



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**PETITION NO. 36 OF 2017**  
*(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)*

**SAMUEL OKURO ..... 1<sup>ST</sup> PETITIONER**  
**SAMUEL ONDOLA ..... 2<sup>ND</sup> PETITIONER**  
**JACOB MUGA ..... 3<sup>RD</sup> PETITIONER**  
**GEORGE AKONGO ..... 4<sup>TH</sup> PETITIONER**  
**CEPHAS KASERA ..... 5<sup>TH</sup> PETITIONER**  
**DEREK OBURA ..... 6<sup>TH</sup> PETITIONER**  
**GEORGE KOYIER ..... 7<sup>TH</sup> PETITIONER**  
**SELINE ODHIAMBO BONYO ..... 8<sup>TH</sup> PETITIONER**

**-VERSUS-**

**KISUMU COUNTY PUBLIC SERVICE BOARD THE GOVERNMENT KISUMU**  
**COUNTY ..... 1<sup>ST</sup> RESPONDENT**  
**H.E. PROF. PETER ANYANG NYONGO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Petitioners are all adults employed by the 1<sup>st</sup> Respondent, a statutory Body established under section 57 of the County Governments Act. The 2<sup>nd</sup> Respondent is the Governor of the County of Kisumu.

The petitioners are all chief officers of the 1<sup>st</sup> Respondent by dint of letters of appointment dated 11<sup>th</sup> September 2014, following a competitive selection process. The appointments were confirmed by letters dated 26<sup>th</sup> January 2017 upon successful completion of probationary appointments by the Petitioners. Their appointments were for a fixed term of 5 years effective from 11<sup>th</sup> September 2014. The contracts were therefore to lapse on 11<sup>th</sup> September 2019.

The Petitioners aver that by letters dated 24<sup>th</sup> August 2017 they were sent on compulsory leave by the 2<sup>nd</sup>

Respondent. The letters were written on letter-headed paper from the Office of the County Secretary but signed by the 2<sup>nd</sup> Respondent in his capacity as Governor, Kisumu County. In the letters it was stated that the purpose of the compulsory leave was to enable the Governor re-evaluate the performance of the Petitioners.

The Petitioners aver that they were shocked when on 6<sup>th</sup> September 2017, while they were still on compulsory leave, their positions were advertised in the Standard Newspaper and on 26<sup>th</sup> September 2017. The Petitioners were issued with letters giving them notice of termination of their contracts effective on 26<sup>th</sup> October 2017. The letters were signed by the Secretary of the 1<sup>st</sup> Respondent. The Respondents proceeded to appoint other persons to act in their positions pending the substantive filling of the positions.

The Petitioner aver that the letters of termination do not make any reference to the evaluation and that they were not involved in the process leading to the termination. They aver that they immediately sought audience with the Respondents which the Respondents failed to give them. They aver that the actions of the Respondents are malicious and designed to edge them out of employment prematurely on grounds that the Petitioners did not campaign for the 2<sup>nd</sup> Respondent. They aver that they had legitimate expectation to work for the full term of their contracts and made financial commitments in terms of loans and will be financially embarrassed should the Respondents not be restrained from their intentions to terminate the contracts of the Petitioners.

The Petitioners aver that the Respondents have breached their right to fair hearing and fair administrative action under Article 47 and 50 of the Constitution, that they have been subjected to discrimination by agents of the Respondents who refer to them as “outsiders” and that the Respondents have breached their right to fair labour practice under Article 41 of the Constitution.

The Petitioners further aver that the actions of the Respondents are capricious and that the reason given in their letters of termination being “to reorganise the government” is not valid, appropriate, necessary or reasonable and is therefore capricious. They aver that their treatment by the Respondents have dehumanised them in violation of Article 28 of the Constitution, that the Respondents have acted without transparency and accountability and that failure to disclose the results of the performance evaluation is in violation of their rights under Article 35 of the Constitution. They aver that the Respondents have violated Articles 20(1), (2), and (3), 22(1), 23(1) and (3), 28, 35, 41 and 50 of the Constitution. They seek the following remedies:

1. A declaration that the actions of the respondents of terminating the employment of the petitioners and relieving the petitioners of their duties is a breach of the petitioners’ rights under articles 27(1) (2) & (3), 28, 28, 35, 41, 47 and 50, OF the Constitution of Kenya, 2010 and the same is null and void for all intents and purposes.
2. An order of judicial review of certiorari be issued to remove into the honourable court for quashing the decision of the respondents relieving the petitioners of their duties as executive officers and as conveyed by each and every letter issued by the respondents and addressed to the petitioners on 26<sup>th</sup> September, 2017 including the one of compulsory leave dated 24/08/2017.
3. Damages, exemplary damages and costs of and incidental to this suit.

The petition was filed together with an application seeking the following orders-

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.

The honourable court be pleased to issue a conservatory 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 6<sup>th</sup> September, 2017 and stay the operationalization of the respondent’s letters to the

petitioners dated 26<sup>th</sup> September 2017, particularly restrain the respondents from interfering with the petitioners' duties as chief officers pending the hearing and determination of this application *inter-partes*.

The honourable court be pleased to issue a conservatory 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 6<sup>th</sup> September 2017 and stay the operationalization of the respondent's letters to the petitioners dated 26<sup>th</sup> September 2017, particularly restrain the respondents from interfering with the petitioners' duties as chief officers pending the hearing and determination of this petition.

1. Costs of the application be provided for.

Upon hearing the application which was filed under certificate of urgency the court ordered that status quo obtaining as at 29<sup>th</sup> September 2017 be maintained pending hearing and determination of the application. On 10<sup>th</sup> October 2017 when the application came up for *inter-partes* hearing the parties agreed that the application be consolidated and heard together with the petition and further that the parties proceed by way of written submissions. The Parties subsequently filed and exchanged written submissions together with all relevant affidavits and documents. The Respondents relied on their replying affidavit as their defence to both the application and petition. The Petitioners filed Supplementary affidavits with leave of court to counter issues raised in the Replying affidavits. The Petitioners relied on the decision of this court in **Eunice Adhiambo Owino & 8 Others v Homa Bay County Public Service Board: Cause 391 of 2017** which is on all fours with the present petition.

In the submissions filed on behalf of the Petitioners. They have identified the following issues for determination:

- i. Who is the employer of the petitioners as chief officers?
- ii. Does the term of the petitioners come to an end with the expiry of the term of the 1<sup>st</sup> governor?
- iii. Does the 2<sup>nd</sup> respondent have powers to remove chief officers from office?
- iv. What procedure attends to the removal of chief officers?
- v. Was that procedure followed?
- vi. Have the rights of the petitioners been infringed and if so, which rights and what are the remedies?

The Respondent filed a Replying Affidavit of HESBON OWUOR HONGO the County Secretary who deposes that the letters of appointment and confirmation of the petitioners were signed by the County Secretary and not Governor and that the Petitioners did not go through a competitive selection process. Mr. Hongo deposes that the Petitioners were appointed on 5-year renewable contracts tailor made to fit within the 5-year cycle of the appointing Governor's term and is therefore tied to the pre-set deliverables and targets for the office holder. He deposes that the letters of appointment of the Petitioners have an exit clause. He deposes that the new Governor was within his right to terminate the contracts of the Petitioners under the exit clause and this does not amount to unfair labour practice. He deposes that the Petitioners are free to reapply for the advertised positions.

Mr. Hongo deposes that the petition is prematurely filed as the Petitioners have not exhausted the procedure set in section 77 of the County Governments Act which provides for appeals to the Public Service Commission. He prays that the petition be dismissed.

In the written submissions filed on behalf of the Respondents, counsel for the Respondents have extracted the following issues for determination:

1. What is the job designation of a 'chief officer' and does the office fall within the context of 'political appointees' appointed by an elected Governor to propagate his manifesto which formed the basis of the contract between him and the electors.
2. What is the legal effect of a contract of employment issued by a Governor to a chief officer, who is a public officer under job group 'S', which overlaps the Governor's term in office?
3. Is this cause non-justiciable to the extent that restricting and re-organization of the government to create departments headed by chief officers is within the province of the Governor?
4. Are the petitioners entitled to the orders sought?

## **Determination**

I have considered the pleadings and submissions filed as well as the documents and authorities on record. The issues for determination in my considered opinion are whether the term of office of the petitioners expired with the term of office of the Governor who appointed them, whether the termination of their contracts was fair and if they are entitled to the remedies sought.

There are other secondary issues raised by both parties. The Petitioners aver that the Replying Affidavit of HESBON OWUOR HONGO the County Secretary should be struck off the record as he is a stranger to these proceedings. They aver that the County Secretary is irregularly office. This is not a matter for decision in this petition as it has not been prayed for. Until the County Secretary is declared to be irregularly in office his actions cannot be contested so long as they fall within his line of duty. Under section 44 of the County Governments Act one of the County Secretary's functions is to convey the decision of the executive. This is what the Secretary was doing when he wrote to the Petitioners the impugned letters.

The Respondents on their part raised the issue of the legal effect of a letter issued by a governor that goes beyond his term. I do not find this to be an issue in the present petition as the termination of the contracts of the Petitioners herein was not based on the said ground.

The other issue raised by the Respondents is the non-justiciability of the petition. The Respondents argue that the return of the Petitioners into office would bastardize the provisions of section 46(1). I do not think so. It cannot be true that only persons appointed by the sitting governor can implement his manifesto as argued by the Respondents. County Chief officers do not report to the Governor. They report to members of the County Executive Committee who in turn report to the Governor. This is expressly provided in section 45(3) and (4) of the County Government Act. They exercise delegated authority and be taken through disciplinary action by the County Public Service Board at the request of the of the County Executive Committee where the Governor is the Chief Executive Officer. I find no merit in the argument. In any event this was not stated to be the reason for termination of the contracts of the Petitioners and is this a direct issue in the petition.

## **Whether the term of office of the petitioners expired with the term of the Governor**

The appointment of county 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.

It is an office in the public service as expressly provided. The only powers of the Governor with respect to county chief officers is appointments and re-assignment, not termination. Only the County Public Service Board can terminate the services of county chief officers after following due process. Should the governor be unhappy with the performance of a county chief officer, the only action the governor can take is to request the County Public Service Board to take disciplinary action against the county chief officer. In fact such reporting should come from the CEC member to whom the chief officer is responsible as the governor does not have direct supervisory powers over county chief officers as provided in section 46 of the Act.

The County Governments Act expressly provides for offices that vacate office with the governor and those that the Governor has powers to remove from office. These are positions in the County Executive Committee. Even in such case the person being removed must be given the reasons for removal and be given an opportunity to be heard as was stated by the Court of Appeal in the case of **County Government of Nyeri v Cecilia Wangeci Ndungu**. As I observed in **Kisumu ELRC Petition No. 395 of 2017 between Florence Khadenje O. Khaguli v The Governor Vihiga County H. E. Wilbur Ottichilo**

*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.*

I therefore find that the term of office of the petitioners are not dependent on and did not expire with the term of office of the Governor who appointed them following the general elections of August 2017.

### **Whether the termination of their contracts was fair**

All the Petitioners were officers of the County Public Service as admitted by the Respondents in both the Replying Affidavit and written submissions filed on behalf of the Respondents. County Public office,

County Public officer and County Public Service have been 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 public officer being an office within the county public service is protected by Article 236 of the Constitution from arbitrary removal from office. Article 236 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.*

The foregoing means that the contracts of the Petitioners as chief officers could only be terminated either upon expiry of the term of their contracts or after due process as provided in Article 236. Their letters of compulsory leave gave the reasons for sending them on compulsory leave to be to allow the Governor evaluate their performance and restructure/reorganise his government. They were however not given feedback on the restructuring/reorganisation. Instead they got letters notifying them of termination of their employment upon expiry of a notice period of 30 days. The letters of termination did not mention the restructuring/reorganisation or the letters sending them on compulsory leave.

The Respondents have argued that they had a right to terminate the contracts after giving notice, and that this was in line with the terms of their engagement. The Respondents have further argued that the contracts were illegal as the Petitioners did not go through vetting and further that the contracts were against the policy of the Public Service Commission **Reference No. PSC/SEC/93/37/(92)** dated **05/01/2015** titled **Delegation of Public Service Commission Human Resource Function to the Cabinet Secretary**.

The Respondents further argued that establishment, continuing, varying and abolition of departments falls within the province of County Executive Committee (CEC) under section 46(1) of County Governments Act.

In as much as the arguments of the Respondents are factually correct the County Governments Act provides at section 82 for abolition of office and at section re-designation. The Respondents did not comply with either.

On the arguments of termination notice both the terms of service for Public Servants and the Employment Act which covers all public service employees provide that there must be valid reason and the employee must be given a hearing before the termination. Article 236 confirms this position, that there must be due process. The termination notices amounted to unfair labour practice thus violating the rights of the Petitioners under Article 41 of the Constitution.

The circular cited by the Respondents is for public service and does not apply to County Public Service Employees as is evident from the title thereof. It is further issued after the contracts of the Petitioners had been signed and cannot operate retrospectively.

The other argument of the Respondents that the Petitioners failed to comply with section 77 of the County Governments Act is misplaced as the section refers to appeals against decisions of County Public Service Board and not the decisions of the Governor or the County Secretary both of whom are not members of the County Public Service Board. In any event the section does not oust the jurisdiction of the court.

Section 45 of the County Governments Act provides for appointment of chief officers but does not provide for their removal from office. This was not an oversight by the legislature. The section clearly states the office of county chief officer is in the public service and there is provision within the Act for removal from office of public officers. Neither the Governor nor the County Secretary have powers to remove chief officers from office. As I stated in the case of **Eunice Adhiambo Owino & 8 Others v Homa Bay County Public Service Board: Cause 391 of 2017**

*“Section 45 of the County Governments Act does not give Governor powers to remove chief officers from office. If there was such intention nothing would have prevented the legislature from expressly providing for the same as has been done in the same Act in respect of removal from office of governors, deputy governors, County Executive Committee Members, County Speakers and County Secretaries.”*

For the foregoing reasons the notice of termination of the contracts of the Petitioners was not only ultra vires the powers of the governor, but also violated the provisions of Articles 236 and 41 of the Constitution and sections 41, 43 and 45 of the Employments Act.

## **Remedies**

The Petitioners prayed for an order of judicial review of certiorari to remove the decision of the Respondents into this court for quashing both the decisions sending them on compulsory leave and the notices of termination. In a Judicial Review application, the court's role is not to concern itself with the merits of the decision but with the decision making process. This was aptly put by the court in **Municipal of Mombasa vs Republic and Umoja** (supra). The court made similar observations in **Pastoli v Kabale District Local Government Council and Others** (supra), which cited with approval the decision of the court in **Council of Civil Unions vs Minister for the Civil Service [1985] AC 2** and in **An application by Bukoba Gymkhana Club [1963] E.. 478**.

Again in the case of **Municipal Council of Mombasa v Republic and Another [2002] EKLR** it was held:

*Judicial Review is concerned with the decision-making process, not with the merits of the decision itself..... The court would only be concerned with the process leading to the making of the decision....*

In the present case I have found that the Respondents acted without jurisdiction and further that the Petitioners were not given a hearing in contravention of Articles 41 and 236 of the Constitution. Article 23(3) provides that courts have powers to grant orders such as those prayed for by the Petitioners. It provides that:

*(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—*

*(a) a declaration of rights;*

*(b) an injunction;*

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) **an order of judicial review.**

Having found that the Respondent acted without jurisdiction and in violation of express provisions of the constitution and legislation, it is my finding that the petitioners have made a justification for the granting of the orders they prayed for. I consequently make orders that the letters dated 24<sup>th</sup> August and 26<sup>th</sup> September 2017 issued by the Respondents sending the Petitioners on compulsory leave and giving notice of termination to the Petitioners respectively be and are hereby removed into this court for the purpose of quashing.

The 2<sup>nd</sup> Respondents shall personally bear the costs of the Petitioners.

**Dated signed and delivered this 7th day of November 2017**

**Maureen Onyango**

**Judge**