



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 389 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**DAVID OGEKA KEBIRO ..... 1ST CLAIMANT**

**JOHN OBWOCHA ..... 2ND CLAIMANT**

**-Versus-**

**KISII COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR KISII COUNTY**

**JAMES E.O. ONGWAE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Claimants are both chief officers of Kisii County Government having been so appointed by letters dated 9<sup>th</sup> April 2014 through a competitive process. **David Ogeka Kebiro** the 1<sup>st</sup> Claimant was appointed as Chief officer, Department of Education, Labour and Manpower Development while **John Obwocha** the 2<sup>nd</sup> Claimant was appointed as Chief Officer Department of Trade and Industry. The appointments were on fixed term contracts of 5 years effective from 1<sup>st</sup> April 2014.

On 29<sup>th</sup> August 2017 the Claimants received letters signed by the Acting County Secretary, Kisii County Mr. Robert M. Ombasa sending them on 45 days' annual leave. The contents of letters are identical with the exception of the names of recipients inserted by hand and the officer they were required to hand over to. The 1<sup>st</sup> Claimant was directed to hand over to Margret N. Mogeni Director ECDE and the 2<sup>nd</sup> Respondent was to hand over to Clive Chweya Kenani, Ag. Director, Trade. The main content of the letters are reproduced below-

*Dear .....*

**RE: ANNUAL LEAVE**

*As you are aware, Section 31(c) of the County Government Act gives the Governor power to appoint Chief Officers whose **contract duration is tied to the term of office of the Governor**. With the expiry of the first term of the Governor, all Governors elected after the general election will be required by law to cause their County Public Service Boards to advertise the position of County Chief officers which will be filled up in accordance with Section 45 of the County Government Act.*

*You are also aware that Section E of the Public Service Commission, Human Resources Policies and Procedures Manual, 2016, states that **annual leave is a right to every public officer** to enable them renew their energies and improve efficiency.*

*You have not gone on leave for over three years due to exigencies of service. To ensure you did not lose your leave days, and since commutation of leave will not be allowed, it has been decided that you proceed on 45 days leave with effect from 1<sup>st</sup> September, 2017.*

*As you proceed on leave, you will be expected to hand over the responsibilities of the office to **Clive Chweya Kenani Ag. Director Trade** in the presence of the Ag. County Secretary and the Economic Advisor respectively. The handing over **MUST** also include the procurement plan of your department for the FY 2017/18.*

*Yours sincerely*

**Robert M. Ombasa**

*Ag. County Secretary*

**KISII COUNTY**

On 30<sup>th</sup> October 2017, Kisii County Government advertised several vacancies including sixteen (16) positions of chief officers. Among the positions advertised were Education, Labour and Manpower development currently held by the 1<sup>st</sup> Claimant and Trade, Industry and Tourism which subsumes the department of Trade and Industry currently held by the 2<sup>nd</sup> Claimant. Concerned about the advertisement of their positions both Claimants immediately wrote to the Secretary Public Service Board Mr. Charles Nyakeri expressing concern about the advertisement of their positions before their term had expired and without any formal communication. They sought information on the status of their contracts in relation to the advertisement. According to the 1<sup>st</sup> Claimant the County Secretary promised to look into the matter. Due to the fact that the closing date for the applications was 12<sup>th</sup> September 2017 at 4:00pm, the Claimants filed the present suit on 13<sup>th</sup> September 2017 in which they seek the following orders-

- a. A declaration that the actions of the respondents of seeking to terminated the claimants' employments whilst they are on annual leave and before their contract expires is malicious, illegal, unfair, unlawful and therefore null and void.
- b An injunction to restrain the respondents from processing applications received for the positions of the claimants by dint of the advertisement of 30<sup>th</sup> August, 2017 and to permanently restrain the respondents from unlawfully terminating the claimants' employment before the expiry of their five year contracts.
- c. An order compelling the respondents to pay the claimants punitive damages for breach of contract.
- d. Costs of this claim.
- e. Any other relieves the honourable court may deem fit to grant.

Simultaneously, the Claimants filed a motion under certificate of urgency seeking the following conservatory orders-

1. The honourable court be pleased to certify this application as urgent and admit the same for hearing ex-parte for grant of prayer 2 below.
2. The honourable court be pleased to issue an order restraining the respondents and/or their

appointed agents from processing applications received for the positions of the claimants by dint of the advertisement of 30<sup>th</sup> August, 2017 and restraining the Respondents by themselves, agents or assigns or their sympathizers from executing their decision vide their letter dated 29<sup>th</sup> August, 2017, particularly restrain the respondents from interfering with the claimants' duties as chief officers of the departments of education, labour, manpower development and trade and industry respectively pending the hearing and determination of this application *inter-partes*.

3. The honourable court be pleased to issue an order restraining the respondents and/or their appointed agents from processing applications received for the positions of the claimants by dint of the advertisement of 30<sup>th</sup> August, 2017 and restraining the Respondents by themselves, agents or assigns or their sympathizers from executing their decision vide their letter dated 29<sup>th</sup> August, 2017, particularly restrain the respondents from interfering with the claimants' duties as chief officers of the departments of education, labour, manpower development and trade and industry respectively pending the hearing and determination of this claim.

4. Costs of the application be provided for.

The application was supported by the grounds on the face thereof and affidavits of the Claimants sworn on 12<sup>th</sup> September 2017. The Claimants filed further affidavits sworn on 3<sup>rd</sup> October 2017 in response to issues raised in the Respondents' replying affidavit.

The application was first heard *ex parte* in Nairobi on 15<sup>th</sup> September 2017 and the following orders granted-

1. The honourable court is hereby pleased to certify this application as urgent.
2. The honourable court is hereby pleased to issue an order restraining the respondents and/or their appointed agents from processing applications received for the positions of the claimants by dint of the advertisement of 30<sup>th</sup> August, 2017 and restraining the Respondents by themselves, agents or assigns or their sympathizers from executing their decision vide their letter dated 29<sup>th</sup> August, 2017, particularly restrain the respondents from interfering with the claimants' duties as chief officers of the departments of education, labour, manpower development and trade and industry respectively pending the hearing and determination of this application *inter-partes*.
3. The application is fixed for *inter-partes* hearing on 25<sup>th</sup> September, 2017 at Kisumu.
4. The file to be transferred back to Kisumu for further hearing.
5. The applicants to effect service of the order and application within the next five days.

On 25<sup>th</sup> September 2017 the Respondents filed a replying affidavit sworn on 22<sup>nd</sup> September 2017 by **James Elvis Omariba Ongwae**, the 2<sup>nd</sup> Respondent and Governor of Kisii County. In the affidavit he deposes that the Claimants are employees of Kisii County Government Public Service Board having been appointed as chief officers to the positions they currently hold on 9<sup>th</sup> April 2014. He deposes that the position of chief officer in the county is similar to Principal Secretary in the National Government as they are accounting and authorised officers in the various county departments like their counterparts in the ministries of the National Government.

The Governor deposes that county chief officers are by law appointed and dismissed by the Governor and not the County Public Service Board which is only mandated to identify suitable candidates and forward the list to the Governor who selects for appointment the putative chief officers subject to vetting by the County Assembly. He deposes that this is similar to Principal Secretaries appointed by Public Service Commission but appointed and selected by the President subject to vetting by the National Assembly.

The Governor deposes that chief officers are subject to the pleasure doctrine as was decided by the court of appeal in the precedent setting case of County Government of Nyeri v Cecilia Wangeci Ndungu. He further deposes that in constitutional law and theory the pleasure doctrine has deep roots in presidential systems of government and the prerogative powers of the Queen. That Kenya has a presidential system of government at the national and sub-national (county level). That despite being employed on contract, certain employees in the County Executive (read the County Executive Committee Members, Chief of Staff, Personal Advisors, and Chief Officers) can be dismissed by the Governor at his/her pleasure subject to compliance with Article 47 of the Constitution.

He deposes that the special recruitment procedures of Chief Officers does not insulate them from this legal position. That at the end of the day they are appointed and can be dismissed by the Governor by dint of Section 45 of the County Government Act 2013 as read with section 51 of the Interpretation & General Provisions Act, Chapter 2 of the Laws of Kenya. This means that no County Executive Committee Members, Chief of Staff, Personal Advisors, or Chief Officers appointed in the government dispensation of 2013–2017 can claim a legal right to continue serving in the new administration. That by law CECs and COOs will continue to discharge their duties in the new administration until the Governor appoints new ones.

The Governor further deposes that the Petitioners having been appointed to serve in the 2013-2017 term their rights and obligations were restricted only to that term. That the 2017-2022 is an entirely new term. That the Petitioners cannot claim a right to continue serving in the new term. That in this term, he is required to form a fresh government by making fresh appointments to positions that the County Government Act requires me to make. That the Claimants, like all other Kenyans, are entitled to apply and be considered for appointment to serve as Chief Officers in the new dispensation.

The Governor deposes that as per the County Government Act 2012, the Petitioners remain Chief Officers and will stay in office until they hand-over to the newly appointed Chief Officers. That although their appointment letters state that they will be employed on contract, the actual contracts were never executed. That the understanding between the parties was that the claimants would serve as chief officers exclusively in the 2013-2017 term. He deposes the sending of the Claimants on annual leave does not in any way remove them from employment. That they will remain Chief Officers until fresh ones are appointed when their appointments will formally come to an end and they will be paid terminal benefits as prescribed by the Salaries and Remuneration Commission. He deposes that the advertisements they are challenging is meant to identify suitable candidates for appointment as chief officers.

He deposes that annual leave is a normal human resource practice and does not in any way affect the rights and obligations of an employee and further that during leave the employer is entitled to appoint another employee to carry out the functions of that office on a temporary basis.

The Governor denies that allegations of the Claimants that they are being edged out because they refused to campaign for him and without false and without merit. He deposes that the Claimants have not been issued with letters of termination and that by filing this suit the Claimants are inviting the court to exercise an executive function that is a preserve of the employer against the well-established principle that courts will very rarely interfere in the employer's internal administrative functions. He further deposes that the application by the Claimants is premature, is not supported by cogent evidence, devoid of merit, is misconceived, an abuse of court process and fraught with misrepresentation. He urges the court to dismiss the application.

When the parties appeared in court for hearing of the application on 25<sup>th</sup> September 2017 parties agreed to collapse the application into the claim and hear the full claim on 11<sup>th</sup> October 2017. Directions were also taken for parties to file all relevant pleadings and documents including skeleton submissions before the date of hearing. However, on the hearing date no submissions had been filed and the suit was by consent argued by way of oral submissions.

## **Claimants Submissions**

Mr. Nyamweya for the Claimants relied on the application, grounds and affidavits in support thereof as well as the supplementary affidavits. He submitted that it is the Claimants' position that advertising their jobs after sending them on leave amounts to constructive dismissal. He submitted that section 45 of the County Governments Act which provides for the appointment of county chief officers contemplates that their employer is the County Public Service Board and the Governor's function is only to nominate and appoint upon recommendation of the County Public Service Board. He submitted that the county chief officers are not state officers as has been confirmed by Gazette Notice 6518 of 7<sup>th</sup> July 2017 which published remuneration and benefits for state officers in the County Government. He further submitted that chief officers are not members of the County Executive Committees, that they are not in charge of ministries, but departments and cannot be likened to principal secretaries in the National Government who have been classified as state officers in the gazette notice No.6516 of 7<sup>th</sup> July 2017.

Mr. Nyamweya submitted that the County Governments Act provides for the powers of the governor to dismiss officers other than chief officers under section 31 and 40. He submitted that section 44 gives the governor power to dismiss the county secretary. He submitted that under section 45 the governor does not have powers to dismiss the county chief officers which is vested in the county public service board. He submitted that even a County Executive Officer (CEC) cannot dismiss a chief officer. He submitted that the powers are provided for under section 46 and are limited to structural organisational powers. He submitted that section 59 of the Act sets out powers of the County Public Service Board which includes exercising disciplinary control.

Mr. Nyamweya submitted that the term of office of a county chief officer is defined by the terms of appointment and does not come to an end with the term of the governor. He submitted that to remove a chief officer from office one has to fall back on the Employment Act and the specific terms of their employment contracts. He submitted that the Claimants were appointed for 5 year terms from 9<sup>th</sup> April 2014 and their terms will expire in 2019. He submitted that their appointment letters do not have an exit clause and they have to be taken through due process. He submitted that the advertisement of the Claimants' positions is therefore null and void.

Mr. Nyamweya submitted that the failure of the Respondents to respond to the Claimants' letters dated 30<sup>th</sup> August 2017 seeking clarification of their positions in view of the advertisement thereof was a violation of Article 47(2) of the Constitution which provides that a person has a right to written reasons. He submitted that the Claimants have been subjected to unfair labour practice and are entitled to relief.

Mr. Nyamweya noted that the 1<sup>st</sup> Respondent did not file any response to the Claim and application. On the response of the 2<sup>nd</sup> Respondent to the effect that the term of office of the Claimants' came to an end with the governor's, Mr. Nyamweya submitted that the 2<sup>nd</sup> Respondent made a wrong assumption on the basis that presidential powers are devolved to the governor. He submitted that only executive power has been devolved and that is why the President is immune to prosecution while the governor is not.

Mr. Nyamweya submitted that the Council of Governors was advised by its counsel against termination of the contracts of county officers without compliance with their contractual terms or due process. A copy of the advisory letter is annexed to the Supplementary Affidavit of **David Ogega Kebiro**, the 1<sup>st</sup> Claimant and marked "**DOK1**".

## **Respondents Submissions**

The Respondents were represented by Mr. Wanyama and Mr. Onsembe. Mr. Wanyama for the Respondents relied on the replying affidavit of **James Elvis Omariba Ongwae**, the 2<sup>nd</sup> Respondent sworn on 22<sup>nd</sup> September 2017.

Mr. Wanyama submitted that the governor's office is established under Article 179(4) as the chief executive officer of the county government and is elected directly by the people. He submitted that the structure of the county government is similar to the national level. He submitted that the office of the governor is clothed with certain prerogative powers in the County Government Act while the powers of

the President are in the Constitution. He submitted that this is why Kenya has a presidential system of government at both national and county level. He submitted that in the case of **County Government of Nyeri v Cecilia Wangeci Ndungu** the Court of Appeal confirmed that there are certain appointments at both county and national level where the appointing authority exercises prerogative powers which is different from public service appointments.

He submitted that county chief officers whom he equated with Principal Secretaries at National Level are appointed in similar manner. He submitted that at National level the advertisements are done by Public Service Commission while at County level it is by County Public Service Board and the governor appoints in accordance with his powers under section 45 of the Act. He submitted that the governor signs in person unlike letters of other county public service officers which are signed by the Board. He submitted that this is notwithstanding that the county chief officers are designated as county public service employees but appointed by the governor by legislation. He submitted that the powers of the county public service board under section 59 do not include appointment of county chief officers. He submitted that county chief officers are positions in the county public service that are filled by the governor.

Mr. Wanyama submitted that under the Interpretation and General Provisions Act (Cap 2) power to appoint includes power to dismiss. He submitted that county chief officers are officers in county departments headed by CECs and are designated accounting officers by virtue of section 148 of Public Finance Management Act. He submitted that this explains why the governor appoints chief officers. He submitted that the advisory at appendix “DOK1” of the affidavit of **David Ogega Kebiro**, the 1<sup>st</sup> Claimant is not binding on either the governors or the court. Mr. Wanyama submitted that chief officers are entitled to due process of law before termination as was stated by the court in the case of **Cecilia Wangeci Ndungu**.

Mr. Wanyama submitted that the question for determination is therefore whether county chief officers by virtue of their appointment by the governor have a right to continue holding office when there is a change of government. He submitted that a governor is supposed to form an entirely new government for the positions where the governor has powers to appoint, these include CEC members, personal advisors and chief officers. He submitted that assuming there are officers serving on fixed term contracts that have not expired their appointments stands terminated by operation of law. He submitted that chief officers have no contractual appointments. He submitted that it is an obligation of the employer to issue contracts and in this case the employer defaulted and therefore the provisions of the Employment Act will kick in.

Mr. Wanyama submitted that as a matter of public policy the Claimants cannot stop recruitment process because their contracts have not come to an end. He submitted that in the present case the Claimants’ contracts have not been terminated as at the time they came to court but the County Government will proceed to terminate the contracts and comply with both Article 47 and the Employment Act. He submitted that all that was done which sent them to court was to send them on annual leave. He submitted that they have not reported to work. He submitted that the advertisements by the Respondents are in accordance with section 45 of the County Governments Act. He submitted that the county chief officers will remain in office until they hand over to the county chief officers recruited competitively. He submitted that according to the advertisement the serving chief officers are eligible to apply for the advertised positions.

Mr. Wanyama submitted that should the court find that the county chief officers have a valid contract which has not expired the only remedy the court can grant is damages. He submitted that these are private rights that cannot supersede public rights. He submitted that the Claimants have no cause of action until after their contracts have been terminated. He submitted the court cannot preserve terms and award damages where the employer has not yet formally acted.

Mr. Onsembe who appeared together with Mr. Wanyama for the Respondents referred the court to section 2 of the County Governments Act for the definition of public service and section 116 on delivery of county public services. He submitted that the reason why county chief officers are in public service is to depoliticise their offices. He submitted that under section 45(6) a county chief officer resigns by tendering

his resignation to the governor because the governor is the appointing authority.

Me. Onsembe submitted that there was no element of surprise to the Claimants because the letters sending them on leave stated that their positions will be advertised but have not been terminated. He submitted that they came to court prematurely, that they should have come to court after termination only if they are not satisfied by the terms of termination. He submitted that this case was filed on the basis of presumptions and apprehensions and not on actual happenings the court cannot grant injunctive orders.

He submitted that the old county government had 10 positions for chief officers but the positions advertised are 16. He further submitted that the governor has powers to reassign chief officers.

Mr. Onsembe submitted that if the law is not clear the court ought to fall back on the basic law of contract and Employment Act. He prayed that the case be dismissed.

### **Determination**

I have considered the pleadings and the oral submissions of counsel. The issues arising for determination are in my opinion the following-

1. Whether or not the office of county chief officer is in the public service;
2. Whether the term of office of county chief officer comes to an end with the term of the county governor;
3. Whether a county chief officer serves under the pleasure rule;
4. Whether the Claimants are entitled to the remedies sought.

#### **1. Whether or not the office of county chief officer is in the public service**

The position of county chief officer is created under section 45 of the County Government Act which provides as follows-

##### ***Appointment of county chief officers.***

*45.(1) The governor shall—*

*(a) nominate qualified and experienced county chief*

*officers from among persons competitively*

*sourced and recommended by the County Public*

*Service Board; and*

*(b) with the approval of the county assembly, appoint*

*county chief officers.*

*(2) The office of a county chief officer shall be an*

*office in the county public service.*

*(3) A county chief officer shall be responsible to the*

*respective county executive committee member for the*

*administration of a county department as provided under section 46.*

*(4) The county chief officer shall be the authorized officer in respect of exercise of delegated power.*

*(5) The governor may re-assign a county chief officer.*

*(6) A county chief officer may resign from office by giving notice, in writing, to the governor.*

Section 45(1) provides that the chief officers are sourced competitively and recommended to the governor by the County Public Service Board while section 45(4) expressly provides that the office of county chief officer is in the county public service and at section 45(4) that the county chief officer shall exercise delegated power.

Section 2 of the County Governments Act defines county public office, officer and service as follows-

*“**county public office**” means an office in the county public service or an office in a public body but does not include any office specifically exempted by the Constitution from the powers of the county government;*

*“**county public officer**” means any person appointed by the county government and holding or acting in any county public office whether paid, unpaid, or on contractual or permanent terms but does not include a person engaged on a part-time basis in a county public body paid at an hourly or daily rate;*

*“**county public service**” means the collectivity of all individuals performing functions within any department of the county government or its agency, but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly;*

Going by exclusion, the only offices excluded from county public service are those of **governor, deputy governor, members of the county executive committee** and **the members of the county assembly**. The office of county chief officer is therefore by the above definitions an office in the county public service.

From the foregoing it is my finding that the office of county chief officer is in the county public service.

## **2. Whether a county chief officer serves under the pleasure rule**

According to the Respondents the county chief officers serve under the pleasure rule and may be relieved of their duties at the pleasure of the governor because under section 45 of the County Governments Act they are appointed by the governor and resign by letter to the governor. The respondents equate the office to that of Principal Secretary in the National Government who serves at the pleasure of the President.

The governor is the head of the county executive as established under Article 179 of the Constitution with the functions provided for under Article 183

as follows-

### ***County executive committees.***

*179. (1) The executive authority of the county is vested in, and exercised by, a county executive committee.*

*(2) The county executive committee consists of—*

*(a) the county governor and the deputy county governor; and*

*(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.*

*(3) The number of members appointed under clause (2) (b) shall not exceed—*

*(a) one-third of the number of members of the county assembly, if the assembly has less than thirty members; or*

*(b) ten, if the assembly has thirty or more members.*

*(4) The county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.*

*(5) When the county governor is absent, the deputy county governor shall act as the county governor.*

*(6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.*

*(7) If a vacancy arises in the office of the county governor, the*

*members of the county executive committee appointed under clause*

*(2) (b) cease to hold office.*

***Functions of County Executive Committees***

**183.** *(1) A county executive committee shall—*

*(a) implement county legislation;*

*(b) implement, within the county, national legislation to the extent that the legislation so requires;*

*(c) manage and coordinate the functions of the county administration and its departments; and*

***(d) perform any other functions conferred on it by this***

***Constitution or national legislation.***

*(2) A county executive committee may prepare proposed legislation for consideration by the county assembly.*

*(3) The county executive committee shall provide the county assembly with full and regular reports on matters relating to the county.*

Under the County Government Act the powers and functions of the governor and county executive are provided for under sections 31 and 36 as follows-

***Powers of the governor.***

**31.** *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;*

*(b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;*

*(c) may appoint an accounting officer for each department, entity or decentralized unit of the*

county government; and

(d) shall have such powers as may be necessary for the execution of the duties of the office of governor.

***Functions of the executive committee.***

36.(1) In addition to the functions provided under Article 183 of the Constitution, a county executive committee shall—

(a) supervise the administration and delivery of services in the county and all decentralized units and agencies in the county;

***(b) perform any other functions conferred on it by the***

***Constitution or national legislation; and***

***(c) carry out any function incidental to any of the assigned functions.***

(2) In the performance of its functions, a county executive committee shall have power to determine its own programme of activities and every member of the committee shall observe integrity and disclosure of interest in any matter before the committee.

Besides the powers in the provisions set out above both the governor and the executive cannot exercise any other powers unless such powers are donated by legislation. This is expressly stated in both the Constitution and the Act and is the purport of the decisions of the Supreme Court in **In Re The Matter of the Interim Independent Electoral Commission S.C. Constitutional Application No. 2 of 2011**; [2011]eKLR and in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others S.C Application No. 2 of 2012**[2012]eKLR where the Court stated that jurisdiction is a matter regulated by the Constitution, statute law and judicial precedent.

The power to dismiss a county chief officer is not donated by any of the provisions set out above. Section 45 of the County Government Act only gives the governor authority to appoint and to reassign a county chief officer and not any other power over the county chief officer.

The powers of removal and/or dismissal in the Constitution and legislation, where donated, has been done very expressly. Examples are the powers to remove the governor, the members of CEC and the speaker. No such provisions have been made with respect to the county chief officer, with the only powers of the governor in relation thereto being very expressly provided for.

Based on the foregoing, the governor has no powers to dismiss a county chief officer and therefore the county chief officers do not serve at the pleasure of the governor. I thus find and hold that the pleasure doctrine does not apply to chief officers.

### **3. Whether the term of office of county chief officer comes to an end with the term of the county governor**

It was submitted for the Respondents that a governor who takes office is entitled to appoint new chief officers under section 45(1) of the County Government Act as they are accounting officers under Public Finance Management Act. As I have already pointed out above, the governor does not have powers to dismiss county chief officers. He can therefore only exercise the powers under section 45(1) when such offices are vacant. Mr. Wanyama submitted that the office of the county chief officers become vacant by operation of the law and by virtue of appointment by governor they leave office with the governor. No provision of the law was referred to in support of this position. Section 45 does not state that the powers to appoint chief officers therein must be exercised by the governor upon taking office even if the positions are not vacant. The only positions that leave office with the governor are those which are either provided for by law or those appointments made at the discretion of the governor. For example, Article 179(7) provides that-

*(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2) (b) cease to hold office.*

No similar provision has been provided with respect of county chief officer.

It is my finding that the term of office of a county chief officer does not come to an end when the governor vacates office but in accordance with the terms of engagement as read with terms of service of other public officers.

### **4. Whether the Claimants are entitled to the remedies sought**

The Claimants prayed for a declaration that the actions of the Respondents seeking to terminate their employment while on leave is malicious, illegal, unfair, unlawful, null and void. As the Respondents stated in both the Replying affidavit and in the oral submissions of counsel, the Claimants are still in employment, only having been sent on leave.

Having found that the governor has no powers to terminate their employment, the advertisement of their positions are ultra vires and therefore null and void and I declare accordingly.

The Claimants further prayed for an injunction to restrain the Respondents from processing applications received for the positions currently held by the Claimants by dint of the advertisement of 30<sup>th</sup> August 2017 and to restrain the Respondents from unlawfully terminating the employment of the Claimants unlawfully. The Claimants being public servants, are protected by Article 236 of the Constitution which provides that-

*236. A public officer shall not be—*

*(a) victimised or discriminated against for having performed*

*the functions of office in accordance with this Constitution*

*or any other law; or*

*(b) dismissed, removed from office, demoted in rank or*

*otherwise subjected to disciplinary action without due*

*process of law.*

The Respondents can therefore only terminate the employment of the Claimants in compliance with the provisions of the Constitution. The Claimants are further protected by Article 41 of the Constitution

which prohibits unfair labour practices, Article 47 which provides for a fair hearing and sections 41, 43 and 45 of the Employment Act. This means that their contracts can only be terminated for valid grounds as set out in the said provisions or upon effluxion of time when their contract terms lapse. Any other termination would be unlawful.

The Claimants further prayed for punitive damages for breach of contract. As pointed out by the Respondents there has been no breach of contract as the Claimants are still in service. The prayer for damages therefore does not lie as no damage has been suffered so far.

### **Conclusion**

Having found that the 2<sup>nd</sup> Respondent has no powers to terminate the services of the Claimants in the manner contemplated by the letters sending them on annual leave or the advertisement of their positions I make the following modified orders-

1. I declare the advertisement of the positions held by the Claimants null and void as the positions are not vacant
2. An order of injunction be and is hereby issued restraining the Respondents from terminating the contracts of the Claimants before expiry thereof without due process.
3. There shall be no orders for costs.

**Dated and signed and delivered this 19<sup>th</sup> day of October, 2017**

**MAUREEN ONYANGO**

**JUDGE**