



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. 37 OF 2015

IN THE MATTER OF: ARTICLE 1,2,3,(1), 10, 12(1)(a), 19,20,21,22, 23(3) (e), 24, 27(1)(2) & (3) 28, 41 & (2), 48, 165(3)(b) 191 & 258(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF: RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 28TH JUNE, 2013

AND

IN THE MATTER OF: SECTION 30 AND 40(1) & (2) OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ATICLES 27(1), (2) & (3), 28, 41(1) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOHN GAKUO.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

THE GOVERNOR–NAIROBI CITY COUNTY.....2ND RESPONDENT

(As consolidated with former High Court Petition 168 of 2015)

DOCTOR TIMOTHY MOKI KINGONDU.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

THE GOVERNOR-NAIROBI CITY COUNTY.....2ND RESPONDENT

Mr. Ngoya for the petitioners

Professor Tom Ojienda for the respondents

JUDGMENT

1. By consent of the Parties, petition 167 of 2015 and petition 168 of 2015 filed at the High Court and subsequently transferred to the Employment and Labour Relations Court were consolidated on 30th April 2015.
2. The petitioners John Gakuo and Dr. Timothy Moki Kingondu prayed for the following orders:
 - a. a declaration that the act of the 2nd respondent in relieving the petitioners of their duties is a breach of the latter's constitutional rights under article 27(1) (2) and (3), 28, 41 & 50 of the constitution of Kenya and that the same is null and void for all intent and purposes;
 - b. an order of judicial review to remove into this honourable court and quash the decision of the 2nd respondent relieving the petitioners of their duties as county executive in charge of water, energy, forestry, environment and natural resources and county executive in charge of health services respectively;
 - c. in the alternative and without prejudice to prayer (b) above, an order of payment of all dues to the petitioners in the period they would have served between now and the end of term.
 - d. any other relief or order this honourable court may deem fit to grant.
3. The court will hereafter refer to Mr. John Gakuo and Dr. Timothy Moki Kingondu as the 1st and 2nd petitioners respectively.

Facts of the two cases

4. On the 7th October 2014, the Governor Nairobi city, the 2nd respondent called the 1st and 2nd petitioners into his office and verbally informed them that their services were no longer needed. No letter of dismissal was ever served on the 1st and 2nd petitioners to date.
5. The 1st petitioner served the 1st respondent the county government of Nairobi city as county executive in charge of water, energy, forestry, environment and natural resources whereas the 2nd petitioner served the 1st respondent as the county executive in charge of health services. The two were appointed on 20th June 2013 and were duly gazetted on 12th July 2013 pursuant to the provisions of Article 179(2) of the constitution of Kenya 2010 and sections 30(2)(d) and 35 of the County governments Act no. 17 of 2012.
6. The petitioners submit that the act of terminating the petitioners' services was in their view null and void and in blatant breach of the petitioners' constitutional rights under articles 27(2) and (3), 28, 41 and 50 of the constitution of Kenya 2010.

Issues for determination

7. The issues that commend themselves for determination are as follows;
 1. whether the termination of the petitioners' services under section 31 of the County governments Act No. 17 of 2012 was in violation of article 27(2) and (3), 28, 41 and 50 of the constitution of Kenya 2010;
 2. whether an order for certiorari should issue quashing the decision of the 2nd respondent to terminate the services of the petitioners; and
 3. whether an order for payment of terminal dues to the petitioners set out in the petitioners'

supporting affidavits should be granted.

Respondents position

8. The respondents filed replying affidavit of Gregory Mwananongo the acting county public secretary and head of county public service of the 1st respondent.

9. The deponent admits all the particulars of appointment of the petitioners but denies that the petitioners do warrant the orders sought.

Determination

10. The county government under the concept of devolution and devolved units is expressed and protected in article 6 of the constitution of Kenya, 2010. In terms thereof, the county government is a distinct and interdependent level of government from the national government.

11. The flag-bearer of the devolved government system is the governor, who is elected by the people of his county under article 180 of the constitution of Kenya, 2010.

12. The County governments Act no. 17 of 2012 is the enabling legislation on the functions of the governor and it outlines under section 30 the governor's powers under section 31 of the act.

13. It is pertinent to outline the provisions of section 40(1) of the County governments Act no. 17 of 2012 which provides for the dismissal of a county executive member by the governor as follows;

“40(1) subject to subsection (2) the governor may remove a member of the county executive committee from office on any of the following grounds;

- i. incompetence;*
- ii. abuse of office;*
- iii. gross misconduct;*
- iv. failure, without reasonable excuse or written authority of the governor, to attend three consecutive meetings of the county executive committee;*
- v. physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or*
- vi. gross violation of the constitution or any other law.”*

14. Subsection 2 provides;

“a member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).”

15. On the other hand, section 31(a) of the Act provides;

“(31) the governor -

- a. may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so.”*

16. It is pertinent to note that the procedure of removal under section 40(1) is commenced by the county assembly and the section requires the county assembly to make a resolution for the governor to dismiss a county executive member. However under section 31(a), the governor initiates the process and makes a decision to dismiss a county executive committee member without involvement of the county assembly.

17. In differentiating these two processes, the Court of Appeal in the case of **County government of**

Nyeri & another V. Cecilia Wangechi Ndungu [2015] eKLR stated thus;

“from the language adopted by the legislator in enacting section 40 & 31(a) we discern two methods through which a member of a county executive committee can be dismissed.

Firstly under section 40 a governor can dismiss a county executive committee member on any of the aforementioned grounds following a resolution by the county assembly for such dismissal. In that case the dismissal is initiated by the county assembly.

Secondly, under section 31(a) a governor can dismiss a county executive member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second mode that appears to vest an element of discretion on the part of the governor and which is the subject of interpretation in this appeal.”

18. The Court of Appeal went on to say;

“there are certain circumstances a governor may lose confidence in a member of a county executive committee and due to the sensitivity and / or urgency of the matter at hand the governor may dismiss the member without giving notice of his intention to do so. Further, section 31(a) of the County governments Act does not require the governor to hold a disciplinary hearing in respect of the said member before dismissal. He can only dismiss if he considers it appropriate or necessary.”

19. The court agrees entirely with the foregoing exegesis by the Court of Appeal. The court needs to be satisfied that in dismissing a county executive committee member, there was sufficient consideration by the governor and indeed a valid reason arrived for the dismissal of the member’s services.

20. On this the high court in **Shadrack Wangombe Mubea vs. County government of Nyeri & another [2015] eKLR** held that;

“first, the court holds that the removal under section 31(a) is exclusive from a removal under Section 40(1) of the Act so that a dismissal under section 31(a) may be upon such consideration that is appropriate or necessary other than any of the grounds for removal set out in section 40(1) of the act. Thus in section 31(a) dismissal, the governor is not required to show that any of the removal grounds in section 40 existed but that there existed considerations that made the dismissal appropriate or necessary.”

21. The court upholds the holding by the court of appeal in **County government of Nyeri and another – versus- Cecilia Wangechi Ndungu [2015] eKLR** that in a dismissal under section 31(a) of the Act, appropriateness or necessity is not arbitrariness or whimsical but that appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary.

22. In this regard, for the court to determine the appropriateness or necessity of the decision to dismiss, the court must be provided with the reasons that informed the decision of the governor to dismiss at the time the governor made that decision.

23. The court has carefully perused the contents of the replying affidavit of Gregory Mwakanongo in response to petitions 167 of 2015 and 168 of 2015 respectively and the respondents have not provided any reason(s) that made the governor consider the dismissal of the petitioners appropriate or necessary.

Issue ii

24. The remedies the employment and labour relations court may grant to an employee who was wrongfully and unlawfully dismissed are set out under section 12 of the Employment and Labour Relations Court Act, 2011 (as amended) as read with the Employment Act, 2007.

25. Furthermore, the constitution of Kenya 2010 under Article 23(3) provides for reliefs the Court may grant in respect of a petition brought under Articles 22 of the constitution.

26. The petitioners sought a declaration that the 2nd respondent violated the latter's constitutional rights set out in the petitions.

27. It is the Court's considered view that the dismissal of the petitioners did not *ipso facto* result in violation of their constitutional rights under articles 27(2) and (3), 28, 41 and 50 of the constitution of Kenya, 2010. The petitioners had the onus of proving the alleged violation on a balance of probability. The court finds that the petitioners have not discharged the onus in this respect.

Issue iii

28. With regard to other remedies sought, the court having found that the 2nd respondent did not comply with the requirements of section 31(a) of the County governments Act, 2012; declares that the 2nd respondent in relieving the petitioners of their duties was in breach of section 31(a) of the County governments Act no. 17 of 2012 and the petitioners are in terms of prayer (c) of the petition entitled to an order of compensation.

29. In terms of the letter of appointment attached to the petition, the 1st petitioner was appointed on a five year contract with effect from 20th June 2013. At the time of termination the 1st petitioner earned a gross monthly pay of Kshs.64,213.70. He was entitled to service gratuity at the rate of 31 % of the annual basic pay for every year served. The 1st petitioner had served for a period of one year and three and a half months at the time of dismissal on 7th October 2014. The petitioner states that the action by the governor was demeaning and made him undergo grave professional humiliation and mental anguish, especially because he had previously held the position of the chief executive officer of the Nairobi city council for 4^{1/2} years which position was equivalent to that of governor in the devolved dispensation.

30. The 1st petitioner claims payment for the lost earnings from the unserved term of the contract.

31. The 2nd petitioner was also employed on a five (5) year contract with effect from 20th June 2013. He earned a monthly pay of Kshs.64,213.70. He served for a period of one year and three and a half months until the dismissal on 7th October 2014.

32. The 2nd petitioner states that he unlawfully lost his means of income and has suffered loss and damage.

33. The 2nd petitioner also claims payment of his lost earnings for the unserved period of the contract.

34. In terms of section 12 of the Employment and Labour Relations Court Act as read with section 49 of the Employment Act, 2007 this court is empowered to reinstate an employee who has been unlawfully dismissed from employment without loss of any benefits and in the alternative, the court may award compensation equivalent to not more than twelve (12) months salary as at the date of dismissal.

35. In awarding the dismissed employees, the court takes into consideration matters set out under section 49(4) of the Employment Act, 2007.

36. In this regard, both petitioners wished to be reinstated to their respective jobs. The two were dismissed in similar circumstances without notice and with no reason for the dismissal given to them. The two were not paid any terminal benefits upon termination and both had served the respondents in executive positions for a period of about one year and three and a half months.

37. The two are senior citizens from the ages provided in their pay-slips of 64 years and 56 years respectively and had little chance of obtaining equivalent employment in future. The petitioners have

incurred expenses in instituting these proceedings and due to failure by the respondents to provide any reason for the dismissal, the court has not found any contribution by the petitioners to the dismissal.

38. Accordingly, the Court awards the 1st and 2nd petitioners the equivalent of twelve (12) months gross salary as compensation for the unlawful dismissal respectively. The 1st and 2nd petitioners are to receive Kshs.770,564,000.00 each from the respondents.

39. In addition, the 1st and 2nd petitioners are to be paid gratuity calculated at 31% of their basic salary (64,213.70) for the period they had served of one year and three and a half months in the sum of Kshs.69,671.00.00 each. Furthermore, and in terms of the minimum terms of service under section 35(1) (c) of the Employment Act, the petitioners are entitled to one month salary in lieu of notice in the sum of Kshs.64,213.70 respectively.

40. Total award to each of the petitioners is Kshs.904,448.00 respectively.

41. The award is payable with interest at court rates from the date of filing this suit till payment in full.

42. The petitioners are also to be paid the costs of the suit.

Dated and Delivered at Nairobi this 15th day of January, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE