



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 4 OF 2016

STEPHEN KINYUA NJIRU..... PETITIONER

-VERSUS-

EMBU COUNTY GOVERNMENT.....1ST RESPONDENT

HON. MARTIN NYAGA WAMBORA.....2ND RESPONDENT

AND

EMBU COUNTY GOVERNMENT.

PUBLIC SERVICE BOARD.....INTERSETED PARTY

(Before Hon. Justice Byram Ongaya on Friday 29th July, 2016)

RULING

The petitioner filed the petition on 05.07.2016 through Mugendi Karigi & Company Advocates. The petition was titled in the matter of rule 13, 23, of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013; in the matter of Articles 22, 23, 162, 165, 236 & 260 of the Constitution; in the matter of alleged contravention of fundamental rights and freedoms under Articles 27, 28, 41, 47 and 50 of the Constitution; and in the matter of sections 31, 40, and 76 of the County Governments Act. Together with the petition the petitioner filed the notice of motion under Articles 22, 23, 162 & 165 of the Constitution, section 12 of the Employment and Labour Relations Court Act, sections 63E, 1A, 3A of the Civil Procedure Act, and all enabling provisions of law. The prayers in the application were as follows:

- a) That the application be certified urgent and service be dispensed with in the first instance.
- b) That a temporary prohibitory injunction do issue restraining the respondents from interfering with the petitioner's discharge of his respective office duties with full benefits and authority and without disruption of the petitioner's employment and or undertaking any disciplinary proceedings against the petitioner as communicated in 2nd respondent's letter dated 27.06.2016 pending the hearing and determination of the application.
- c) That pending the hearing and determination of this application, the honourable court be pleased to issue interim order of injunction restraining the respondents from interviewing, considering, recommending, appointing and replacing by any other person, apart from the petitioner, the office of chief officer lands and water.

d) That the respondents be condemned to pay the costs of the application.

The application was based on the affidavit of the petitioner filed together with the petition and on the following grounds:

a) The 2nd respondent by the letter dated 27.06.2016 send the petitioner on a compulsory leave with immediate effect pending investigations leveled against the claimant and recommendations by the 3rd respondent.

b) The 2nd respondent by issuing the letter of 27.06.2016 acted outside the provisions of the County Governments Act, 2012 as his actions were unreasonable, *ultra vires*, null and void ab initio. The disciplinary powers over the applicant are vested in the interested party under section 59(c) of the County Governments Act, 2012.

c) The interested party and the 2nd respondent have not filed a replying affidavit so that the two parties are taken not to oppose the application.

d) The court enjoys jurisdiction under Articles 162 and 165 (5) of the Constitution.

The respondents and the interested party filed on 18.07.2016 the replying affidavit of Raymond Kinyua, the Embu County Secretary, to oppose the application. The respondents appointed Ileri & Company Advocates to act on their behalf. The respondents and the interested party also filed on 18.07.2016 the grounds of opposition together with the answer to the petition and cross petition. The parties' advocates argued the application on 19.07.2016. For the petitioner the grounds as enumerated above were urged. For the respondent it was submitted as follows:

a) Under Article 179 (4) the county governor is the chief executive officer of the county so that in exercise of the general powers as the chief executive of the county, the governor was entitled to send the petitioner on compulsory leave.

b) The proper authority to exercise disciplinary control over the petitioner as a chief officer was the interested party and the compulsory leave was not punitive but that the interested party had been given the opportunity to exercise the disciplinary powers while the petitioner was on compulsory leave paving way for relevant investigations.

c) Order 3 rule 1 of the Civil Procedure Rules required filing of a verifying affidavit and the petitioner had failed to comply accordingly.

d) The court lacked jurisdiction because the petitioner was seeking to enforce constitutional rights and should have invoked the High Court's jurisdiction.

e) The remedies sought in the petition such as certiorari are not available.

f) The petitioner had failed to establish a *prima facie* case with a probability of success, that damages were adequate in the circumstances, and that the balance of convenience tilted in favour of not granting of the orders in the application so that the fair exercise of the discretion by the court was to deny the prayers in the application.

The court has considered the parties' respective cases and makes findings as follows.

The 1st issue for determination is whether the Court lacks jurisdiction to determine the suit. In **Seven Seas Technologies Limited –Versus- Eric Chege [2014] eKLR** the Court (Rika J) stated that the High Court is expressly excluded by the Constitution to deal with matters under Article 162 so that there is a constitutional imperative thrust upon this Court to deal with all aspects of disputes that relate to labour and employment matters in Kenya. The Court further stated that to hold otherwise would abridge the

rights of parties to access justice and run counter the principles in Article 159(2) of the Constitution. Thus, the Court, and not the High Court, has the jurisdiction to hear and determine all issues as far as employment and labour matters go. The Court follows that opinion and further upholds Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015]eKLR where this Court stated thus, “As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”

Further, the court upholds its opinion in Peter Muchai Muhura –Versus- Teachers Service Commission [2015]eKLR thus,

“It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted.”

The court, on the procedural manner litigants should invoke and approach the court’s jurisdiction, further upholds its opinion in Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR thus,

“...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court’s opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus- Attorney General of Trinidad and Tobaco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”

Thus the court returns that it enjoys the necessary jurisdiction to hear and determine the petition and with remedies as prayed for.

On the **2nd issue** for determination the court returns that order 3 rule 1 of the Civil Procedure Rules on verifying affidavits to be filed together with the suit clearly did not apply to constitutional petitions as filed for the petitioner and the petition and application invoked and complied with the relevant rules.

The **3rd issue** for determination is whether the prayers in the petition should be granted. The 2nd respondent has not established the specific provisions of the law that empowered him to send the petitioner on a compulsory leave. Further it has not been established that there were provisions in the law or contract of service that provided for the respondent to be subjected on a compulsory leave. The court has considered that the applicant has established a *prima facie* case that the compulsory leave as imposed may be continuing in contravention of his constitutional rights as alleged in the petition so that a *prima facie* case with a probability of success has been established. In such applications seeking to interfere with employer's powers, the court follows **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, "**The principles are clear.**"

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process." The court considers that the applicant has satisfied the outlined justification for the court's interference in the present case because on the material on record the applicant appears to have established that the compulsory leave was issued without authority or legal basis and on that basis, a *prima facie* case as established by the petitioner has a high probability of success.

While making that finding the court further considers that nothing stops the interested party from swiftly exercising its disciplinary control over the petitioner in accordance with the interested party's statutory authority and duty and which is not in dispute between the parties. To that extent there was nothing wrong in the Governor complaining to the Board with a view of triggering the initiation of the Board's powers of disciplinary control over the petitioner; what the Governor could not do and has been found doubtful in law was to impose the compulsory leave. The court has further upheld **Monica Cyombua Gitari and Another –Versus- Embu County Government and 3 Others [2015]eKLR** that it was not open for the County Governor to usurp the functions of the County Public Service Board to exercise disciplinary powers over county chief executive officers such as the petitioner as the power of disciplinary control over the officers was clearly vested in the Board under section 59(1) (c) of the County Governments Act, 2012. The court adds that the governor could not override such clear statutory provision by invoking general constitutional status of the chief executive officer of the county but without specific authority to impose such adverse disciplinary decision of compulsory leave and which was a measure that was strange to the petitioner's terms and conditions of service or relevant statutory constitutional provisions governing the petitioner's service.

The court has noted that in the circumstances of this case there is no vacancy in the office held by the petitioner. Thus, employment of another person in the capacity held by the applicant is a matter which has not accrued and cannot be contemplated at this stage. Thus the court will decline to grant the prayer that pending the hearing and determination of the petition, the honourable court be pleased to issue an interim order of injunction restraining the respondents from interviewing, considering, recommending, appointing and replacing by any other person, apart from the petitioner, the office of chief officer lands and water.

While the court has found merits in staying the decision on compulsory leave pending the hearing and determination of the petition, the court considers that the prayers as drafted failed to strictly seek orders pending the determination of the petition and further it has been found that one of the prayers was misconceived as there was no vacancy in the office held by the petitioner. Accordingly, each party shall

bear own costs of the application.

In conclusion the petitioner's application dated 30.06.2016 and filed on 05.07.2016 is hereby partially allowed with orders:

a) That a temporary prohibitory injunction is hereby issue restraining the respondents from interfering with the petitioner's discharge of his respective office duties with full benefits and authority and without disruption of the petitioner's employment as there shall be stay of implementation of the compulsory leave against the petitioner as communicated in the 2nd respondent's letter dated 27.06.2016 pending the hearing and determination of the petition.

b) That for avoidance of doubt and subject to order 1, the powers vested in the interested party to exercise disciplinary control over the petitioner as per section 59(1) (c) as read with section 45 (2) of the County Governments Act, 2012 are not stayed or varied in any manner pending the hearing and determination of the petition.

c) That each party to bear own costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 29th July, 2016.

BYRAM ONGAYA

JUDGE