



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 395 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

FLORENCE KHADENJE O. KHAGULI PETITIONER

-Versus-

THE GOVERNOR VIHIGA COUNTY

H. E. WILBUR OTICHILO 1ST RESPONDENT

VIHIGA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

His Excellency Wilber Otichilo, Governor of Vihiga County, the 1st Respondent, was sworn into office on 21st August 2017 and assumed office the following day on the 22nd August 2017. Upon taking office he acquainted himself with state of affairs at the county and prepared a press release on 29th August 2017. The press release detailed serious lapses in the management of the county affairs including mismanagement of resources. The Governor also set out the actions he intended to take in order to bring back order. Page 6 of the press release sets out actions the governor was taking with immediate effect, the first being that:

1. All CECM's and C.O's to proceed on compulsory leave pending their replacement.

I presume that CECM's are County Executive Committee Members while C.O's are Chief Officers.

On the same day Tuesday 29th August 2017 there was an advertisement of several vacancies by the Office of the Governor, Vihiga County Government.

Among the positions advertised was the position of Chief Officer Department of Land, Housing, Urban Development and Physical Planning, the position currently held by the Claimant, **Florence Khadenje O. Khaguli**. The Claimant/Applicant was aggrieved and filed this suit on 25th September 2017 seeking the following remedies:

a. A declaration that the actions of the Respondents of seeking to terminate the Claimant's employment while she is on duty and before her contract terms expire is malicious, illegal, unfair, unlawful and therefore null and void.

b. An injunction to restrain the Respondents from receiving applications and processing applications so far received for the position of the Chief Officer occupied by the Claimant by dint

of advertisement of 29th September, 2017 and the interviews commencing on 2.10.2017 and to permanently restrain the 1st respondent from unlawfully terminating the claimant's employment before expiry of her four (4) years contract.

c. An order compelling the Respondents to reinstate the Claimant to her employment as stipulated in the contract of employment.

d. An order compelling the Respondents to pay the Claimant punitive damages for breach of contract.

e. Cost of this claim.

f. Any other relief this Honourable court may deem fit to grant.

Together with the Claim the Applicant filed a Motion under Certificate of Urgency seeking the following orders:

1. THAT this honourable court be pleased to certify this application as urgent and be heard ex-parte at first instance and grant prayer 2 herein below.

2. THAT this Honourable court do issue an order restraining the Respondent from conducting any interviews scheduled to commence from 2.10.2017 to recruit or appoint new Chief Officers based on the advertisement of 29.8.2017 by the Respondents and the advertisement and also restrain the Respondents their agents from interfering with the Claimant's duties as a Chief Officer of Vihiga County Government pending hearing and determination of **this application inter-partes**.

3. THAT this Honourable court do issue an order restraining the Respondents from conducting any interviews scheduled to commence from 2.10.2017 to recruit or appoint new Chief Officers based on the advertisement of 29.8.2017 by the Respondents and the advertisement and also restrain the Respondents their agents from interfering with the Claimant's duties as a Chief Officer of Vihiga county Government pending hearing and determination of this claim.

4. The Respondents be directed to reinstate or restore the claimant into her office as the Chief Officer in the County Government of Vihiga pending hearing and determination of this claim.

5. THAT cost of this application be provided for.

The application is supported by the grounds on the face thereof and the affidavit of the Applicant in which she deposes that she was employed as a county chief officer for Environment, Natural Resources, Water and Forestry in the County Government of Vihiga on a four (4) year fixed term contract commencing 17th March 2014. The contract provides for termination before expiry date of the contract by either party giving three (3) months' notice.

The Applicant deposes that she discharged her lawful duties effectively and was surprised when she came across the Governor's Press Release sending all CECM's and C.O's on compulsory leave pending their replacement. She was again surprised when she saw an advertisement of her position in the Daily Nation of 29th August 2017 calling for qualified persons to apply for 15 positions of Chief Officers in total disregard of her employment contract.

The Applicant avers that the 1st Respondent is in breach of the law in advertising vacancies in the positions of chief officers who are public servants employed by Vihiga County Public Service Board, the 2nd Respondent which is the only body mandated to carry out such recruitment. She further avers that the Governor's action in appointing officers in acting capacity is ultra vires, and further that the officers appointed by the Governor in acting capacity are not qualified to hold the positions. She deposes the actions of the Governor have caused anxiety and confusion among employees.

The Applicant deposes that the Governor also breached the law and employment regulations by sending her on compulsory leave verbally pending replacement and as the Claimant was not given audience before such action was taken. She further states that the Governor's decision to approve all financial transactions is illegal and in contravention of the law and an interference with her role as accounting officer in her department. The Applicant deposes that she has made financial commitments in the legitimate expectation that she will serve until the end of her contract.

The Respondents filed a replying affidavit sworn by the Governor on his behalf and on behalf of the 2nd Respondent. He avers that the applicant herein has applied for the positions that were in the advertisement that she alleges to be illegal which fact she failed to disclose to the court and is thus coming to court to seek equity with dirty hands. The Governor further deposes that there is no reason to stop the interviews as there is no intention to fill the applicant's position before expiry of her contract. He deposes that the Applicant should at any rate not have stopped interviews for all 15 positions advertised but only the position that affects her.

He deposes that the Applicant is guilty of indolence having known of the advertisement on 29th August but coming to court on 25th September, 2017. He deposes that this suit as well as Kakamega High Court Election Petition No. 11 of 2017 are a wider scheme to curtail the new government of Vihiga from exercising its constitutional mandate. He deposes that the petition and this suit make cross references of each other and appear to have the same malicious motive.

The Governor deposes that the Applicant's contract has not been terminated as she has only been sent on leave to facilitate investigations. He deposes that he invited the Ethics and Anti-Corruption Commission and the Kenya National Audit Office to carry out investigations and the officers being investigated had to step aside to facilitate investigations and ensure non-interference with evidence and the process. That since investigations and prosecutions, if any, are likely to take a while it was necessary to appoint other officers to carry out the functions of those offices in acting capacity.

He further deposes that under section 45 of the County Governments Act the governor is the appointing authority for county chief officers and the 2nd Respondent will be involved in the final stage of recommending names of the successful candidates.

The Governor denies that any of the persons appointed in acting capacity are unqualified and challenges the Applicant to demonstrate the same. He further denies that the applicant was sent on leave verbally as alleged in her affidavit.

It is deposed that the orders sought have no merit as the Applicant is on leave with full salary and has thus not suffered any loss or damage. He prays that the application be dismissed.

When the application came up for inter partes hearing on 28th September 2017 the parties recorded the following consent orders-

1. **THAT** an order is hereby issued by this Honourable Court restraining the Respondent from filling the position of the Chief Officer Lands, Housing Urban Development and Physical planning pending hearing and determination of this application.
2. **THAT** the parties to file **written submissions within 14 days** with regard to prayers 3, 4 and 5 with necessary modifications.
3. **THAT** Mention on 11/10/2017 to take a ruling date for recording any further consent.

The Claimant was represented by Mr. Getanda instructed by Onsando Getanda & Company Advocates while the Respondents were represented by Mr. Sore instructed by GSLAW LLP Advocates.

Submissions for the Applicant

In the written submissions filed on behalf of the Claimant it is argued that she was terminated by way of the Governor's Press Release without compliance with the law, that it is the County Public Service Board which is mandated to employ, discipline and terminate the employment of county chief officers as provided in sections 59, 62 and 63 of the County Governments Act, and the Governor had no capacity to terminate the Applicant's contract.

It is further submitted that the Claimant's name is not among the officers to be investigated for financial impropriety as set out in page 6 of the Press Release and there was no reason to terminate her contract or send her on compulsory leave and replace her with another officer in acting capacity.

It is submitted that in view of admissions at paragraphs 7 of the Replying Affidavit and in view of the consents entered by the parties in court on 28th September 2017 the Claimant should be restored to her position as Chief Officer Department of Lands, Housing, Urban Development and Physical Planning until her contract expires. It is further submitted that the 1st Respondent cannot speak for the 2nd Respondent which is an independent agency.

Submissions for the Respondents

For the Respondents it is submitted that the application by the Claimant being interlocutory the principles in ***Giella v Cassman Brown*** as reiterated in ***Paul Gitonga Wanjau v Githuthi Tea Factory Company Ltd*** apply to the effect that the Applicant must demonstrate the following-

- A. Is there a serious issue to be tried?
- B. Will the Applicant suffer irreparable harm if the injunction is not granted?
- C. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits (often called "balance of convenience")?

It was submitted that the Claimant has not demonstrated a prima facie case according to the test set by the court in the case on ***Mrao Ltd v First American Bank of Kenya and 2 Others*** where the court stated that "*A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude there is a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the other*".

It is submitted that the Claimant's contract has not been terminated and she has defied the directive to proceed on leave; that the Claimant's contract expires in March 2018 and the substantive question is a matter for determination in the substantive claim; and that there is no termination letter in court. It is submitted that the Claimant has not established a prima facie case.

On the second test of irreparable harm it is the Respondents' submission that since that Claimant is on full salary and allowances she stands to suffer no harm, that the length of her contract is known, that her claim is a liquidated claim that can be paid for by the Respondents should the court find that a governor can give contracts in excess of his term of office. It is further submitted that the court will have to determine if a governor can change the team appointed by his predecessor.

On balance of convenience it is submitted that the facts of this case favour the Respondents.

Determination

The facts of this case are not in dispute. What is disputed is whether the actions taken by the governor in sending the Applicant on compulsory leave and advertising her position together with others is valid.

The Respondents have only briefly touched on this in the replying affidavit but only glossed over it in the submissions. The Applicant has disputed the power of the governor to both send her on leave/terminate

her employment and appoint another officer in acting capacity to carry out the duties of her office. These in my opinion are the issues for determination and the basis on which to grant or deny the orders sought by the Applicant in her application.

The appointment of chief officers is provided for in section 45 of the County Governments Act 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.

As correctly pointed out by the Claimant the office of county chief officer is in the public service. The terms “*county public office*”, “*county public officer*” and “*county public service*” are defined in section 2 of the County Governments Act 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;

A county chief officer being an office within the county public service is protected by Article 236 of the Constitution from arbitrary removal from office.

Article 236 of the Constitution provides as follows-

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.

Section 45 of the County Governments Act does not give the Governor powers to remove the chief officers from office. It only gives the Governor powers to **appoint** and **reassign**. A Governor does not even directly supervise a county chief officer as this is done by the CECM who is the officer accountable to the Governor. If there was any intention to give the Governor powers to dismiss a county chief officer nothing would have prevented the legislature from expressly providing for the same as has been done in respect of all powers of removal from office in the Act. This can only be because this is an office in the public service and the procedure for removal is as already provided for all public officers under section 59 of the County Governments Act or as may be provided in the individual contract of the county chief officer.

The powers of a governor as head of the county executive as established under Article 179 and 183 of the Constitution and in the County Governments Act are 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.

Under section 45 of the County Governments Act a county chief officer exercises delegated power and is responsible to the County Executive Committee Member (CECM) and not the Governor. The Act expressly provides at section 39 that it is the CECM who is accountable to the Governor.

Foregoing means that the term of office of a county chief officer does not come to an end upon the expiry of the term of office of the governor. It is also clear that the County Governments Act does not provide for removal of chief officer from office by the governor and that a county chief officer can only be removed from office after following due process in a manner applicable to all other county public officers.

Conclusion

From the forgoing it is my finding that the Governor for the County of Vihiga, the 1st Respondent herein acted in excess of his powers to send the Claimant on compulsory leave pending the replacement of the Claimant and all other county chief officers as only the County Public Service Board is vested with such powers. It is also my finding that the term of office of a county chief officer does not come to an end when the term of office of the governor who appointed the county chief officer comes to an end. It is further my finding that a county chief officer may only be removed from office in accordance with the terms of engagement or earlier in accordance with Article 236 of the Constitution. I therefore make the following modified orders with respect to the Claimant's Application dated 25th September 2017: -

1. The Respondents are restrained from removing the Claimant from office pending the determination of the Claim herein except in accordance with her contract or Article 236 of the Constitution.
2. The Respondents are directed to restore the Claimant to her office unless reassigned in

accordance with the provisions of the County Governments Act or removed from office in accordance with order 1 herein above.

3. The costs of this application shall be in the cause.

4. Parties are directed to take a hearing date for the substantive suit at the time of ruling or within 30 days on priority basis.

Dated Signed and Delivered This 19th Day of October, 2017

MAUREEN ONYANGO

JUDGE