



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

Petition No. 7 Of 2017

**IN THE MATTER OF ARTICLES 10, 27, 28, 41, 50, 176, 179 AND 236 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27, 28, 41 AND 50 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF COMPULSORY LEAVE IMPOSED ON THE PETITIONERS

Between

LILIAN KARANJA	1ST PETITIONER
NIXON CHERUIYOT	2ND PETITIONER
WACHIRA MWANGI	3RD PETITIONER
DOMINIC KIPLANGAT	4TH PETITIONER
LYDIA WAWERU	5TH PETITIONER
SARAH KANGARA	6TH PETITIONER
PETER IRUNGU	7TH PETITIONER
DAVIS MWAURA	8TH PETITIONER
VIVIAN YEGON	9TH PETITIONER
COLLINS KIPKOECH	10TH PETITIONER
NANCY MUNYAO	11TH PETITIONER

TIMOTHY NJOROGE	12th PETITIONER
TABITHA KIBITHE	13th PETITIONER
NANCY JERUTO	14th PETITIONER
KELVIN KEMBOI	15th PETITIONER
NICHOLAS KIPLAGAT	16th PETITIONER
BENARD CHELULE	17th PETITIONER
ROSE JEPKOECH	18th PETITIONER
SAMUEL KOSGEY	19th PETITIONER
ANN KAMAU JACKSON	20th PETITIONER
JANE KIHUNA	21st PETITIONER
PERIS KIHARA	22nd PETITIONER
CATHERINE MUMBI MUGO	23rd PETITIONER
MICHELLE KARIUKI	24th PETITIONER
FANNUEL KIPROTICH	25th PETITIONER
CYRUS NJOAU	26th PETITIONER
JACKLINE NJERI KIBUI	27th PETITIONER
FRANKLINE KIPKURUI CHERUIYOT	28th PETITIONER
EDITH NJERI NDUNGU	29th PETITIONER
FLORENCE WANJIKU KARANJA	30th PETITIONER
JOAN KANDIE	31st PETITIONER
JOYCE NYAMBURA NJOROGE	32nd PETITIONER
GEORGE KARANJA KARIUKI	33rd PETITIONER
JAMES KIPCHUMBA KABIRER	34th PETITIONER
STEVE MWANGI	35th PETITIONER
DORCAS NJERI WAMBUI	36th PETITIONER
KENNEDY MUNGAI	37th PETITIONER

NJUGUNA RAHAB WAMBUI	38th PETITIONER
ANN WANGUI MUYA	39th PETITIONER
FRED BORE RUTTOH	40th PETITIONER
SIMON KAMAU	41st PETITIONER
RASHID ANYANJE JUMA	42nd PETITIONER
EDWIN KETER KIBET	43rd PETITIONER
PAUL KAMAU	44th PETITIONER
CAROL WANJIRU GATHURA	45th PETITIONER
AGNES MWANGI	46th PETITIONER
ROSE KIMUNGEN	47th PETITIONER
AGENES CHEPKOSKEI	48th PETITIONER
DAVID KARANJA	49th PETITIONER
ANDREW KARIA	50th PETITIONER
JOHN MIGWI MWANIKI	51st PETITIONER
VERONICA GACHAMBI	52nd PETITIONER
ALEX KURIA	53rd PETITIONER
JAMES CHERONO	54th PETITIONER
MUGO NJOROGE	55th PETITIONER
LEVYCHERUIYOT LANGAT	56th PETITIONER
ABEL MUNGAI CHEGE	57th PETITIONER
IBRAHIM MWANGI MACHARIA	58th PETITIONER
EDWARD OTIENO OMONDI	59th PETITIONER
NEWTON MWAURA MPESA	60th PETITIONER
GITONGA DAVID KINYANJUI	61st PETITIONER
KENNEDY ANUNDA ROGITO	62nd PETITIONER
MAGDALINE KAMAU	63rd PETITIONER

OBED MWAURA	64th PETITIONER
FRANCIS MAATHAI KINGORI	65th PETITIONER
JAMES MWANGI NDEGWA	66th PETITIONER
DAVID WAITHAKA KIMANI	67th PETITIONER
ZIPPORAH NYAMOITA GWAKO	68th PETITIONER
MARY W. GACHIO	69th PETITIONER
JOHN KARIUKI WAINAINA	70th PETITIONER
MAGARET KIRORI	71st PETITIONER
CATHERINE MUIRURI	72nd PETITIONER
BENARD KITUR	73rd PETITIONER
KELVIN VIOLET CHACHA	74th PETITIONER
STANLEY ROTICH	75th PETITIONER
RUTH MURUGI	76th PETITIONER
CAROL KIBUI	77th PETITIONER
ALICE CHEROP TOO	78th PETITIONER
ROSE LUCY WANJIKU	79th PETITIONER
SAMMY KIRAGU NDERITU	80th PETITIONER
CHERUIYOT KANGONGO	81st PETITIONER
JACKLINE KANGONGO	82nd PETITIONER
SELINA NKATHA	83rd PETITIONER
MMBONE NTAGE	84th PETITIONER
BENARD MWATHI MACHARIA	85th PETITIONER
DANIEL NDUNGU NJOAN	86th PETITIONER
ALBERT BOWEN	87th PETITIONER
FRIDA MORAA	88th PETITIONER
ANN KEITANY	89th PETITIONER

GLADYS AMUNDA PKEMEI	90th PETITIONER
GIDEON KIPROTICH KIBET	91st PETITIONER
SILVESTOR TOTONA K	92nd PETITIONER
ROSELYNE CHERUTO	93rd PETITIONER
KIPNGETICH TUEY	94th PETITIONER
SYMON MACHARIA MUCHERU	95th PETITIONER
COLLINS K. TOO	96th PETITIONER
ELISHA MUCHERU	97th PETITIONER
SAMUEL NDEGWA	98th PETITIONER
ELIZABETH WANGUI MWANGI	99th PETITIONER
ZACHARIA MWANGI NJERU	100th PETITIONER
JAMES M. WAWERU	101st PETITIONER
JOYCE SANG	102nd PETITIONER
BEATRICE CHEPKEMOI	103rd PETITIONER
RACHEL WAITHERA KIGOSI	104th PETITIONER
KEN MUNGAI	105th PETITIONER
NJENGAH PATRICK NGANGA	106th PETITIONER
GRACE MBUSIRO CHACHA	107th PETITIONER
KINGORI MWANGI	108th PETITIONER
SAMUEL K. ROTICH	109th PETITIONER
IAN MUKIIRA KINOTI	110th PETITIONER
WINNIE NAMASAKA	112th PETITIONER
PAMELA TANUI M	113th PETITIONER
AGNES KARIUKI	114th PETITIONER
VERONICA GACHAMBI	115th PETITIONER

COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAKURU

1st RESPONDENT

HON. LEE KINYANJUI,

NAKURU COUNTY

2nd RESPONDENT

COUNTY GOVERNMENT OF NAKURU

3rd RESPONDENT

PUBLIC SERVICE BOARD,

COUNTY GOVERNMENT OF NAKURU

4th RESPONDENT

JUDGMENT

1. The Petitioners moved Court on 31 August 2017 alleging that the Respondents by sending them on *compulsory leave* through a press release on 28 August 2017 had acted unprocedurally and unconstitutionally, and thus violated their constitutional rights to fair administrative action; equal protection of the law; inherent dignity; fair labour practices; fair hearing; protection from removal from public office without due process, and the national values and principles.

2. Filed at the same time with the Petition was a motion under certificate of urgency seeking orders/conservatory orders staying the letters/action of the Respondents sending the Petitioners on *compulsory leave* and/or recruitment of other persons as sub-county, deputy sub-county and ward administrators.

3. On 18 September 2017, this Court gave directions as to the determination of the Petition and in this regard, the 1st Respondent filed a replying affidavit sworn Benjamin Njoroge, and the 3rd and 4th Respondents filed Grounds of Opposition to Petition on 14 September 2017.

4. The Secretary of the 4th Respondent, James K. Mbugua filed a replying affidavit on 9 October 2017.

5. The Petitioners filed their written submissions on 29 September 2017, the 1st and 2nd Respondents filed their submissions on 11 October 2017 and the 3rd and 4th Respondents filed their submissions on 10 October 2017.

6. The submissions were highlighted on 19 October 2017.

Whether 3rd and 4th Respondents non suited

7. The 3rd and 4th Respondents contended that they were non-suited or mis-joined to the Petition.

8. That contention has no legal foundation because in terms of section 59 of the County Governments Act, the 3rd Respondent, an organ of the 4th Respondent has been given the function over the county public service, where the Petitioners fall employees employees.

Whether compulsory leave lawful

9. The Petitioners were sent on *compulsory leave* with pay pending investigations into their recruitment. The *compulsory leave* was not time bound.

10. Under the common law, a unilateral suspension of an employee with or without pay without a contractual basis would amount to a breach of contract (see *McKenzie v Smith* (1976) IRLR 345). The

compulsory leave was effectively a unilateral suspension.

11. The Court is also alive to the common law position that an employer is under no obligation to give or assign work to an employee. The obligation is to pay wages so long as the employment relationship subsists.

12. An employee who is paid wages may not therefore found a cause of action that he/she has not been given work.

13. In the present case, the Respondents did not cite any contractual authority or basis upon which it was decided to send the Petitioners on *compulsory leave*.

14. In terms of statutory or legal framework, the Respondents did not equally declare under what particular provisions of law it could anchor its decision to send the Petitioners on *compulsory leave*.

15. They however contended that the continued stay in the workplace of the Petitioners would have compromised the investigations.

16. Article 236 of the Constitution afford public officers certain protections on before removal from office or on disciplinary process.

17. Article 41 of the Constitution also assure employees of fair labour practices.

18. Legally, it appears that the Respondents did not act lawfully or fairly in the case of the Petitioners as the investigations which precipitated the *compulsory leave* could as well have been carried out while they were in the workplace.

19. It is also noteworthy that the *compulsory leave* had no time frame thus legitimately leading the Petitioners to allege violations of their rights as employees/public officers.

20. On the concerns by the Respondents that investigations could not proceed with the Petitioners in the work place, the Court can only observe that an employee is also under an obligation to cooperate with the employer when the employer is carrying out investigations preliminary to a disciplinary process and during the disciplinary process, when it is initiated. Such cooperation is universally implied in all contracts of employment.

Conclusion and Orders

21. The declarations sought by the Petitioners were verbose to the extent of being imprecise. Court orders ought to be precise to ensure that an appropriate remedy striking at the legal injury or wrong established is granted.

22. The Court has also considered that Petitioners have continued to enjoy their remuneration.

23. In lieu of the declarations sought by the Petitioners, the Court orders

(i) A declaration do and is hereby issued that the decision to send the Petitioners on compulsory leave was unlawful.

(ii) The Petitioners to be allowed access to the individual work places forthwith.

(iii) The Petitioners to cooperate with the Respondents in the investigations being conducted which should be completed expeditiously.

24. Considering that there are subsisting employment relationships, the Court orders each party to bear own costs.

Delivered, dated and signed in Nakuru on this 7th day of December 2017.

Radido Stephen

Judge

Appearances

For Petitioners	Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates
For 1 st and 2 nd Respondents	Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates
For 3 rd and 4 th Respondents	Mr. Kimatta instructed by Kimatta & Co. Advocates
Court Assistant	Nixon