined as an ordinary Cause involving employment law.

69. In lieu therefore of the reliefs sought, the Court would find and hold that although the Respondent substantially complied with the requirements of procedural fairness, it has failed to prove the reasons for dismissing the Petitioner, or that the reasons were valid and fair reasons.

70. The primary remedies for unfair termination of employment are found in section 49(1)(c) of the Employment Act, 2007 and having found that there was unfair termination of employment, and considering the circumstances of separation, the Court awards the Petitioner the maximum compensation (gross salary as per offer of appointment was Kshs 200,270/-).

Order

71. The Court awards the Petitioner

(i) Compensation of **Kshs 2, 403,240/-**.

72. Petitioner to have costs.

Delivered, dated and signed in Nakuru on this 14th day of July 2017.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Njenga instructed by Muchoki Kangata Njenga & Co. Advocates

For Respondent Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

Court Assistant Nixon