



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.226 OF 2015

(Before D. K. N. Marete)

SAMUEL KIPKOECH KETER.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF BOMET.....1ST RESPONDENT

THE GOVERNOR OF BOMET COUNTY.....2ND RESPONDENT

BOMET COUNTY SERVICE BOARD.....3RD RESPONDENT

SPEAKER OF BOMET COUNTY.....4TH RESPONDENT

JUDGMENT

This is a petition dated 26th June, 2015 and filed in court on the same date. It seeks the following orders of court;

- a. *THAT A Declaration be issued that the revocation of the Petitioner appointment as County Attorney vide the 3rd respondent letter on behalf of the 2nd respondent dated 16th June, 2015 is unlawful on account of violation of article 41, 76 and 251 of the Constitution.*
- b. *THAT A Declaration be issued that grounds or reasons specified in the 2nd respondents letter dated 16th June 2015 is ultra vires S 12 of the Bomet County Office of the county Attorney Act, 2014 as read with Articles 47 and 251 of the constitution.*
- c. *THAT An Order of Certiorari be issued to remove into the this Honourable Court for purposes of being quashed the Resolution and decision of the 1st, and 2nd, Respondents contained in the letter dated 13th June, 2013 addressed to the Petitioner revoking the appointment*
- d. *letter of the Petitioner for being in contravention of S 12 of The Bomet county Office of the County Attorney as read together with Articles 47 and 251 of the Constitution.*
- e. *THAT An Order of Certiorari be issued to bring into this Honourable Court for purposes of quashing the direction of PAC/PIC committee to look into alleged misappropriation of public funds as result of the petitioners appointment as County Attorney.*

- f. *THAT a Declaration be issued that under Section 58 of the County Governments Act and Article 251 of the Constitutional Petitioner remains lawful holder of the position of County Attorney Bomet.*
- g. *THAT An Order of Mandatory injunction be issued to compel the Respondents to reinstate the Petitioner's letter of appointment as County Attorney Bomet and to execute the contract of service with the Petitioner as provided for in his appointment letter.*
- h. *THAT a declaration be issued that the actions of the Respondents in contravention of fundamental freedoms secured and guaranteed by Articles 27,28,41,47 and 50 of Constitution.*
- i. *THAT a Permanent injunction restrain respondents from interfering with petitioners exercise of his function as County Attorney Bomet, harassing, intimidating, threatening, distressing, maligning, slandering and publishing misleading and or confidential information about and concerning the Petitioner.*
- j. *THAT a Declaration be issued that the decisions and acts of the Respondents in respect of revocation of Petitioner's appointment constitute conduct violating Articles 6,10,73 & 75 of the Constitution of Kenya(2010).*
- k. *THAT an Order of Mandatory injunction to issue restraining the 1st, 2nd and 3rd Respondents from varying, interfering, effecting any deductions as recovery of alleged overpayment of salary, effecting payment of salary at the rates of the Special advisor or in any other way so dealing with the Petitioners terms and conditions of service.*
- *THAT in the alternative the Respondents be deemed to have breached the terms and conditions of the Contract by frustrating its performance and be condemned to pay the salary, emoluments and other benefits due to the Petitioner upto his retirement at the age of 60 years.*
- m. *THAT an Order of Mandamus do issue compelling the 1st and 2nd Respondents to pay the Petitioner the salary and emoluments payable on group T for the period March 2013 to June 2013 and thereafter from.*

□ *General damages.*

It came to court vide an application by way of Notice of Motion dated 26th June, 2015 vide a certificate of urgency but this limb was not pursued, or at all, during the proceedings. The case against the 4th respondent was also withdrawn by the consent of the parties at the onset of the proceedings on 19th November, 2015.

The 1st, 2nd and 3rd Respondents, vide Grounds of Opposition, dated 7th July, 2015 denies the petition and prays that it be dismissed with costs.

The petitioner's case is that at all material time he is an advocate of the High Court of Kenya having been admitted to the Roll of Advocates on 16th November, 2000. He has variously served as legislative counsel between November 2000 and May, 2008 in the Attorney General's Chambers and as Senior Legal Officer, Rural Electrification Authority in June 2008 to May, 2013.

The petitioners further case is that from May, 2013, he has served as the Special Advisor to the 2nd respondent, having been appointed vide a letter dated 10th May, 2013 and signed by the said 2nd respondent. He was subsequently appointed County Attorney vide a letter dated 17th October, 2013 by same authority, this being effective from 1st July, 2013. This was a consequence of a head count by the 2nd respondent aforementioned to assist in developing legislative drafting and also recruitment to the service management of the county on account of his extensive experience in government. This culminated in several interpersonal arrangements in which he was appointed to the offices of the County Public Service as aforesaid.

Sometimes in February, 2015, members of the County Assembly began agitating for his vetting. This was followed by a barrage of dirty play in the social media and other administrative means thus culminating in directions by the 2nd respondent to the county secretary to write to the petitioner purporting to revoke his letter of appointment as County Attorney and add that the letter dated 10th May, 2013 would stand. This is the letter appointing the petitioner a special advisor to the Governor. It is the petitioners position that this was irregular and illegal. The Petitioner would further be summoned to the assembly of the PIC/PAC's meeting on 23rd June, 2013 to discuss issues of his appointment and emoluments but declined to attend the same.

The petitioner is apprehensive of continued harassment by the MCA's and also complains of verbal abuse by the 2nd respondent in the presence of junior staff and even outsiders thus hurting his personal dignity. He cites the injury caused or likely to be caused to him by the malfeasance of respondents as;

1. *The Petitioner faces the immediate removal from an Office set up by a Statute without due process of the law.*
2. *The Petitioner is being injured by having confidential information about him being posted on social media.*
3. *The Petitioner is being injured as his emoluments are disclosed without proper cause and even quoted out of context giving the public at large a perspective of his being corrupt or unfit to hold public office.*
4. *The Petitioner is being injured by having his emoluments arbitrary and capriciously reduced to his disadvantage and threatening to bring him to an impecunious state.*
5. *The Petitioner has financial and family obligations and commitments which will be adversely affected by the Respondents Act.*
6. *The Petitioners moral and professional integrity is being jeopardized using unlawful means by the Respondents.*
7. *The purported scrutiny by the County Assembly through PIC/PAC is meant to rubber stamp the actions of the Respondents and to permanently besmirch his name.*
8. *The Petitioner rights and freedoms guaranteed Under 27,28,41,47 and 50 are being violated by his being subjected to unfair labour practices and oppressive working condition with a view to forcing him out of office.*
9. *The Petitioner is being subjected to psychological torture and which is affecting his physical and mental health.*
10. *The Petitioner is being humiliated by being placed in limbo doing the duties of a County Attorney whilst purportedly appointed as Special Advisor.*
11. *The Petitioner is being made to look unfit to hold public office by dint of misappropriation of public office.*

The respondent's case in opposition to the petition is that the petitioner is guilty of material non disclosure and seeks justice with unclean hands in that he is no longer performing the duties of County Attorney and has failed to attach his letter of appointment dated 7th October, 2013 in both the application and petition. This is coupled with non production of *inter alia* practising certificates for the years 2013 and 2014.

It is the respondents further case that the orders sought are not efficacious. This is because the petitioner is not a state officer but a public officer and an employee of the County Government who has not in any manner pursued established alternative dispute resolution mechanisms as provided under Section 77 of

the County Government Act. The respondent avers that she will raise a preliminary objection at the onset of the hearing on the matter.

It is also the respondent's case that this petition is actuated by malice, bad faith and misrepresentation as the legal provisions relied on are used out of context and timed to stifle disciplinary functions of the respondents. The petitioner is informed and aware of the revocation of his appointment to the position of County Attorney. She further argues that the office of County Attorney has not been established by the County Public Service Board per Section 5 of The Bomet County Office of the County Attorney Act, 2014 and a formal appointment to this position is not had and if there is, this is, illegal *ab initio*. There is therefore no justifiable labour despite or even constitutional issue for determinable in either the application or the petition and therefore this is an engagement in an academic exercise.

They in the penultimate pray that the orders sought should be declined in public interest, performance of duty and enhancement of good public administration which overtly outweighs the interests of the petitioner.

In his written submissions, the petitioner reiterates his case as pleaded. He emphasizes that the pleasure doctrine, as is being invoked by the respondent has now been rendered inoperative by the promulgation of the constitution of Kenya, 2010 which directs and that public servants are servants of the people and are governed by the rule of law.

The petitioner contends and submits that the letter offering appointment to him is the one dated 7th October, 2013. It sets out salary and allowances attached to his position. It was effective from 1st July, 2013. He thereon performed his duties appropriately and there was no complaint. However, when the respondents decided to remove him from office, the issue of appointment was invoked and grounds for removal set out thus;

- a. *Unilaterally determining his own terms of service by issuing a letter to the 2nd Respondent for his signature without regard to the due process of appointments in the Public Service.*
- b. *Arbitrarily placing the position of County Attorney at Job Group T basing it on a scheme of another Government which was never approved by the County Government.*
- c. *Misleading the 2nd Respondent into signing the letter to the position of County Attorney knowing very well that the position had not been created at the time and proceeding to backdate the same to 1st July, 2013 thus occasioning unjustified overpayment of salary, arrears and other allowances to himself.*
- d. *The said letter of appointment was never witnessed by any authorized Officer in the County Government.*

The respondents in their replying affidavit further claim that the petitioner is not a public officer, him having been appointed by the Governor without being subjected to the process of appointment to public office that includes competitive recruitment. He is, in their own terms, a political appointee serving at the pleasure of the Governor. The respondent also did not find it fitting to require and request the petitioner to answer to the numerous and serious allegations of misconduct that he was accused of. The petitioner denies this and submits/contends that at all times during his employment he was subjected to the authority and supervision of the Governor and his agents.

The petitioner further submits that the respondents impressed upon him that his appointment was regular and therefore he performed his duties diligently until the fall out. If indeed the respondents were acting in good faith, he would have had recourse to Section 75 of the County Government Act which enables the County Public Service Boards to regularize and cure any anomalies if the process of appointment was anomalous.

Action on irregularity of process

“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 Petitioner from the foregoing therefore concludes and submits that his employment was at all times regular and any attempts to rubbush the same amounts to mischief and an excuse and justification to abuse of office in revoking the appointment.

In answer to the 2nd issue for determination whether the petitioner was a political appointee, this is denied. It is his submission that the doctrine of a servant serving at the pleasure of the crown has been overtaken by the promulgation of the Constitution of Kenya, 2010. Courts have followed suit and held that all public servants are now servants of the people and are governed by the constitution and the law. This is restated by my brother Byram Ongaya, J in **Margaret Lorna Kariuki v Embu County Government (2015) eKLR**. Here the pleasure doctrine was analysed as follows;

*“The first issue for determination is whether the pleasure doctrine applies in Kenya and in particular, the removal of the claimant as county secretary by the respondent's governor. The court upholds its opinion in **Richard Bwogo Birir – Versus- Narok County Government and 2 Others (2014) eKLR** thus, “To answer the 1st issue for determination being whether the pleasure doctrine applies in Kenya's public service and particularly in this case, the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010. The court further finds that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the petitioner by the 2nd respondent as was purportedly advanced for the respondents. Finally, the court holds that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The court further holds that is through the application of the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The court further holds that it is through the application of the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subdued by the people who are the holders of sovereign power in the new Republic.”*

Further, “The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya.

The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.”

*The court further upholds its opinion in **Cecilia Wangechi Ndungu -versus- The County Government of Nyeri and Another (2014)eKLR** where the court stated thus, “The court holds that elected and appointed leaders, state officers or public officers, do not hold individually generated goals that constitute political will and goals mysterious to the Constitution. The preamble to the Constitution is clear that the people*

of Kenya are committed to nurturing and protecting the well being of the individual, the family, communities and the nation; and the aspirations of all Kenyans is for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Constitution is replete with specific provisions of the preamble. Article 1 vests all sovereign power in the people of Kenya to be exercised only in accordance with the Constitution. Article 10 (1) provides that the principles of governance bind all the state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Article 73(2) (b) and (d) provides that the guiding principles of leadership and integrity include objectivity and impartiality in decision making, and ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corruption; and accountability to the public for decisions and actions. Article 129 provides that executive authority derives from the people of Kenya, is to be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya and for their well being....”

On the authority of the constitution and precedent, the petitioner would not be a political appointee of the 2nd respondent as alleged by the respondents. This would not be so in this era of a constitutional dispensation that seeks to reorganize society through a transformative, democratic and rule of law environment. I agree.

The 3rd issue for determination is whether the termination/revocation of the petitioners employment was wrongful, unfair and unlawful? It is the petitioners submission that his relationship with the respondents was contractual in nature. This was regulated by the County Government Act, 2012 and the Employment Act, 2007. The latter provides for instances of employment by declaring and defining their fundamental rights besides providing the basic conditions of their employment.

It is the petitioner’s submission that the procedure carried out by the respondents in revoking the appointment of the petitioner offends Section 75 of the County Government Act, 2012 as aforesaid. The petitioner frame, thrash and answer their issues in dispute as follows;

1. *Whether the petitioner was irregularly employed as the Bomet County Attorney?*
2. *Whether the petitioner was a political appointee?*
3. *Whether the dismissal/revocation of the petitioner's employment was wrongful, unfair and unlawful?*
4. *Whether the petitioner is entitled to the relief sought?*
5. *Who bears the costs of this petition?*

He further submits that the respondents also flouted the provisions of The Bomet County office of the County Attorney Act, 2014 in which Section 12 provides for the removal from office of the County Attorney. This taints his dismissal/termination with illegality. Further, the petitioner submits a violation of Section 45, Employment Act, 2007 which provides for situations of unfair termination of employment as follows;

45. (1) *No employee shall terminate the employment of an employee unfairly.*
 - (2) *A termination of employment by an employer is unfair if the employer fails to prove-*
 - a. *that the reason for the termination is valid;*
 - b. *that the reason for the termination is a fair reason-related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and*
 - (c) *that the employment was terminated in accordance with fair procedure.*

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

a. the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-

a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e. the existence of any previous warning letters issued to the employee.

The petitioner submits that the process of removal from office was unprocedural and did not pursue the law. It was unilateral and auspicious and should not be allowed to stand for its illegality. He further relies and emphasizes on the authority of **Lorna Kariuki** aforecited as follows;

“The court therefore holds that any public authority must be exercised in accordance with the Constitutional tests including the power to remove a public or state officer from office like it was anticipated and legitimately expected by the petitioner in the present case. In making that holding, the court further holds that statutes or other written laws and policies need not repeat the cited constitutional tests whenever authority or power is vested or conferred upon a person or body. The cited constitutional provisions are of universal application and not mere flowers in the constitutional text that readily wither in our constitutional practices; in the opinion of court, they are provisions that must bloom into seeds of vitality that enhance our constitutional practices and lifestyle.”

He further relies on the observation by Hon. Justice Abuodha in **Mundia Njeru Geteria v Embu County Government & 3 Others (2013)eKlr;**

“Removal from office or loss of employment for that matter is a very drastic step especially in a country like ours where jobs are hard to come by. But it can be done where circumstances demand so. However those tasked with such responsibility are enjoined both by law and good conscience to act in good faith and in accordance with the law. To this Lord Denning observed in the case of Abbot vs. Sullivan (1952) 1KB 189 at p189 that:

“... bodies which exercise a monopoly in important sphere of human activity with power of depriving a man of his livelihood must act in accordance with elementary rules of justice. They must not condemn a man without giving an opportunity to be heard in his own defence and any agreement or practice to the contrary would be invalid.”

It is also the petitioner's submission that his averments at paragraphs 36-73 of the Supporting Affidavit to the petition sworn on 26th June, 2015 regarding his performance in office and subsequent relationship with the MCA's, the County Assembly and the 2nd respondent and their concerted efforts by the respondents to remove him from office are not controverted. This further entitles him to his claim in the petition.

The 1st, 2nd and 3rd Respondents in their written submissions on the Petition make various submissions on the subject. At the onset, they submit a case of misjoinder of parties in that their inclusion should never have been the case. The petitioner should have sued the Bomet County Public Service Board instead.

The Respondents also deem this an ordinary employer/employee relationship and therefore the violation of constitutional rights of the Petitioner does not arise. I disagree. The borderline between employment and constitutional rights is indeed very thin. These are intertwined. Again, the parties have the choice on the procedure and methodology of approaching a court of law. This does not necessarily render a cause defective.

The Respondents also fault the Petitioner's appointment as Bomet County Attorney between May and October, 2013. There is no specificity on this. The petitioner relies on the Bomet County office of the County Attorney Act, 2014 as authority for his appointment. This is an indication that at the time of the alleged appointment, the law enacting this office was not in place. The appointment cannot therefore have been done to a non-existent position. The Petitioner also does not annex the letter dated 7th October, 2013 that appointed him as such and back dated this to July, 2013. This letter is determinant in an analysis of the issue(s) in dispute. It would have been an essential demonstration and clear cut evidence of what contractual relationship the parties entered into. The absence of such material data reduces the petitioner's case to a shell.

The letter of appointment is a critical document in establishing an employment contract and relationship. This is because it clearly illustrates the nature of the actual contract entered into by the parties and therefore eases the work of the court or any other agency in a determination of the terms of employment. Another such essential document is the payslip for the employee. These documents are necessary annextures in any claim relating to terms of employment and particularly unfair termination of employment. These facilitates a determination on the nature of termination and also relief sought in the event of unlawful termination. Their production, where appropriate is essential and non-negotiable in the establishment of a good claim.

The Petitioner displays the letter of revocation of his appointment as County Attorney. He also admits that he was invited to undergo vetting for the position of Bomet County Attorney but he declined to attend. This, the respondents submit that this was wrong;

“As an advocate of the High Court of Kenya he should have been in the fore front to uphold the rule of law which he miserably failed in this basic requirement of an Advocate. He should have attended the vetting and raised before the vetting passed whatever objections that he may have had to the vetting process.”

This is also illustrated by the authority of **John Mose Amiga Versus Dominion Vegfruits Ltd Industrial Cause No. 77 of 2012** where Rika, J. observed as follows;

“The Court has held in the past that where an employee portrays a belligerent attitude on being confronted with accusations of having committed an employment offence, such an employee makes it impossible to hold a civil disciplinary hearing. Amiga walked out angrily on his employer, and did not submit himself to the disciplinary process.”

This relates well with the refusal by the petitioner to attend the vetting process as requested.

The authority of **Jared Aimba Versus Fina Bank Ltd Industrial Cause No. 525 (N) of 2009** where

Kosgei, J. (as he then was), made the following observations;

“The claimant was asked to attend a disciplinary hearing but he refused to attend saying the respondent had already decided to terminate his contract with effect from 10th June 2009 and the disciplinary hearing would just be cosmetic..... This refusal to attend a disciplinary hearing provided a further ground for the claimant’s dismissal, namely refusal to obey a lawful order from the employer. It was wrong for the claimant to refuse to attend a disciplinary hearing when he was still in the respondent’s payroll.

When the claimant refused to attend the disciplinary hearing, the respondent proceeded to dismiss him. This brings us to the second question. An employee is entitled to a fair hearing before termination in accordance with the rules of natural justice and the demands of section 41 of the Employment Act 2007.... He refused to take advantage of the opportunity granted to defend himself. This was very unwise....

Further, the court observed;

“It is our considered opinion that an employer may dispense with disciplinary inquiry when faced with exceptional circumstances which make it impossible for the employer to comply with the requirement. The exceptional circumstances that come to our minds include cases such as violent strikes staged by employees and where employees waive their right to a hearing. In this case the claimant consciously waived his legal right to a pre-dismissal inquiry by refusing to attend the inquiry. His conduct made it impossible for the respondent to hold the inquiry. In the circumstances it was unnecessary for the respondent to proceed with the inquiry in the claimant’s absence.”

It is the respondents submissions that failure to attend this lawfully instituted and notified vetting process by the employer rendered the employment of the petitioner vulnerable and led to a lawful termination of the employment contract. This is agreeable. The petitioner was at all times during the course of the employment contract amenable and subject to normal employer/employee relationship in accordance with the employment contract. Any contravention of this would be fatal.

This plausible, well presented and illustrated petition must fail on the basis of our later analysis and the case of the respondent regarding non presentation of the letter of appointment, the validity of appointment in the absence of the enabling environment and statute creating the position of County Attorney and the conduct of the respondent on the call to vetting. Failure to annex and qualify a letter of appointment in the first place leads to lack of demonstration of employment. In as much as this is not denied by the respondents it casts a shadow on the genesis, existence and terms of contract. This is not fair or supportive of the mainstay of the petition.

It is also the respondent’s argument and submission that the alleged appointment to the office of the County Attorney, if at all, was irregular in that this position was non-existent at the time of appointment in October, 2013. I would agree with this. These, coupled with the conduct and the attitude of the petitioner on the vetting exercise by the 1st respondent renders the case for the petitioner unsustainable.

I am therefore inclined to dismiss the petition with an order that each party bears their own costs of the petition.

I must, in the penultimate, thank the parties for their very able presentation of the respective cases. This was excellent and is laudable. It was worth every effort and I thank you.

Delivered, dated and signed this 16th day of March 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. J.W. Madahana instructed by J.W. Madahana & Company Advocates for the petitioner.
2. Mr. Masinde instructed by Boniface Masinde & Company Advocates for the 1st, 2nd and 3rd respondents.