



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

OF KENYA AT KISUMU

PETION NO. 4 OF 2015

(AS CONSOLIDATED WITH PETITION NOS. 5, 6 & 7 OF 2015

IN THE MATTER OF ALLEGED THREAT AND CONTRAVENTION OF ARTICLES 27(1) & (2),30, 41,47(1) &2,50(1) AND 23(1) OF THE CONSTITUTION

AND

IN THE MATTER OF KISUMU COUNTY GOVERNMENT EXECUTIVE COMMITTEE

AND

IN THE MATTER OF CONSTITUTIONALISM, RULE OF LAW, NATURAL JUSTICE AND GOVERNANCE

BETWEEN

DR. STEPHEN OTIENO OROTO.....1ST PETITIONER

ENG.VINVENT K'ODERA ADDA.....2ND PETITIONER

JOSPEH OMULO OKAL.....3RD PETITIONER

ROHODA AHONO BADHA.....4TH PETITIONER

DR. BARACK OTIENO ABONYO.....5TH PETITIONER

AND

JACKTONE N. RANGUMA.....1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

This judgment is in respect of Petition No. 4 of 2015 filed by **Dr Stephen Otieno Orot and Eng. Vincent K'Odera Adda**, Petition No. 5 of 2015 filed by **Joseph Omulookal**, Petition No. 6 of 2015 filed by **Rhoda Atieno Ahono Badha** and Petition No. 7 of 2015 filed by **Dr. Barack Otieno Abonyo** against

the respondents herein. The petitions were consolidated as the issues involved in all of them are similar and cut across the same causes.

The petition challenges the constitutionality of Section 31(a) of the County Governments Act No. 17 of 2012 and asks the Court to determine the question whether the doctrine of pleasure is applicable in the dismissal of a member of a County Executive Committee by the Governor under Section 31(a) of the County Governments Act and if so whether it applies absolutely. The Court has also been asked to determine the question whether the petitioners' constitutional rights were violated by the respondents and should it find in the affirmative quash the decision of the 1st respondent terminating the petitioners' contracts as County Executives in various ministries in Kisumu County.

Factual Background

The basic facts precipitating the petition are largely undisputed.

The 1st respondent (hereinafter "the Governor") is the Governor of Kisumu County. On 10th June, 2013 the Governor in exercise of his constitutional mandate under Article 179 of the Constitution appointed the petitioners as part of the members of the County Executive Committee serving in various dockets. Their contracts of service were on fixed term contracts to run for a period of five years from the date of appointment.

On 30th January, 2015, the Governor issued a press release wherein he terminated the services of the petitioners. The press release was followed by Kenya gazette notice on 6th February 2015 which confirmed the termination of their contracts. The Governor appointed the 3rd and 4th respondent to be successors of the petitioners in some of the dockets.

Being aggrieved by the Governor's decision to terminate their contracts the petitioners moved to Court in their respective petitions, each seeking ex-parte conservatory orders staying the Governor's decision terminating their contracts of service. Upon hearing the petitioners on their separate applications the court directed that the petitions be consolidated and ordered that status quo be maintained pending the hearing and determination of this petition.

Petitioners' case

The petitioners' case is contained in their petitions filed on various dates and their affidavits in support of the petitions. It is the petitioners' case that the Governor acted in violation of Article 236 of the Constitution in terminating their contracts of employment without regard to due process. It is their case that their right to a fair administrative action as guaranteed under Article 47(1) of the Constitution was infringed upon as no reasons were given for their termination nor were they allowed a chance to be heard.

The petitioners are aggrieved by the fact that the Governor made a press release and terminated their services without due process. No formal communication was made informing them of their dismissal and or the reasons for their dismissal. They are aggrieved that they learnt of their sacking through the media.

The petitioners have also questioned the validity and constitutionality of Section 31(a) of the County Governments Act on the basis that it does not incorporate the right to due process as envisaged under Article 47(1) and 236(b) of the Constitution and the right to a fair hearing envisaged under Article 50(1) of the Constitution.

in their written submissions it was argued for the petitioners that the main thrust of the petition is that the Governor is bound by provisions of Article 10 of the Constitution on values and principles of governance, that in removing the petitioners from office at a press conference without notice and or reasons, the Governor acted in contravention of Article 47(1) of the Constitution. It was argued that though the provisions of the Employment Act did not apply to the petitioners' case, the Governor was duty bound to give reasons for the removal of the petitioners from office and to give regard to due process.

It was argued further that though the petitioners were appointed by the Governor at will, they are not his servants. That they are entitled to equal protection and benefit of the law and as such they do not serve at the pleasure of the Governor. The petitioners have thus asked the Court to allow their petition and quash the Governor's decision.

Respondents' case

Both the 1st and 2nd respondents filed grounds of opposition, replying affidavits to the consolidated petition and written submissions. The 3rd and 4th respondents did not file any replies or submissions to the petition.

It is the common case for the respondents that the Governor under Section 31(a) has the power to hire and fire County executive Committee members if and when he deems it right to do so and without giving any reasons for his decision. They argue that the petitioners are not covered by the Employment Act and as such no cause of Action arises under the Act as against the Respondents. That the Governor has the same prerogative to hire and fire members of Executive as the president at the national level with respect to cabinet secretaries and the Governor is not limited by the frontiers of the Employment Act. It is the case for the respondents that the petitioners hold office at the pleasure of the Governor.

In their submissions the respondents reiterated the position that the petitioners held their offices at the pleasure of the Governor. It was submitted for the respondents that the intention of Section 31(a) of the County Governments Act was to give Governors a similar discretion as that enjoyed by the president at the national level. Further that Article 236 was meant to guarantee public officers procedural removal from office and not take away the prerogative of the Governor and the president in dismissing the Executive members. The respondents relied on the case of *Tom Luusa Munyasa & Anor vs.- Governor, Makueni County &Anor[2014]eKLR*.

On the question whether the doctrine of pleasure was absolute, the respondents submitted that though section 31(a) grants power to a Governor to dismiss at will, the said power is qualified to the extent that he can only exercise the same reasonably and or fairly and not arbitrarily or capriciously. The respondents borrowed extensively from the Court of appeal decision of *County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR*.

It was their case that before the press release, the Governor had written to the petitioners on diverse dates warning them of poor service delivery and the urgent need for them to improve for the sake of the people of Kisumu. As such, they submitted, the Governor cannot be said to have acted selfishly or whimsically. It was their submission the Governor issued them with letters inviting them to show cause why their appointments should not be terminated and in so doing gave them a chance to be heard but the petitioners did not respond.

The respondents concluded by submitting that the dismissal of the petitioners was for public good and the petitioners' claims are unfounded and unsustainable in law. They urged the court to dismiss the petition with costs.

Issues for Determination

From the arguments of all parties, I am of the considered view that the following issues arise for determination:

- a. What is the procedure of removal from office of a County Executive Member?
- b. Does the doctrine of pleasure apply to the removal from office of a County Executive Member and if so to what extent?
- c. Were the petitioners' constitutional rights infringed upon by the Respondents?
- d. Are the petitioners entitled to the remedies prayed for?

Analysis and Determination

Procedure of removal from office

The County Government Act provides for two ways through which a County Executive Member can be removed from office. Section 31(a) provides that the Governor can remove a county executive from office if he deems it appropriate or necessary to do so. The section provides as follows:

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;

On the other hand, under Section 40 a Governor can dismiss a county executive on any of the grounds provided thereunder following a resolution for his removal by a committee to be established under the section. It provides thus:

(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county

executive committee;

(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

(2) 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). (3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations—

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5)(b) is supported by a majority of the members of the county assembly—

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member.

Going back to our present case, it would appear that the petitioners were dismissed following the process prescribed under Section 31(a) of the Act. It is this mode that confers discretion upon the Governor to dismiss at will and of his motion. But is the discretion absolute?

Applicability of the Doctrine of Pleasure

As already stated above, the Governor exercised his discretion to dismiss the petitioners herein. The petitioners argue that the Governor is duty bound to exercise the powers conferred upon him in line with the Constitution and specifically Article 10 which provides for national values and principles of Governance. Consequently, they argue, the Governor ought to have had regard to Article 236 and 47(1) of the constitution which provides for the right to fair administrative action. On the other hand, the respondents are of the view that the petitioners served at the pleasure of the Governor. As such the Governor was not bound by the provisions of the Employment Act nor was he duty bound to give any form of explanation before dismissing the applicants so long as he acted selflessly and for the benefit of the public good.

The doctrine of pleasure has its origin in England where a public servant under the British crown had no tenure but held his position at the absolute discretion of the Crown.

H.M. Seervai, in his treatise 'Constitutional law of India' (4th Ed., Vol. 3, pp.2989-90) explains this English Crown's power to dismiss at pleasure in the following terms:

"In a contract for service under the Crown, civil as well as military, there is, except in certain cases where it is otherwise provided by law, imported into the contract a condition that the Crown has the power to dismiss at pleasure....Where the general rule prevails, the Crown is not bound to show good cause for dismissal, and if a servant has a grievance that he has been dismissed unjustly, his remedy is not by a law suit but by an appeal of an official or political kind.....If any authority representing the Crown were to exclude the power of the Crown to dismiss at pleasure by express stipulation, that would be a violation of public policy and the stipulation cannot derogate from the power of the Crown to dismiss at pleasure, and this would apply to a stipulation that the service was to be terminated by a notice of a specified period of time. Where, however, the law authorizes the making of a fixed term contract, or subjects the pleasure of the Crown to certain restrictions, the pleasure is *pro tanto* curtailed and effect must be given to such law."

Black's Law Dictionary 9th edition defines 'Pleasure Appointment' as the assignment of someone to employment that can be taken away at any time, with no requirement for notice or hearing.

The doctrine of pleasure has since evolved and different jurisdictions of the world are of the view that it is not absolute. The Supreme Court of India while dealing with the question of the scope of the pleasure doctrine in the Case of *B.P Singhal vs.- Union of India & Anor Writ(civil) Petition No. 296 of 2004* stated thus:

The doctrine of pleasure as originally envisaged in England was a prerogative power which was unfettered. It meant that the holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. But where rule of law prevails, there is nothing like unfettered discretion or unaccountable action. The degree of need for reason may vary. The degree of scrutiny during judicial

review may vary. But the need for reason exists. As a result when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should however necessarily be read as being subject to the "fundamentals of constitutionalism". Therefore in a constitutional set up, when an office is held during the pleasure of any Authority, and if no limitations or restrictions are placed on the "at pleasure" doctrine, it means that the holder of the office can be removed by the authority at whose pleasure he holds office, at any time, without notice and without assigning any cause. The doctrine of pleasure, however, is not a licence to act with unfettered discretion, to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure. In other words, "at pleasure" doctrine enables the removal of a person holding office at the pleasure of an Authority, summarily, without any obligation to give any notice or hearing to the person removed, and without any obligation to assign any reasons or disclose any cause for the removal, or withdrawal of pleasure. The withdrawal of pleasure cannot be at the sweet will, whim and fancy of the Authority, but can only be for valid reasons.

Here at home, the Court of Appeal has also dealt with the same question of the scope of pleasure doctrine in a democracy. In the case of *Cecilia Wangechi Ndungu(supra)* the Court dealt comprehensively with the doctrine of pleasure in relation to a Governor's power under section 31(a) and had these to say:

Originally the doctrine of pleasure was a prerogative power which was unfettered. A holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. However, with the passage of time and evolution of democracy this doctrine has undergone a series of modification.

It would therefore seem that, with the growth of democracy, the doctrine has also undergone modifications requiring that it be exercised with reason and not at the sweet will, whim and fancy of the holder and that would also apply to the Governor's discretion under Section 31(a) to hire and fire County Executive Members. The Court of Appeal in *Cecilia Wangechi Ndungu(supra)* powerfully expressed itself on this thus:

"....Section 31 (a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising this power."

The Court went further went on to state that

"Further, by virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her county. We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution as set out herein above."

From the foregoing it is patent that the Governor ought to exercise his discretion under Section 31(a) reasonably and for the benefit of the people. the pleasure doctrine in its traditional sense has been consigned to history.

Were the Petitioners' Constitutional rights violated?

It is the petitioners' case that their right to a fair administrative action was infringed upon. That the Governor announced their termination without according them a chance to be heard and no reasons were given for their termination. On the other hand, the Governor avers that the termination were reasonable and not blemished with selfishness. In his replying affidavit dated 21st April, 2015, the Governor stated

that he wrote several letters to the Petitioners warning them of their underperformance and poor service delivery and the urgent need to improve for the sake of the residents of Kisumu. He states further that he even wrote to them asking them to show cause why they should not be dismissed but they failed to reply to his letters. The Governor gave a list of wrongs that the petitioners had done to warrant their dismissal and annexed several letters to that effect.

The petitioners' also filed Affidavits in response to the Governors Replying Affidavit. The 1st Petitioner in his affidavit sworn on 7th May 2015 on his own behalf and on behalf of the 2nd and 5th Petitioners, deponed that they had never received any warning, notice to show cause or notification of allegations either verbal or written and he put the Respondents to strict proof of their allegations. In paragraph 8 of his affidavit he stated as follows:

"8. That your petitioners aver that todate, save for the documents filed in Court, they have not received any letter notifying them of any alleged poor service or requiring them to show cause or terminating their appointments. Annexures JR3, JR4, JR5, JR6, JR7, JR15, JR16 and JR17 are documents manufactured after the fact to attempt a compliance with finding of the Nyeri Court of Appeal. For record, your petitioners have never been served with the subject annexures, the same only came to their attention upon service on their advocates. The 1st Respondent is put to strict proof of the converse. (sic)"

The 3rd and 4th Petitioners also filled affidavits denying that they were served with the letters annexed in the Governor's Replying affidavit.

A plain look at the annexed letters shows that the petitioners were admonished for their poor performance. A closer look at the letters reveals however that it is not possible to tell whether the letters ever reached the petitioners. The letters do not bear stamps indicating that they were received by the petitioners and neither has the Governor demonstrated in any way that the letters were actually served upon the petitioners. It is also interesting to note that the Governor only did a replying affidavit after the Court of Appeal decision of Cecilia Wangechi delivered in Nyeri having filed only grounds of opposition earlier. Again the only annexures that accompanied the replying affidavit sworn on behalf of the 2nd respondent are the petitioners' letters of termination and a Kenya Gazette notice verifying the terminations. I am inclined to agree with the petitioners that the replying affidavit by the Governor was an afterthought after the decision of the Court of appeal in the **Cecilia Wangechi** case.

Consequently, it is my opinion that the petitioners' right to a fair administrative action was violated by the 1st and 2nd respondents. I say the 1st and 2nd respondents because, the 3rd and 4th respondents were just appointees of the Governor who were meant to replace the petitioners as no independent cause of action has been disclosed against them.

Section 31(a)

The petitioners have also challenged the constitutionality of Section 31(a) of the County Government Act. The petitioners' submissions were to the effect that Section 31(a) offends the constitutional right to a fair administrative Action in so far as the Governor is empowered to hire and fire County Executives at will and without giving any reasons whatsoever.

However, as already stated above, the doctrine of pleasure has since evolved with the growth of democracy and exercise of the rule of law. The discretion given under section 31(a) is not absolute. The Governor is under a duty to act reasonably and for the benefit of the public. The Governor is not allowed to act whimsically in exercise of his discretion. He is obliged to give reasons for his action and to act with utmost candour and not for his selfish reasons. In my view, the constitutionality of Section 31(a) is thus not questionable as the safeguards of the discretion are clear. the section is also on all fours with Article 152(5)(b) which merely provides that-

(5) The President-

(a)...

(b) may dismiss a cabinet secretary; and

(c) shall dismiss a cabinet secretary if required to do so by a resolution adopted under clauses (6) to (10).

Any interpretation of the Act to construe section 31(a) otherwise than by presumption of constitutionality would call to question the provisions of article 152(5)(b) which would in turn be in contravention of Article 1 on the sovereignty of the constitution. Further Article 259 of the constitution enjoins the courts and all persons to interpret and apply the constitution in a manner that promotes its purposes, values and principles, advances the rule of law and human rights, permits the development of the law, and according to the doctrine that the law is always speaking.

Remedies

The petitioners have sought a plethora of remedies. they sought declarations that they are protected under article 236 and their termination was unconstitutional. they further sought an order of Certiorari to bring into this Court and quash the decision of the 1st respondent terminating and removing them from the position of County Executive Committee Members and finally an order of reinstatement. in the alternative they sought compensation by payment of remuneration for the remaining contractual term.

Article 23(3) of the Constitution provides that a Court may grant appropriate relief and not limited to the ones outlined thereunder. It is therefore upon this Court to decide the appropriate reliefs to grant. In determining the remedies the Court must take into account the fact that the Petitioners did not deny the substance of the accusations against them as set out in the 1st Respondents replying affidavit. They only challenged the constitutional basis of their removal.

The Court must also take into account the nature of accountability of the Petitioners. Section 39 of the County Governments Act provides that-

The members of the county executive committee are individually and collectively accountable to the governor in the exercise of their powers and performance of their duties and responsibilities.

Such accountability and collective responsibility can only be achieved where there is harmony amongst and between the governor and the executive committee members. The Court would be acting against public interest to force the petitioners and the 1st Respondent to get back together and expect them to work harmoniously following the acrimonious nature of the proceedings herein.

For the foregoing reasons the court makes the following findings and orders-

1. The termination of the contracts of employment of the petitioners and their removal from membership of the Kisumu County Executive Committee was unconstitutional for failure to give the petitioners an opportunity to defend themselves.
2. I award each of the Petitioners damages against the Respondents in the equivalent of 12 months' salary in the sum of Kshs. 3,636,000.
3. The respondents shall pay the petitioners' costs.

Dated delivered and signed this 12th day of February 2016

MAUREEN ONYANGO

JUDGE