



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 26 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JAMIN SHITSUKANE MULIRU.....PETITIONER

-Versus-

GOVERNOR WYCLIFF AMBETSA OPARANYA1ST RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA2ND RESPONDENT

JUDGEMENT

The petitioner was a member of the Executive Committee for Labour, Social Services, culture, Youth and Sports of Kakamega County having been appointed as such on 14th June, 2013. His contract of service was to run up to 31st December, 2017. However, vide a letter dated 17th March, 2015 the 1st respondent terminated the service of the petitioner without any form of notice. The petitioner being aggrieved by the termination has brought the petition herein alleging a contravention and threat to his rights guaranteed under Articles 23, 27, 30, 41, 47 and 50 of the Constitution. The petitioner seeks the following orders:

- a. A declaration that your petitioners are public officers protected under Article 236 of the Constitution.
- b. A declaration that the termination and removal of the petitioner as the Executive Committee Member for Labour, Social Services, culture, Youth and Sports vide 1st respondent's public pronouncement and by a letter dated 17th March, 2015 violates the petitioner's constitutional rights under Articles 27(1) and (2), 30,41,47(1) and (2), 50(1) and 23(1) of the Constitution is unconstitutional and thus null and void for all purposes.
- c. An order of certiorari to issue to bring to the High Court for purposes of quashing the decision of the 1st respondent terminating and removing the petitioner as the Executive Committee Member for Labour, Social Services, culture, Youth and Sports and for any consequential action thereafter taken by the 1st Respondent for being illegal and unconstitutional.
- d. An order directing that the petitioner remain in the service of the 2nd respondent and to be allowed to continue in the 2nd respondent 's service forthwith until the end of his contractual term.

In the alternative and without prejudice to the foregoing prayers, the respondents be compelled to pay your petitioner his contractual remuneration for the remainder of the contract period.

That costs of the petition be borne by the respondents.

Petitioner's case

The petitioner's case is contained in his petition dated 19th October, 2015, his affidavit sworn in support of the petition on the same day and the written submissions filed on 18th December, 2015. The petitioner began by setting out the background of his employment with the 2nd respondent. He deponed that his contract as county executive member was for five years which was to end on 31st December, 2017. That on 17th March, 2015 in a public gathering the 1st respondent verbally purported to terminate his contract of employment and later on the same day he received a letter informing him of his termination. The petitioner averred

that the said termination violates his constitutional rights under Articles 27(1) and (2), 30,41,47(1) and (2), 50(1) and 23(1) of the Constitution and that the same is founded on impunity. Further that the decision to terminate his employment was unfair and contrary to Article 47(1) of the Constitution as he was not given a fair hearing before termination and he was denied equal protection of the law guaranteed under Article 27(1) of the Constitution.

The petitioner also filed written submissions. The petitioner's submitted that his termination was unfair and unlawful. Having been appointed through fair procedures, the terminal procedure ought to have been the same and due process ought to have been adhered to.

He submitted that although an executive Committee member is a state officer, Article 260 of the Constitution defines a "public officer" to include a state officer and as such a state officer is covered under Article 236 of the Constitution which provides that "**a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law**". It was therefore paramount that due process be followed before his dismissal. The petitioner relied on the case of **The County Government of Nyeri & Anor vs.- Cecilia Wangeci Ndungu Civil Appeal No. 2 of 2015** where the court held a dismissal pursuant to Section 31(a) of the County Government Act to be arbitral for reasons that there was no evidence to show that the 2nd respondent exercised his discretion reasonably in dismissing the appellant.

The petitioner concluded by stating that his dismissal was arbitrary and a violation of his constitutional rights. He urged this court to grant his petition.

The Respondent's case

The case for the Respondents is set out in the affidavit of Lukale M. Sande sworn on 30th November, 2015 filed in reply and opposition to the petition, and written submissions. Mr. Sande stated that the dismissal of the petitioner by the 1st respondent did not violate the constitution or any other law. That the 1st respondent appointed the petitioner pursuant to the powers conferred upon him by Article 179(2)(b) of the Constitution and Section 35(1) of the County Government Act as a member of the executive committee and consequently, the petitioner was accountable to the 1st respondent for the performance of his functions and the exercise of his powers as provided in Article 179(6) of the Constitution.

Mr. Sande further averred that, the petitioner as a member of the county executive, was a state officer. Accordingly, the strict requirements for due process in the dismissal of public officers did not apply to his dismissal. He contended that, the 1st respondent has discretionary power to dismiss executive Committee members under Section 31(a) of the County Government Act without necessarily having to follow the procedure for the dismissal of a public officer. That even then the 1st respondent exercised this discretion cautiously and had compelling reasons for relieving the petitioner from his duties. These reasons were duly communicated to the petitioner.

In their written submissions, the respondents reiterated the contents of Mr. Sande's affidavit and stated that the 1st respondent was conferred with the power to dismiss a County Executive Committee member at any time, if he considers it appropriate. It was their case that the petitioner served at the pleasure of the

1st respondent.

The respondents submitted further that the 1st respondent gave reasons for the petitioner's dismissal and the same were not personal but for the public good of the people of Kakamega. They urged the court to dismiss the petition with costs.

The Law

The appointment of a County Executive Committee Member is underpinned on Article 179(2) (b) which provides that they are appointed by the County governor with the approval of the assembly, from among persons who are not members of the assembly. Article 179(6) and (7) provide that they are accountable to the governor and vacate office when a vacancy occurs in the office of the Governor.

The County Government Act provides for appointment of County executive members under section 35. Section 39 provides that they are accountable to the governor. Their removal is provided for under section 31(a) and section 40 as follows;

31. Powers of the governor

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;*
- (b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;*
- (c) may appoint an accounting officer for each department, entity or decentralized unit of the county government; and*
- (d) shall have such powers as may be necessary for the execution of the duties of the office of governor.*

40. Removal of member of executive committee

(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.

The letter removing the petitioner from office reads as follows;

HON. JAMIN MULIRU SHITSUKANE

P/NO.2010018136

RELIEVE FROM COUNTY GOVERNMENT OF KAKAMEGA AS COUNTY EXECUTIVE COMMITTEE MEMBER

Pursuant to the powers conferred upon me by the County Government Act, 2012 in particular section 31(a), I hereby relieve you from your position as an Executive County Committee Member with immediate effect. I therefore direct that you surrender formally all the County Government property, tools and equipment that were issued to you as an Executive Committee Member to the County Secretary before you leave office. This should be done before Friday, 20th March, 2015.

Thank you for the time you have served in my Government as an Executive Committee Member.

Yours Sincerely,

H. E. Hon. Wycliffe Ambetsa Oparanya, EGH

GOVERNOR

The letter does not assign any reason for relieving the petitioner of his position.

The Respondents have submitted that the removal of the Petitioner did not violate his constitutional rights, and that the dismissal of the petitioner was under powers vested in the 1st petitioner by section 31 of the Act under the "pleasure doctrine."

The Court of Appeal did a detailed analysis of the "pleasure doctrine" in the case of **County Government**

of Nyeri & Another v Cecilia Wangechi Ndungu [2015]eKLR in which it stated as follows;

We are of the considered view that section 31(a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily.

In this case like in the case of **Cecilia Wangechi**, the Governor did not inform the Petitioner why he had found it "appropriate" or "necessary" to dismiss him. The Court of Appeal stated at paragraph 42 that;

"As demonstrated hereinabove, the extent to which due process is applicable in a case such as this depends on the express and implied limitations by statutes and the circumstances of the case. There are certain circumstances a Governor may lose confidence in a member of the County Executive Committee and due to the sensitivity and urgency of the matter at hand the Governor may dismiss the member without giving any notice of his intentions to do so. Further, Section 31(a) of the County Government Act does not require a Governor to hold a disciplinary hearing in respect to the member before dismissal, he can only dismiss if he considers it appropriate or necessary. Appropriateness or necessity is not arbitrariness or whimsical. Appropriateness or necessity imports the requirements that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power exercised under section 31(a) of the County Government Act is reasonable or not"

In this case the Respondents have not stated the circumstances under which the Petitioner was dismissed. They have not explained the necessity or appropriateness of the action taken against the petitioner.

In the affidavits sworn in support of both the petition and application, it is alluded that the 1st Respondent dismissed the petitioner for actively engaging in political activity against his code of conduct and ethics and bringing the office of the 1st Respondent into disrepute, contempt and odium and that the Petitioner knows why he was dismissed since it was explained to him. Although this has been denied by the Petitioner, no attempt was made by the Respondent to provide proof of either the allegations made against the petitioner or that the petitioner was made aware of the allegations.

Article 41(1) guarantees every person a right to fair labour practice while Article 47(1) guarantee administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Article 47(2) further guarantee a person adversely affected by administrative action the right to be given written reasons for the action.

Article 20(1) binds all persons and state organisations while Article 20(2) guarantees enjoyment of right and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

As was stated in the **Cecilia Wangechi** case by the Court of Appeal, the County Governments Act was enacted to give effect to chapter 11 of the Constitution which provides for devolution . Therefore the interpretation of section 31(a) of the said Act ought to be in light of the values, purposes and principles of the constitution.

There is one other observation that I must make before concluding. This is that the letter dismissing the Petitioner did not make any reference to powers of the Governor to dismiss the members of the County Executive under section 31(a). The Respondents cannot therefore limit the court to interpretation of the dismissal letter to section 31(a). The court is thus entitled to consider all relevant provisions including section 40 which provides for the grounds for dismissal of members of the County Executive Committee by a governor.

Conclusion

For the foregoing reasons, I find that the dismissal of the Petitioner by the 1st Respondent was without valid reason and without compliance with basic principles of natural justice. The same was therefore arbitrary and unreasonable.

I allow the petition and make the following orders;

A Declaration that the termination and removal of the Petitioner as the Executive Committee Members for Labour, Social Services, Culture, Youth and Sports vide 1st Respondent's Public pronouncement and by a letter dated 17th March, 2015 violates the Petitioners' constitutional rights under Articles 27(1) and (2), 41, 47(1) and (2), 50(1) and (23) (1) of the Constitution and is unconstitutional.

The Petitioner prayed for either an order of *certiorari* to bring into this court and quash the decision of the 1st Respondent removing him from office or in the alternative payment of his contractual remuneration for the remainder of his term. I have considered all the circumstances relevant to this case and take cognisance of the obviously strained relationship occasioned by the petitioner's removal and these proceedings. It is therefore my opinion that it will not be in the public interest to order the return of the Petitioner to his office as member of the County Executive Committee which requires him to work very closely with the Governor as set out in the Petitioner's letter of appointment annexed at page 49 of the petition.

It would also not be conscionable and in the public interest to compensate the petitioner for the whole of the remainder of his term in office as I expect him to find other engagements elsewhere. I therefore order his compensation in the sum of Shs.3,600,000 based on 12 months salary at the highest rate of pay provided for in his appointment letter being Shs.300,000 per month.

The Respondents will also pay Claimants Costs of this petition.

Dated, signed and delivered this 23rd day of June, 2016

MAUREEN ONYANGO

JUDGE