



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 3 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER**

**-Versus-**

**KISUMU COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT**

**KISUMU COUNTY GOVERNMENT.....2ND RESPONDENT**

**J U D G E M E N T**

The Petitioner is the Kenya County Government Workers Union, a Trade Union registered in Kenya under the Labour Relations Act to represent the interests of workers employed in the County Governments. It has filed this petition on behalf of the 40 interested parties who are all former employees of the defunct Municipal Council of Kisumu.

The 1st Respondent is a County Public Service Board established under section 57 of the County Government Act as a body corporate.

The 2nd Respondent is the County Government of Kisumu established pursuant to Article 176 of the Constitution of Kenya 2010.

**Petitioners Case**

The Petitioner's case is that the interested parties were employees of the former local authority and were deemed to have been transferred to the County Government on the same terms and conditions upon the creation of the County Government after the 2013 elections by virtue of Article 262 of the Constitution 2010.

The petitioner avers that the interested parties were terminated from employment without complying with the collective bargaining agreement. The Petitioner avers that the Respondents contravened Article 47, 232(1) and (3), 235(1), 236(b), 41 and section 74 of County Government Act. They pray for the following reliefs:-

1. A declaration that the actions of the Respondents and/or their predecessor Kisumu Municipal Council were discriminatory full of mistakes and amounted to unfair labour practices and therefore violated the provisions of Article 22,47,232,235 and 236 of the Constitution, The County Government Act section 57,59,62,65,69,70,75 and 76, the Employment Act and the rules of natural justice hence null and void.

2. A declaration that the actions of the Respondents and or its predecessor amounts to unfair administrative action and therefore against the letter and spirit of the Constitution hence null and void.
3. An order compelling the Respondents to enforce the resolutions of the "Okolla Committee" ordering reinstatement of the interested parties to their employment however subject to the provisions of the constitution and the law relating to the interested parties employment.
4. An order compelling the Respondents to desist from tasking any action that infringes on the rights of the interested parties.
5. An order compelling the Respondents to reinstate the interested parties to their employment.
6. Costs of this Petition be borne by the Respondents jointly and severally.
7. Interests on (i) above.

The Respondents responded to the petition through the replying affidavit of **JOHN WAMALWA MUNOKO**, the Human Resource Manager who states that the employment contracts of the interested parties were terminated by the defunct Municipal Council of Kisumu pursuant to the investigations by the Public Service Commission, that they were employees of the Ministry of Local Government engaged by the Public Service Commission. Mr. Munoko further states in the replying affidavit that investigations by the Public Service Commission revealed that the interested parties had forged academic certificates. He states that Municipal Council of Kisumu had no say and took no part in the dismissal of the interested parties.

Mr. Munoko further states that the Respondents came into existence after the General Elections of 2013 long after the fate of the interested parties had been sealed and are therefore wrongly sued by the petitioner.

### **Submissions by the Petitioner**

In its written submissions the Petitioner submits that it has *locus standi* to represent the interested parties by virtue of Article 22 and 258 of the constitution which provides that every person has a right to institute court proceedings where the persons constitutional rights have been contravened or threatened with contravention and further that apart from acting in their interest court proceedings may be instituted by an association acting in the interest of one or more of its members. To emphasise this point the petitioner relied on the case of **John Main Temoi & Another v Governor of Bungoma County & 17 others [2014]eKLR** in which the court held that;

*"40. I have considered the opposing arguments on this issue. I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedom. The same provides that:-*

*22. (1) Every person has a right to institute court proceedings claiming that a right or*

*Fundamental freedom in the Bill of Rights has been denied, violated or infringe, or is threatened.*

*(2) In addition to a person action in their own interested, court proceedings under Clause (1) may be instituted by:-*

*a) A persons acting on behalf of another person who cannot act on their own.*

*b) A persons acting as a member of or in the interest of a group or class of persons.*

*c) A person acting in the public interest or*

**d) Association acting in the interest of one or more of its members.**

The Petitioner also submitted that the Respondents inherited employees of the local authorities who are not deemed as employees transferred to the County Governments. The petitioner relied on the case of **Timothy Omollo and 79 Others v Kakamega County Government & Another [2013]eKLR** where the Judge stated;

*"That being the legal position the relationship between the Claimants and Respondents cannot be terminated without due process They remain employees of the County Government and they can only be separated after following due process"*

*"Local Authorities were abolished when the Local Government Act was repealed, on the announcement of the final results of the County election. The functions of Local Authorities are function of the County Governments. Staff of Local Authorities, who are public servants appointed by or under delegation from the PSC automatically become County Government Staff".*

The Petitioner Submits that the Interested Parties were summarily dismissed without being subjected to fair administrative action. It was further submitted that they were discriminated, that the "Okolla Committee" formed by the Respondents predecessor investigated the terminations and made binding recommendations that were adopted by the 1st and 2nd Respondents and their predecessor.

**Submissions by the Respondents**

The Respondents submitted that the Respondents came into being after the termination of the employment of the Interested Parties, that the terminations were carried out according to the provisions of the collective bargaining agreement and the Public Service (Local Authority Officers) Regulations.

The Respondents submit that the interested parties cannot be reinstated as they were found guilty of committing forgeries. It was submitted that the appeals by the interested parties made to public service commission were rejected.

**Determination**

I have considered the petition and the submissions by the parties. The issues that arise for determination are whether the petitioner has established that the constitutional rights of the Interested Parties have been infringed and if the answer is in the affirmative, whether they are entitled to the reliefs sought.

It is a well settled rule that in a petition where the petitioner alleges infringement of a constitutional right, the petitioner is duty bound to set out with particularity the specific right and how it was violated. This principle was established in the case of **Anarita Karimi Njeru v Republic (No.1) [1979] 1 KLR 154**. This has been emphasised by the court of appeal in several cases one of them being the case of **Mumo Matemu v Trusted Society of Human Rights Alliance [2013]eKLR**.

In the case of **Daniel Chacha Muriri v Attorney General [2012]eKLR** the Court stated that *"It is the petitioner's duty to specify and demonstrate with particularity the constitutional rights which have been violated, in what manner and by whom. He must also frame the reliefs he is seeking from the court."*

In this petition it is alleged that the constitutional rights of the Interested Parties on whose behalf the petitioner filed this petition were infringed by the Respondents. The specific rights alleged to have been infringed are 22, 47, 232 and 236. It is further alleged that the Respondents violated the provisions of sections 57, 59, 62, 64, 65, 69, 70, 75 and 76 of County Government Act. Article 22, 47, 232 and 236 provide as follows;

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

- (a) the rights of standing provided for in clause (2) are fully facilitated;
  - (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
  - (c) no fee may be charged for commencing the proceedings;
  - (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
  - (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.
- (4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is Constitution of Kenya, 2010 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- (b) promote efficient administration.

232. (1) The values and principles of public service include—

- (a) high standards of professional ethics;
- (b) efficient, effective and economic use of resources;
- (c) responsive, prompt, effective, impartial and equitable provision of services;
- (d) involvement of the people in the process of policy making;

*(e) accountability for administrative acts;*

*(f) transparency and provision to the public of timely, accurate information;*

*(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*

*(h) representation of Kenya's diverse communities; and*

*(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—*

*(i) men and women;*

*(ii) the members of all ethnic groups; and*

*(iii) persons with disabilities.*

*(2) The values and principles of public service apply to public service in—*

*(a) all State organs in both levels of government; and*

*(b) all State corporations.*

*(3) Parliament shall enact legislation to give full effect to this Article.*

*236. A public officer shall not be—*

*(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or*

*(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.*

It is however not stated how the interested parties were dismissed. It is not even stated what transpired before the interested parties were dismissed. All that is set out in the petition are names of the interested parties, the dismissal letters and employment records of a few of them specifically 4 of the 40 interested parties, and the minutes of the Disciplinary (HRM) Committee meeting held on 21st May, 2013 which reviewed cases of 43 employees dismissed by the Public Service Commission.

In the recommendations of the Committee under the "Remarks" Column, all the employees whose cases were reviewed are indicated to have been guilty of some form of impropriety by either submitting fake or altered certificates to gain employment or promotion. The minutes state that the recommendations which are varied, should be tabled before the committee first, before it was presented to the City Manager (sic).

Nothing is stated in the petition about the mandate of the committee, who set it up and what action was taken on the recommendations.

It is therefore not possible to discern from the petition whether the process adopted before the interested parties were dismissed did not comply with any set procedure or if any of their constitutional rights were violated. It is also not possible to tell what the mandate of the Disciplinary Committee was or if it had the power to review the decision of the Public Service Committee, and if its recommendations were binding on the Respondents.

The Respondents have submitted that they were established after the dismissal of the interested parties and are therefore non-suited as the interested parties were not in employment at the time they were

established and they therefore did not inherit the interested parties from the defunct Municipal Council of Kisumu. No effort was made by the Petitioners to demonstrate how the 1st and 2nd Respondents became liable for the dismissal of the interested parties who were (apparently) dismissed in December 2012, before the establishment of the Respondents.

From the foregoing I find that the Petitioner has failed to establish the manner in which the rights of the interested parties were violated and by whom. They have therefore not demonstrated that they are entitled to the prayers sought.

I find no merit in the petition and dismiss the same with no orders for costs.

**Judgement Dated, signed and delivered this 16th day of June, 2016**

**MAUREEN ONYANGO**

**JUDGE**