

JUDGMENT

Background facts

1. The County Assembly of Nakuru (1st Respondent) established an *ad hoc Committee* to investigate the recruitment and employment of sub-county, deputy sub-county and ward administrators within the County Government of Nakuru during the financial year 2014/2015.
2. The *ad hoc Committee* carried out its work and prepared and presented a report before the 1st Respondent.
3. The 1st Respondent thereafter formed a *Special Adhoc Committee* to interrogate and investigate the findings further.
4. The *Special Adhoc Committee* tabled a report before the 1st Respondent on 29 June 2016.
5. Among the recommendations by the *Special Adhoc Committee* were
 - (i) Immediate termination of the contract of Joseph Motari, County Secretary (1st Interested Party) by the Governor (3rd Respondent)
 - (ii) Immediate termination of the contract of Philip Sigei (2nd Interested Party).
6. The 1st Respondent adopted the report of the *Special Adhoc Committee* on 29 June 2016.

Court proceedings

7. On 5 July 2016, the Petitioners moved Court under certificate of urgency seeking conservatory orders stopping the 2nd and 3rd Respondents from receiving and or acting on the report from the 1st Respondent to remove the Interested Parties from their offices.
8. Filed together with the application was a Petition alleging constitutional violations and rights and freedoms of the Interested Parties.
9. On 11 July 2016, the Court relying on an undertaking by the 2nd and 3rd Respondents that the *status quo* could be maintained allowed the prayer for conservatory order in terms of order 3 in the motion pending the hearing of the Petition.
10. During the said session on 11 July 2016, the Court gave directions as to the filing and service of submissions in order to facilitate the expeditious determination of the Petition herein.
11. The timelines were as follows
 - (a) Respondents and Interested Parties to file Answers to Petition before 20 July 2016.
 - (b) Petitioners to reply before 27 July 2016.
 - (c) Petitioners to file submissions before 10 August 2016.
 - (d) Respondents/Interested Parties to file submissions before 24 August 2016.
 - (e) Submissions to be highlighted on 7 September 2016.

12. The timelines were not adhered to (the Petitioners eventually filed their submissions on 16 September 2016 while the 1st Respondent filed its submissions on 26 September 2016. The 2nd, 3rd Respondents and the Interested Parties did not file written submissions (Interested Parties indicated they would adopt the submissions by the Petitioners).

13. In the intervening period, the 1st Respondent had challenged the conservatory order allowed on 11 July 2016, and in a ruling delivered on 29 July 2016, the Court set aside/vacated the conservatory order.

14. Thereafter, the 1st Respondent filed a preliminary objection asserting, that the Petition offended the provisions of section 12 of the Industrial Court Act, the Court lacked jurisdiction; the Petition violated Article 258 of the Constitution; the Petition did not raise any issues of public interest; that the 1st Respondent had acted pursuant to its oversight authority in terms of Article 185(3) of the Constitution and that the Petition breached the doctrine of separation of powers.

15. In a ruling rendered on 28 April 2017, the Court dismissed the preliminary objection.

16. On the same day, the Court gave directions as to the filing of submissions and scheduled mention for 19 June 2017.

17. The 2nd and 3rd Respondents did not attend Court on 19 June 2017 nor file any submissions. The Petitioners sought a judgment date.

18. In their submissions, the Petitioners identified 3 *Issues* as arising for determination and the Court will address the parties' contentions in terms of the *Issues*.

Whether the 1st Respondent's actions were unconstitutional

19. The Petitioners contended that the Interested Parties being employees were and could only be subject to the disciplinary control of the 3rd Respondent in terms of the provisions of Part VII of the County Governments Act.

20. According to the Petitioners, any allegations of irregularities or fraud against the Interested Parties should have been brought to the attention of the 3rd Respondent to investigate and take appropriate action, including disciplinary action.

21. In this regard, the Petitioners position was that if indeed there were irregularities or fraud in the recruitment process, it was the mandate of the 3rd Respondent to investigate and take action and not the 1st Respondent.

22. In the view of the Petitioners, the 1st Respondent could not purport to use the *oversight* mandate given to county assemblies pursuant to Article 185 of the Constitution to investigate and recommend the removal from office of the Interested Parties because that was in breach of the doctrine of separation of powers.

23. In other words, the Petitioners were contending that the authority to exercise disciplinary control over the Interested Parties lay with the 3rd Respondent, an organ belonging to the executive branch, and not the legislative branch of the county government.

24. And in putting context to what *oversight* involved, the Petitioners directed the attention of the Court to the decisions in *Elizabeth Nziza Masaku v County Government of Nakuru* (2014) eKLR, *Nation Media Group Ltd & 6 Ors v Attorney General & 9 Ors* (2016) eKLR and *Judicial Service Commission v Speaker of the National Assembly & 8 Ors* (2014) eKLR.

25. According to the Petitioners, the 1st Respondent was involving itself in an executive function and thus

acting *ultra vires* the Constitution and the County Governments Act.

26. The 1st Respondent took a contrarian view of the position taken by the Petitioners.

27. For the 1st Respondent it was submitted that because it had a role in the appointment of the 1st Interested Party, by implication, it could recommend his removal by virtue of the oversight role under Article 185(3) as read with Article 1 of the Constitution, as the county assembly exercised delegated sovereign authority.

28. To support the submission, the 1st Respondent cited the decision in *Owen Yaa Baa v County Assembly of Kilifi* (2015) eKLR.

29. It was also contended that the action of the 1st Respondent to constitute an *ad hoc* committee was part of the checks and balances as contemplated by Article 174 of the Constitution, and that pursuant to the provisions of Article 195 of the Constitution it could summon any person including the Interested Parties to appear before it (powers similar to those of the High Court to summon any person).

30. On the issue that the exercise of disciplinary control over the Interested Parties was reposed in the 3rd Respondent, the 1st Respondent agreed that overall disciplinary control was a responsibility of the 3rd Respondent, but it urged that because the 1st Interested Party sat in the 3rd Respondent and was head of the county public service, he could not sit as judge in his own case or be disciplined by the body he headed.

31. It was also asserted that both 2nd and 3rd Respondents (Governor and County Public Service Board) communicated their decisions through the 1st Interested Party and therefore he (1st Interested Party) would not communicate a decision involving his own removal.

32. It is not in dispute that a county assembly has *oversight* functions over the county government/executive.

33. It is also not in dispute that there are clear and express statutory provisions governing disciplinary control over public officers serving under the devolution framework.

34. What appears to be in contention is the scope, extent and content of the *oversight* function or to put it blandly, whether a recommendation by the county assembly in the exercise of the *oversight* function must be implemented by the other organs.

35. The Court has looked at the Report of the *Special ad hoc Committee* on the Recruitment of sub-county Administrators, Deputy sub-county administrators, ward administrators and other cadres.

36. At the material part of the report it is stated

In view of the stated grave transgressions, the committee, while noting that Mr. Joseph Motari is on **Secondment** to the county Government service by the National Government, resolved and recommends, for the **immediate termination** of his services by His Excellency the Governor. His position to be competitively filled as ruled by the High Court ruling, 2014.

37. Regarding the 2nd Interested Party, the report states

The committee recommends that his contract of employment **be terminated** forthwith by the appointing authority.

38. The 1st Respondent therefore did not direct but rather made recommendations to the appropriate organ.

39. It is not lost to the Court that within the county government set up, the organ receiving a recommendation is not always obliged to act in a particular manner.

40. It is a reality of life that within the public sphere, complaints and or allegations of misconduct or other failures requiring disciplinary action may emanate from the public and it would not be remiss for the organ to whom the complaints have been addressed to investigate and make recommendations.

41. Therefore the 1st Respondent may not be faulted for carrying out investigations and making recommendations when there is no express constitutional or statutory framework prohibiting it from carrying out such an exercise.

42. In my very humble view, the focus in a case such as this ought to be on the organ(s) with either the constitutional and/or statutory authority to exercise disciplinary control over the employees recommended for removal, to ensure that the protections afforded public officers/employees are scrupulously complied with and not the source of complaint or in this case, the body recommending removal or disciplinary action.

43. Recommendations such as the one which necessitated the present proceedings can only be treated by the organ with disciplinary authority as a complaint to be presented before the public official and requiring his response, but cannot serve as the direct reason or ground for terminating a public officer's contract or appointment.

44. Except for the foregoing, it is the view of the Court that this is not an appropriate case to attempt to delineate the scope, extent and content of the *oversight* mandate of the county assembly, otherwise the Court risks the danger of turning a determination of rights into a theoretical thesis on the oversight role of the legislature when the circumstances and facts presented do not warrant such an exercise.

Whether Interested Parties rights were violated

45. The Petitioners further contended that the Respondents had violated the Interested Parties rights to equal protection and benefit of the law (Article 27), dignity (Article 28), fair labour practices (Article 41), fair administrative action (Article 47) and fair hearing (Article 50).

Equal protection of the law

46. On the violation of the right to equal protection of the law, the Petitioners posited that 5 officers were faulted in the report, but the 1st Respondent only singled out the Interested Parties for removal from office because of their ethnicity.

47. However, the Petitioners did not lay or provide any evidential anchor to the allegations of ethnicity or preferential treatment.

Right to dignity

48. The Petitioners in asserting that the Interested Parties right to dignity had been violated made reference to the fact that the Interested Parties photos had been published in the media leading to public demonstrations to pressurise the 2nd Respondent to remove them from office.

49. This, according to the Petitioners portrayed the Interested Parties as fraudsters.

50. In my view, the right to dignity is so personal to the human person such that violation thereof should be raised by the person whose dignity has been violated if capable of so doing rather than through proxy.

51. The Petitioner did not present any evidence that the publication of the Interested Parties photos affected them and if there is any evidence of such, there are legal options available to the Interested Parties, including suing for defamation.

Right to fair labour practices

52. On the violation of right to fair practices, it was contended that the recommendation to remove the Interested Parties from office amounted to disciplinary action/finding without authority or due process.

53. The primary statute governing the *county public service* is the County Governments Act, while the statute of general application is the Employment Act, 2007.

54. These statutes have provided for the removal of county public officials, and employees generally, respectively.

55. Apart from the statutory framework, public officers have also been afforded constitutional protections during disciplinary process/action and more specifically in Articles 236 and 41 of the Constitution.

56. In my view, without evidence that the constitutional and statutory protections contemplated for public officers had been violated, or that the 2nd or 3rd Respondents, being the persons with legal authority, had acted on the recommendations of the 1st Respondent, the contentions on violation of the right to fair labour practices were still inchoate by the time the Petition was presented in Court.

Right to fair administrative action

57. The right to fair administrative action keeps coming up within the employment relationship.

58. In my view, the right to fair administrative action as provided for in Article 47 may be implicated in some but not all employment relationships.

59. In the instant case, the Petitioners have not demonstrated that the 1st Respondent's recommendations constituted administrative action or that in removing the Interested Parties from office, the 2nd and 3rd Respondents were to exercise administrative action as opposed to contractual authority as an employer.

Right to fair hearing

60. The Interested Parties were summoned and appeared before the Committee constituted by the 1st Respondent and made representations.

61. In the view of the Court, therefore the allegation of a violation of the right to fair trial was not warranted.

Appropriate relief

62. The Petitioners sought 2 declarations, an order of certiorari and a permanent injunction.

63. Considering the foregoing, none of the orders are merited.

64. The Court has also learnt that the Interested Parties have since left the public offices they held.

Conclusion and Orders

65. The Court finds no merit in the Petition and orders that it be dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 1st day of December 2017.

Radido Stephen

Judge

Appearances

For Petitioners

Mr. Konosi instructed by Konosi & Co. Advocates

For 1st Respondent

Mr. Karanja instructed by Mirugi & Co. Advocates

For 2nd & 3rd Respondents
Attorney

Mr. Gakinya instructed by Hari Gakinya, Advocate, County

For Interested Parties

Mr. Magatta instructed by Magatta & Associates

Court Assistants

Nixon/Martin