



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1963 OF 2017

JEREMIAH MEPUKORI NAIROWUA.....1ST CLAIMANT

GLADYS SELEINA MARIMA.....2ND CLAIMANT

ALI DAUD LETURA.....3RD CLAIMANT

KESWE MAPENA.....4TH CLAIMANT

NANCY GATHAIYA.....5TH CLAIMANT

FLORENCE NDUNGE MUTUA.....6TH CLAIMANT

VERSUS

THE GOVERNOR, KAJIADO COUNTY GOVERNMENT.....1ST RESPONDENT

KAJIADO COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

1. On 2nd October 2017, the Claimants filed a Notice of Motion under certificate of urgency seeking an order of injunction restraining the 1st and 2nd Respondents from appointing and/or swearing in new persons to the various departments in the County Executive Committee, Kajiado County Government, to replace the 1st to 6th Claimants.

2. The application went before the Duty Judge (**Nduma J**) on 2nd October 2017, who granted interim orders. The Respondents subsequently filed a replying affidavit and a notice of preliminary objection, plus their own application seeking to set aside the interim orders granted on 2nd October 2017.

3. When the matter came up before me on 17th October 2017, I referred it to **Nduma J**, who had granted the order of 2nd October 2017. During the appearance before **Nduma J**, the Respondents withdrew their application dated 12th October 2017, in order to pave way for *inter partes* hearing of the Claimants' application. What is now before me therefore is the Claimant's application dated 29th September 2017 to which the Respondents have responded by way of a replying affidavit and a preliminary objection on a point of law.

4. The application which is supported by an affidavit and a supplementary affidavit sworn by the 1st Claimant, Jeremiah Mepukori Nairowua on 29th September 2017 and 23rd October 2017, respectively is

based on the following grounds:

a) The 1st, 2nd, 3rd, 4th, 5th and 6th Claimants are the duly appointed members of the County Executive Committee, Kajiado County Government, having been competitively appointed by the 1st and 2nd Respondents on five (5) year contracts commencing on diverse dates from the year 2013 as follows:

i) Jeremiah Mepukori Nairoiua (1st Claimant)-County Executive Member for Water, Irrigation, Environment & Natural Resources, appointed on 2nd August 2013, with the contract expected to end on 1st August 2018;

ii) Gladys Seleina Marima (2nd Claimant)-County Executive Member for Health Services, appointed on 12th June 2013, with the contract expected to end on 11th June 2018;

iii) Ali Daud Letura (3rd Claimant)-County Executive Member for Land and Executive Planning, appointed on 12th June 2013, with the contract expected to end on 11th June 2018;

iv) Keswe Mapena (4th Claimant)-County Executive Member for the County Treasury, appointed on 15th July 2013, with the contract expected to end on 14th July 2018;

v) Nancy Gathaiya (5th Claimant)-County Executive Member for Public Service Administration & Citizen Participation, appointed on 2nd August 2013, with the contract expected to end on 1st August 2018;

vi) Florence Ndunge Mutua (6th Claimant)-County Executive Member for Trade & Cooperatives, appointed on 3rd July 2013, with the contract expected to end on 2nd July 2018.

b) From the dates of their respective appointments, the 1st to 6th Claimants have diligently rendered service to the 1st and 2nd Respondents, under their respective terms of reference, and were not involved in any disciplinary issues.

c) The 1st and 2nd Respondents have now illegally and irregularly prematurely terminated the Claimants' contracts.

d) The 1st to 5th Claimants only came to learn of their termination through an advertisement published in '*The Star*' Newspaper edition of 18th September 2017, while the 6th Claimant learnt of her termination through social media.

e) The County Assembly of the 2nd Respondent has conducted approval hearings and/or vetting of seven (7) persons to replace the 1st to 6th Claimants.

5. The Respondents' response is contained in a replying affidavit sworn by Martin M. Moshisho, the Deputy Governor and acting County Secretary of the 2nd Respondent, on 12th October 2017. He states that the Claimants' letters of appointment are by their terms subject to the discretion of the appointing authority and the provisions of Articles 179(1)(b) and 179(7) of the Constitution and were unconstitutional to the extent that they purported to confer a duration of service beyond the tenure of the outgoing County Governor.

6. Moshisho further depones that continuation in office of the Claimants on the strength of the letters of appointment would not only violate the provisions of Articles 179(1) and 179(2)(b) of the Constitution on the vesting and exercise of executive authority of the County, but would also be contrary to the provisions of Sections 30(2)(d), 31(a) and 35 of the County Government Act, No. 17 of 2012.

7. In addition, under Section 42(1) of the County Government Act, the outgoing County Executive Committee may only remain in office, pending appointment and constitution of a new County Executive Committee, after an election of a new Governor, pursuant to Article 180(1) of the Constitution.

8. Moshisho adds that in accordance with the provisions of Section 40(2) of the County Government Act, the 1st Respondent as the County Governor, elected into office pursuant to Article 180(1) of the Constitution, bears the duty and prerogative to constitute a new County Executive Committee within 21 days of the swearing in of Members of the County Assembly.

9. The Respondent's position is that the Claimants ceased to hold office by operation of law and to that extent, the Employment Act does not apply in this case.

10. The parties have made great effort in answer to the question as to the legality of the Claimants' employment contracts, which *prima facie*, run beyond the tenure of the outgoing Governor. I think however that this is a question for the main trial. The issue before the Court at this stage is whether the Claimants have made out a case for grant of the injunctive orders sought.

11. The conditions under which such an order may be granted were well articulated in the famous case of ***Giella v Cassman Brown & Company Limited [1973] EA*** as follows:

- a) An applicant must show a *prima facie* case with a probability of success;
- b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
- c) If the Court is in doubt, it will decide the application on the balance of convenience.

12. As already intimated in the foregoing parts of this ruling, I will not at this stage, delve into the merits of the Claimants' claim that their employment contracts have been violated. It is however clear from the Claimants' pleadings as well as oral submissions made by their Counsel that the Claimants are not asking to stay in office. It would appear that they are aware that the law does not allow them to do so.

13. What is in issue, in my view, is what happens to the remainder of the terms of their respective contracts of employment. Given this background, to insist that the Respondents be barred from appointing and/or swearing in new persons to these positions is to introduce a '*dog in a manger*' situation which is not tenable in law.

14. This is a clear case where any injury to the Claimants would be well satisfied by an award of damages. The balance of convenience therefore tilts in favour of the Respondents. The result is that the Claimants application dated 29th September 2017 is dismissed with costs in the cause. The interim orders granted on 2nd October, 2017 are vacated.

15. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF NOVEMBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Mung'ao for the Claimants

Mr. Njoroge for the Respondents