



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 337 OF 2017 CONSOLIDATED WITH CAUSE 342 OF 2017

STEPHEN MUNENE NJAGI.....1ST CLAIMANT

AND

JOSEPH MARANGU SHEM.....2ND CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 8th December, 2017)

JUDGMENT

The 1st claimant filed the statement of claim on 19.09.2017 through Havi & Company Advocates. The 1st claimant prayed for judgment against the respondent for:

- a) A declaration be and is hereby issued that the letter dated 30th day of May, 2017 from the respondent to the claimant, revoking the claimant's confirmation of employment on permanent and pensionable terms as set out in the letter of confirmation dated the 3rd day of May, 2017, is unconstitutional and unlawful on account of violations of the Constitution of Kenya, the Employment Act, Cap 226 Laws of Kenya, the County Governments Act, No.17 of 2012, the Public Service Commission Act, No.10 of 2007, the Fair Administrative Act, No.4 of 2015 and the Respondent's Human Resource Manual.
- b) An order of certiorari be and is hereby issued quashing the decision made by the respondent on the 30th day of May, 2017 and communicated to the claimant on the 4th day of September, 2017.
- c) An order of prohibition be and is hereby issued restraining the respondent from punishing the claimant by reduction in rank or seniority or otherwise terminating his employment without due regard to the law and the Human Resource Manual.
- d) A conservatory order be and is hereby issued staying the implementation or enforcement of the decision made by the respondent on the 30th day of May, 2017 and communicated to the claimant on the 4th day of September, 2017, revoking the claimant's confirmation of employment with the respondent on permanent and pensionable basis in terms of the letter dated the 3rd day of May, 2017 from the respondent to the claimant.
- e) In the event that the claimant's employment with the respondent would have been terminated, the

respondent be and is hereby compelled to reinstate the claimant to employment upon the terms set out in the letter dated the 3rd day of May, 2017 from the respondent to the claimant.

The respondent be and is hereby directed to pay the claimant costs of the claim.

The 2nd claimant filed the statement of claim on 26.09.2017 through Havi & Company Advocates and prayed for Judgment against the respondent for:

a) A declaration be and is hereby issued that the letter dated 30th day of May, 2017 from the respondent to the claimant, revoking the claimant's appointment/promotions on permanent and pensionable terms as set out in the letter of appointment dated the 27th day of April, 2017, is unconstitutional and unlawful on account of violations of the Constitution of Kenya, the Employment Act, Cap 226 Laws of Kenya, the County Governments Act, No.17 of 2012, the Public Service Commission Act, No.10 of 2007, the Fair Administrative Act, No.4 of 2015 and the Respondent's Human Resource Manual.

b) An order of certiorari be and is hereby issued quashing the decision made by the respondent on the 30th day of August, 2017.

c) An order of prohibition be and is hereby issued restraining the respondent from punishing the claimant by reduction in rank or seniority or otherwise terminating his employment without due regard to the law and the Human Resource Manual.

d) A conservatory order be and is hereby issued staying the implementation or enforcement of the decision made by the respondent on the 30th day of May, 2017 from the respondent to the claimant, revoking the claimant's appointment/promotion on permanent and pensionable terms as set out in the letter of appointment dated the 27th day of April, 2017.

e) The respondent be and is hereby directed to remit to the claimant's account the salary for the month of August, 2017 and for subsequent months until after the determination of the claim herein.

f) In the event that the claimant's employment with the respondent would have been terminated, the respondent be and is hereby compelled to reinstate the claimant to employment upon the terms set out in the letter dated the 27th day of April, 2017 from the respondent to the claimant.

g) The respondent be and is hereby directed to pay the claimant costs of the claim.

The claimants' suits were consolidated.

The respondent filed the statement of defence and counterclaim against the 1st claimant's case on 26.09.2017 through Kamau Kuria & Company Advocates. The respondent prayed that the 1st claimant's suit be dismissed with costs and further, by way of counterclaim, prayed for:

a) A declaration that the purported variation on 3rd May, 2017 of the contract of employment made on 2nd September 2017 is null and void.

b) A declaration that the claimant ceased to be an employee of the respondent on 18th August, 2017.

c) An order that the claimant do pay to the respondent Kshs.142, 011.00 being overpayment for May, June and July 2017 consequential to the unjustified or fraudulent variation of the contract of employment.

d) Interest on (c) above.

e) Cost of the suit.

On 02.10.2017 the respondent filed the defence and counterclaim against the 2nd claimant's suit. The respondent prayed that the 2nd claimant's suit be dismissed with costs and by way of counterclaim further prayed for judgment against the 2nd claimant for:

a) A declaration that between 01.04.2015 and 30.11.2016 the claimant was an employee of the European Union through Plan International.

b) A declaration that the claimant was, between 1st April, 2015 and 31st March, 2017 paid Kshs.1, 844, 370.00 by the respondent by mistake.

c) A declaration that the claimant was, between 1st April, 2017 to 31st July, 2017, paid Kshs.825, 445.00 by the respondent by mistake.

d) An order that the claimant do pay the respondent Kshs.2, 669, 815.00.

e) Interest on (d) above.

f) Costs of the suit.

The 1st claimant previously served as a secondary school teacher in the public service as employed by the Teachers Service Commission effective 03.07.1995. The respondent offered the 1st claimant employment as a Personal Assistant (Job Group N) effective 01.09.2014. The engagement was contractual to serve in the office of the respondent's Governor. The employment was subject to the terms and conditions of service as prescribed in the respondent's Human Resource Policy Manual. Under the respondent's Job descriptions and Specifications for Selected County Officers, a Personal Assistant's duties involve managing the Governor's diary; handling of correspondence and enquiries; managing appointments for the Governor; setting up meetings; managing the affairs of the Governor's office; managing personal staff of the Governor; and any other duties that may be assigned by the Governor. It was not in dispute that the serving Governor at the time the 1st claimant was appointed left office on 18.08.2017 upon a newly elected Governor being sworn in to office. It is also clear that the letter of offer of appointment which the 1st claimant signed did not state the tenure of that appointment. The letter merely stated that it was contractual engagement. It was the 1st claimant's testimony that his term of service as a Personal Assistant to the Governor ended on 03.05.2017 when he received the letter of confirmation to the position of Assistant Director – Administration (Job Group P).

The letter of confirmation dated 03.05.2017 conveyed that the 1st claimant had been confirmed to the post of Assistant Director – Administration (Job Group P) with effect from the date the 1st claimant was placed on contract (1st September, 2014) and salary changes were to be effected from 01.05.2017. The letter was signed by Kenneth Kanga, the secretary to the respondent's public service board.

The letter of 30.05.2017 was addressed to the 1st claimant by the same Kenneth Kanga and it was about revocation of the confirmation. It referred to the letter of confirmation dated 03.05.2017 and conveyed that the confirmation had been revoked. The letter stated that the revocation had been due to regulations governing staff serving the Governor and whose term is dependent on the terms of service of the sitting Governor. In the present suit the claimant challenged the revocation.

The respondent's case is that the 1st claimant served as a personal assistant to the Governor until that Governor left office on 18.08.2017. There were no personal or other services he could render to the newly elected and sworn Governor. That was the case because the duties of a Personal Assistant were personal to the Governor. It was further urged that the claimant conspired with the secretary to the County Public Service Board, the said Kenneth Kanga. That was sometimes prior to 3rd May, 2017 and the outcome of

that conspiracy was the confirmation letter that had been revoked. The court observes that the particulars of the conspiracy were not pleaded and no evidence was provided in that regard.

The **1st issue** for determination is whether the letter of confirmation of the 1st claimant to the post of Assistant Director – Administration (Job Group P) with effect from the date the 1st claimant was placed on contract (1st September, 2014) and salary changes as effected from 01.05.2017 was lawful and therefore valid. Section 71 of the County Governments Act, 2012 provides for confirmation of appointment upon lapsing of the period of probationary service. The section provides as follows:

1) If the relevant authority fails to confirm an appointment of a public officer initially appointed on probationary terms and the term has lapsed with or without an extension, the officer shall stand confirmed in the appointment on the due date.

2) The period served on probationary terms shall be taken into account when computing the period of service for the purpose of payment of pension benefits, gratuity or any other terminal benefit.

3) A probationary period of service shall not be extended except on account of –

a) affording the public officer further opportunity to pass an examination the passing of which is a condition for the confirmation, the officer's service otherwise being satisfactory;

b) affording the public officer an opportunity for improvement in any respect, in which the officer's work or conduct have been adversely reported on.

It is clear that the 1st claimant was not initially appointed to the position of Assistant Director – Administration (Job Group P) effective 01.09.2014. The court therefore returns that the confirmation was not lawful. The confirmation not being lawful, it was invalid together with the changes in the 1st claimant's salary that the confirmation purported to confer. As to the liability of the person from whom the extra unlawful payment should be recoverable, the court will revisit the subject later in this judgment.

The **2nd issue** for determination is whether the revocation of the confirmation was lawful. It appears that the 1st claimant having received the confirmation letter, he was entitled to enjoy the benefits it conferred unless varied in accordance with the law or voided as unlawful. It was not in dispute that the revocation was without due process and it amounted to an adverse consequence visited upon the 1st claimant without an opportunity of being heard. Section 76(1) of the County Governments Act, 2007 provides that in exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice. Section 76 (2) of the Act provides that no public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament. The court returns that the 1st claimant was not accorded due process as per the principles of natural justice and the revocation of the confirmation was unlawful to that extent. The court has considered submissions made for the respondent that the 1st claimant and the said Kenneth Kanga had allegedly been in a conspiracy to procure the confirmation. The court returns that such would be the matters the respondent through the Public Service Board would investigate and make appropriate findings and decisions - only if the 1st claimant had been accorded due process as per rules of natural justice.

To answer the **2nd** issue for determination the court returns that the revocation of the confirmation was unlawful to the extent that by so doing, the respondent failed to accord the 1st claimant due process as prescribed in the Act.

The **3rd issue** for determination is whether the 1st claimant is entitled to the remedies as prayed for. As the confirmation has been found to be unlawful, it will not serve any legitimate purpose to quash the revocation decision that set aside the offensive confirmation decision. The court has found that the

revocation decision amounted to imposition of a demotion or punishment without due process and the claimant is entitled to a declaration that his right to due process was thereby infringed upon. The court has considered the prayers for a conservatory order and retaining the 1st claimant upon terms of service as per letter of 03.05.2017. The court returns that the prayers were not justified as the court cannot uphold the unlawful confirmation and the ensuing terms of service. The court has however found favour in the 1st claimant's prayer for prohibition that he will not be punished or reduced in rank or seniority without regard to the law and the respondent's human resource manual. The court returns that the offer of appointment dated 28.08.2014 emplaced the 1st claimant upon contractual engagement but the tenure was not defined. The court returns that it was misconceived for the respondent to take the view that taking into account the job description of a Personal Assistant, Job Group N in the office of the Governor, then the 1st claimant's tenure must have ended on 18.08.2017 when a newly elected Governor was sworn in. The court holds that the parties must be bound by law and the terms of the contract of employment. There was no agreement that the 1st claimant's tenure would lapse if there was a change in the holder of the office of Governor. Thus, the court holds that the idea that the 1st claimant's employment ended by effluxion of time when a new Governor was sworn into office on 18.08.2017 was clearly a misconception not founded upon the parties' contract of service. Accordingly, the order of prohibition would issue that the respondent shall not demote or remove the 1st claimant from the position of Personal Assistant, Job Group N as appointed by the letter dated 28.08.2014 except in accordance with the law or contract of employment and the 1st claimant shall continue in the service of the respondent accordingly.

The **4th issue** for determination is whether the respondent is entitled to the counterclaim. The court has already returned that the purported variation on 03.05.2017 of the contract of employment made on 02.09.2017 was unlawful and therefore null and void as prayed for in the counterclaim. The court has found that the contract of employment made on 02.09.2017 survived the outgoing Governor and the respondent is therefore not entitled to the declaration the 1st claimant ceased to be an employee of the respondent on 18.08.2017. As the confirmation was unlawful, the respondent says it is entitled to recover Kshs. 142, 011.00 from the 1st claimant paid pursuant to the unlawful confirmation as an Assistant Director – Administration (Job Group P) effective 01.09.2014. The court returns that the payment of the enhanced salary was not disputed. The court has also found that the respondent failed to subject the 1st claimant to due process as provided in section 76(1) and (2) of the Act. It is the opinion of the court that such due process would establish the extent of the culpability of the 1st claimant, if any, in that regard. In such circumstances, the court returns that it was not enough for the respondent to show that the 1st claimant was paid the **Kshs.142, 011.00** pursuant to the unlawful confirmation. The court considers that the respondent by way of due process had to show that one way or the other, the 1st claimant had contributed to his unlawful confirmation. That contribution was not established at all. It is the view of the court that the authority or the person who led to or caused the unlawful confirmation to take place must be held liable for the recovery of the ensuing financial losses. Indeed, it was not urged for the respondent that the 1st claimant had unlawfully confirmed himself in the office of Assistant Administration. The evidence is that the respondent's case is that the person alleged to have illegally confirmed the 1st claimant was the Board secretary one Kenneth Kanga and who was facing criminal charges in that respect. It is therefore the view of the court that due process would be relevant towards establishing the person culpable for the resultant financial loss. Accordingly, the court returns that the counterclaim for payment of Kshs.142, 011.00 will fail.

As for the 2nd claimant, he was appointed by the respondent to the position of Project Officer effective 28.03.2015 and as per the letter of offer of appointment dated 28.03.2015. The appointment was for 3 years from 28.03.2015 to 31.10.2017. By the letter dated 19.04.2017 the respondent's Governor conveyed that the 2nd claimant had been appointed as a Director of Education, in the Department of Education, Youth, Sports and Social Services Job Group R with effect from 20.04.2017. The appointment was said to be on permanent and pensionable terms and with immediate effect. He was to report to the Chief Officer in charge of the Department. The same position was offered to the 2nd claimant by the letter dated 27.04.2017 by the respondent's Public Service Board and upon terms as contained in the earlier letter by the Governor. That letter was signed by the Board's secretary Kenneth Kanga. The 2nd claimant

signed on 28.04.2017 accepting the offer of appointment. By the letter dated 16.05.2017 the claimant was assigned to head the Directorate of Sports in the Department of Education, Youth Affairs, Sports, Gender, Culture and Social Services.

By the letter dated 30.08.2017 signed by the same Board's secretary Kenneth Kanga, reference was made to the letter of 27.04.2017 and it was conveyed that the Board had revoked the appointment to the position of Director, Education, Youth, Sports, Gender and Social Services with immediate effect. The revocation was stated to be due to irregularities found in the process of appointment. The letter directed the 2nd claimant to report to the County Secretary for redeployment accordingly.

The 5th issue for determination is whether the appointment of the 2nd claimant as Director, Education, Youth, Sports, Gender and Social Services with immediate effect as per the Governor's letter of 19.04.2017 or the Public Service Board letter of offer of appointment dated 27.04.2017 was unlawful. The power to appoint persons to hold or act in offices of the county public service such as the office the Governor purported to appoint the 2nd claimant to hold is vested in the County Public Service Board as per section 59(1) (b) of the County Governments Act, 2012. Accordingly, the court returns that the appointment of the 2nd claimant as done by the Governor was unlawful. Section 63 (1) of the Act provides and repeats the power of the Board to make appointments and promotions in the county public service. Section 63 (2) of the Act then states, **"63.(2) The power of the Board under section 63(1) shall be exercised -**

- a) at the request of the relevant county chief officer of the department to which the appointment is made;**
- b) at the request of the clerk of the county assembly; or**
- c) on the County Public Service Board's own motion on account of best interest of the county public service and parity of treatment of public officers taking into account the circumstances of each case."**

Section 65 of the Act provides for matters to be taken into account during appointments to include:

- a) the standards, values and principles set out in Articles 10, 27(4), 56(c) and 232 (1) of the Constitution;**
- b) the prescribed qualifications for holding or acting in the office;**
- c) the experience and achievements attained by the candidate;**
- d) the conduct of the candidate in view of any relevant code of conduct, ethics and integrity;**
- e) the need to ensure that at least thirty percent of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county;**
- f) the need for open and transparent recruitment of public servants; and**
- g) individual performance.**

Section 65 (2) of the Act further provides that **in determining whether an appointment, promotion or re-designation has been undertaken in a fair and transparent manner, the overriding factors shall be merit, fair competition and representation of the diversity of the county.**

The court has considered the 2nd claimant's appointment by the Board to the position of Director and returns that the same has not been shown to have complied with the provisions of sections 63 and 65 of the Act. In particular it has not been shown that the relevant Department made the request and the

overriding factors of merit, fair competition and representation of diversity of the county have not been established. The court returns that the appointment was unlawful.

The **6th issue** for determination is whether the revocation of the 2nd claimant's appointment as Director was unlawful. Like in the case of the 1st claimant, it was not in dispute that the revocation was without due process and it amounted to an adverse consequence visited upon the 2nd claimant without an opportunity of being heard. Section 76(1) of the County Governments Act, 2007 provides that in exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice. The principles were clearly not observed and the revocation was unlawful to that extent.

The **7th issue** for determination is whether the 2nd claimant is entitled to the remedies as prayed for. The 2nd claimant is entitled to the declaration that the revocation was unlawful to the extent that it amounted to imposition of a punishment without according the 2nd claimant due process as per the rules of natural justice. The consequence of quashing or setting aside the revocation of the appointment would be to validate the appointment of the 2nd claimant to the position of Director but which appointment the court has already found to have been irregular and unlawful because it was clearly in contravention of the cited provisions of the County Government Act, 2012 on appointments and promotions. Similarly, the prayer for a conservatory order staying the implementation of that decision revoking the appointment of the 2nd claimant to the position of the Director will be declined. The court has considered that there were interim orders on payment of due salaries as per the terms of the interim orders and pending the hearing and determination of the case. Thus, the court returns that the prayer for payment of salaries for August, 2017 and thereafter was effectively expended and awarding the same in this judgment would be unjustified. Finally, the court returns that the 2nd claimant is entitled to the prohibitory order in terms that he shall not be terminated from employment except in accordance with the law and he continues in the respondent's employment in terms of the letter of offer dated 28.03.2015. Under the terms of the letter, the term of employment lapsed on 31.10.2017, but, for the interim orders in place which retained him in employment until determination of the suit. Thus, the court finds that in absence of parties' contrary agreement, a declaration would issue that the 2nd claimant's employment as a project officer will lapse on the date of this judgment per the interim orders in place and as read with the letter of offer of appointment dated 28.03.2015.

The **8th issue** for determination is whether the respondent is entitled to the prayers made against the 2nd claimant in the counter claim. The court returns that the respondent is not entitled to the declaration that between 01.04.2015 and 30.11.2016, the claimant was an employee of the European Union through Plan International. The court returns that the letter of offer of appointment dated 28.03.2015 is an express contract of employment between the respondent and the 2nd claimant. The terms of the 2nd claimant's employment were spelt out in the letter and the respondent's human resources policies applied together with the respondent's supervisory protocols. Thus, the respondent's reliance on correspondence between Plan International or European Union and the respondent did not vitiate the binding nature of the contract of employment between the parties as concluded and conveyed in the letter of offer of appointment dated 28.03.2015. The court further returns that the respondent would therefore not be entitled to recover from the 2nd claimant the sum of Kshs.1, 844,370.00 paid to the 2nd claimant between 01.04.2015 to 31.03.2017 purportedly as a mistaken pay – as the court further returns that the pay was properly effected as per the contract of employment between the parties.

The respondent claims Kshs.825, 445.00 said to have been paid to the claimant by mistake between 01.04.2017 to 31.07.2017. The computation of the figures in the prayer was not outlined. What is on record and as per the court's findings is that 2nd claimant's appointment to the position of Director was unlawful. The respondent revoked that unlawful appointment but did not seek to surcharge the 2nd claimant in view of the extra pay flowing from that revocation. In any event, imposition of surcharge or recovery of any extra pay would be a disciplinary process to which the rules of natural justice must apply. Further, there has been no pleading or prayer that the court orders the recovery of such extra pay that may have been made under the revoked appointment. Consequently, the court returns that the respondent as employer having not undertaken due procedure to make such recovery and the same not being pleaded or

prayed for, the prayer for recovery as made in this suit will fail.

The court has found that the revocation of the 1st claimant's confirmation in the post of Assistant Administrator and the revocation of the 2nd claimant's appointment as Director were devoid of due process. The court has further declined to quash or to set aside the revocations on account that doing so would have no consequence or would yield a consequence contrary to law and public interest because the confirmation and the appointment have been found to have been unlawful. While making those findings the court considers that a declaration that the revocations offended the claimants' right to due process entailing principles of natural justice will serve justice.

In declining to quash or set aside the revocations, the court has followed the respondent's submission citing the Privy Council in **Macfoy –Versus- United Africa Company Ltd (1963) 3 All ER 1179 at 1172** thus, **“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more to do, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”** Thus the court holds that it cannot set aside or quash the offending revocations and as a consequence, validate the said 1st claimant's confirmation or 2nd claimant's appointment that have already been found unlawful and therefore null and void. To say it another way, the court will not act in vanity.

The court has also considered section 75 of the County Governments Act, 2012 about action on irregularity of process thus, **“75. If it comes to the attention of the County Public Service Board that there is reason to believe that any process or decision under this Part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may –**

- a) revoke the decision;**
- b) Direct the concerned head of department or lawful authority to commence the process afresh; or**
- c) Take any corrective action including disciplinary action.”**

The court returns that under the cited section 75, the respondent's Public Service Board was entitled to undertake a revocation. However, the same had to be applied together and in alignment with the other provisions of the Act on disciplinary process if, like in the present cases, the revocation amounted to imposition of a punishment or adverse decision against the claimants. The court holds that in exercising the power of action on irregularity of process as contemplated under section 75 of the Act, the Public Service Board must carefully assess the nature of the human resource function in issue and must undertake the action on the irregularity strictly in compliance with the provisions of the Act governing the matter or human resource function in issue. Thus, like in the present cases, the corrective measure entailed a decision in the nature of imposition of a punishment and the court returns that the Board was bound to comply with the Act's provisions on disciplinary process such as the already cited section 76 (1) and (2) of the Act.

The **9th issue** for determination is whether the claimants needed to appeal to the Public Service Commission and not to file in court the present suits. It was submitted for the respondents that the claimants ought to have appealed to the Public Service Commission under section 77 of the County Governments Act, 2012 and not to have moved to court as they did. The court returns that the submission was not founded upon the respondent's pleadings as it was clearly a point not urged before the court looking at the pleadings and the evidence. The court would therefore be reluctant to delve into the merits of that submission. It is sufficient to state that the claimants clearly pleaded illegalities and further sought declarations which clearly went beyond the factual merits of the case. In that regard the court follows its opinion in **Abdikadir Suleiman –Versus- County Government of Isiolo [2015]eKLR** ruling of 31.07.2015 thus,

“...This court’s holding is that while making its primary decisions or decisions on appeals, the Commission like any other state organ or person under Article 10 of the Constitution must care and ask itself whether the decision is lawful or legitimate in view of relevant constitutional and statutory provisions but the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under Article 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Article 22(1), and section 12 of the Employment and Labour Relations Act, 2011.”

And further,

“The court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. In the opinion of this court, such constitutional and legislative provisions shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body has exercised the powers or functions in accordance with the Constitution or any other law. The court holds that such provisions do not oust or extinguish or adjourn the court’s jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute.”

The court also upholds its opinion in the judgment in George Maina Kamau –Versus-The County Assembly of Murang’a and 2 others [2016]eKLR thus, **“Nevertheless, the court is not setting a hard rule that its jurisdiction is limited to only an inquiry into procedural matters. The rule the court is setting is that it will consider all cases where illegality is alleged both in matters of substance and procedure. The court says that it would have to look into merits of the grounds for removal in an appropriate case where a petitioner may seek to show illegality founded upon the county assembly moving against the petitioner under the said section 40 upon illegal grounds; such that illegality would be founded upon the principle of unreasonableness per Lord Greene in Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683 thus, “It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonableness’ in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”**

The respondent cited James Tinai Murete & Others –Versus- County Government of Kajiado & 22 Others[2015]eKLR (Mumbi Ngugi J) where the court found that the issues raised in the petition should have been raised before the Public Service Commission, which has the statutory mandate under section 77 of the County Governments Act to deal with such disputes. That case is clearly distinguishable because the court found that the petitioners were not dissatisfied with the process that had been followed in the recruitment of the personnel for the county but their grievances related to the merits of the

decisions made.

In the present case, illegalities or unlawfulness having been pleaded or alleged and the lawfulness of the respondent's decisions having been questioned, it would appear that the court and not the Commission was the appropriate forum. Indeed, the suits were about lawfulness of the decisions by the respondent and there was no mention of matters going to the merits of the decisions in question.

Finally, towards balancing justice and considering the parties' respective margins of success, each party shall bear own costs of the proceedings.

In conclusion, judgment is hereby entered for the parties for:

- a) The declaration that the revocation of the 1st claimant's confirmation in the position of Assistant Director Administration as conveyed in the letter of 30.05.2017 and the revocation of appointment or promotion of the 2nd claimant as Director, Education, Youth, Sports, Gender and Social Services and as conveyed in the letter dated 30.08.2017 infringed upon the claimants' respective right to due process and natural justice as protected under section 76(1) and (2) of the County Governments Act, 2012.
- b) The order of prohibition which is hereby issued prohibiting the respondent from demoting or removing the 1st claimant from the position of Personal Assistant, Job Group N as appointed by the letter dated 28.08.2014 except in accordance with the law and terms of the contract of employment and the 1st claimant shall continue in the service of the respondent accordingly.
- c) The declaration which is hereby issued that the purported variation on 3rd May, 2017 of the 1st claimant's contract of employment made on 2nd September, 2017 was unlawful, null and void.
- d) The declaration which is hereby issued that, in absence of parties' agreement to the contrary, the 2nd claimant's employment as a project officer in the respondent's establishment will lapse on the date of this judgment per the interim orders in place and as read with the letter of offer of appointment dated 28.03.2015 and that, but for the interim orders, the contract of employment would otherwise have lapsed on 31.10.2017 in accordance with the parties' express agreement in that regard.
- e) Each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at **Nyeri** this **Friday, 8th December, 2017.**

BYRAM ONGAYA

JUDGE