



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**PETITION NO. 2 OF 2016**

**HUSSEIN ROBA BORU.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF ISIOLO.....1<sup>ST</sup> RESPONDENT**

**IBRAHIM WAKO.....2<sup>ND</sup> RESPONDENT**

**HON. GODANA DOYO.....3<sup>RD</sup> RESPONDENT**

**THE ISIOLO COUNTY PUBLIC SERVICE BOARD.....4<sup>TH</sup> RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 22<sup>nd</sup> July, 2016)**

**RULING**

The petitioner filed a petition on 24.05.2016 through Mithega & Kariuki Advocates. The petition was in the matter of Articles 1(1), (2), (3b) and (4b), 2, 3, 10, 19, 20, 21, 22, 23, 73, 75, 159, 174, 175, 232, 235, 251, 258, and 259 of the Constitution of Kenya, 2010; in the matter of alleged contravention of fundamental rights and freedoms under Articles 27, 28, 41, 47, and 50(1) of the Constitution; and in the matter of the purported suspension of the petitioner from the office of the chairman of Isiolo County Public Service Board. The petition was filed together with a notice of motion brought under Article 23(3) of the Constitution and section 12(3) of the Industrial Court Act, 2011. The application was supported with the petitioner's affidavit attached on the application and made prayers for orders as follows:

- 1) That the application be certified urgent and it be heard ex-parte in the first instance.
- 2) That a temporary order of injunction as well as an order of prohibition be issued restraining and prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents as well as their agents, officers, servants or employees from effecting, implementing, enforcing or in any other manner whatsoever or howsoever acting on the purported letter of suspension dated 25.04.2016 pending the inter-partes hearing of this application and thereafter pending the hearing and determination of this petition.
- 3) That a temporary order of injunction as well as an order of prohibition be issued restraining and prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents as well as their agents, officers, servants or employees or anyone acting on their behalf from preventing, restricting or in any other manner whatsoever interfering with the petitioner in his performance, discharge, undertakings and execution of his duties as the chairperson of the 4<sup>th</sup> respondent, pending the hearing of the application and thereafter pending the hearing and determination of the petition.

4) That a temporary order of injunction as well as an order of prohibition be issued restraining and prohibiting the 4<sup>th</sup> respondent from undertaking any new recruitments, transfers, promotions and creating new offices within the public service of the 1<sup>st</sup> respondent, pending the inter-partes hearing of this application and thereafter pending the hearing and determination of the petition.

5) That the officer in charge (O.C.S) Isiolo Police station be ordered to ensure compliance with court orders issued herein.

6) That costs of the application be provided for.

To support the application, it was submitted for the petitioner as follows:

1) The 2<sup>nd</sup> respondent has served the petitioner or applicant with a suspension letter dated 25.04.2016 purporting to suspend the petitioner from the office held by the petitioner, the office of chairman, Isiolo County Public Service Board.

2) The 2<sup>nd</sup> or 3<sup>rd</sup> respondent has no constitutional or statutory powers to exercise disciplinary control or take any disciplinary action against the petitioner.

3) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have acted with impunity in view of the earlier judgment by the court in petition 11 of 2015 between the parties and where the court set out the parties' rights and obligations and the legal position on matters similar to the current dispute.

4) That the present suspension is calculated scheme by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to hound the petitioner out of office without following due process.

5) The unlawful suspension of the petitioner from office is aimed at paving way for validation of irregular recruitments undertaken by the 4<sup>th</sup> respondent while the petitioner was out of the office challenging the earlier suspension in the said petition 11 of 2015.

6) That the application is merited and should be allowed.

The respondents opposed the application by filing on 30.06.2016 the replying affidavit of Dika Bilala a member of the 4<sup>th</sup> respondent; the replying affidavit of Safia Sheikh Adan the vice chairperson of the 4<sup>th</sup> respondent; Farida Mohamud a member of the 4<sup>th</sup> respondent; Aloise Naitira a member of the 4<sup>th</sup> respondent; and Kuno Abgudo a member of the 4<sup>th</sup> respondent. The respondents also filed on 30.06.2016 the grounds of opposition through Kithi & Company Advocates. The grounds of opposition were as follows:

1) The petitioner's application dated 24.05.2016 was bad in law, incompetent, misconceived and an abuse of the process of the court.

2) The application and petition offended the provisions of section 133 of the County Governments Act, 2012 which confers the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from personal civil liability for an act, matter or thing done or omitted in good faith in the execution of a duty or under direction in view of their held public or state office.

3) The application was fatally defective and no cause of action can be sustained as against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by the petitioner.

The respondents prayed that the application should therefore be dismissed with costs.

The **1<sup>st</sup> issue** for determination is whether in view of section 133 of the County Governments Act, 2012 the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not proper parties to the suit and they should be struck off as parties to the

suit as was submitted for the respondents. First, the grounds in support of the application as stated earlier in this ruling make specific reference to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. At paragraph 6 of the supporting affidavit the petitioner says that he had been performing duties of the office of the chairperson of the 4<sup>th</sup> respondent albeit with interferences and sabotage by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. At paragraph 7 of the affidavit the petitioner states that the 2<sup>nd</sup> respondent in preparation of ground for dirty schemes and machinations removed two staff members from the offices of the 4<sup>th</sup> respondent. At paragraphs 9 and 10 the petitioner states in the affidavit that the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents deployed one Halima Liban to his office to spy on him after the petitioner complained about the irregular removal of the two staff members from his office. The petitioner has stated that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents then improperly deployed further persons to the 4<sup>th</sup> respondent's offices and incited members of the 4<sup>th</sup> respondent to boycott board meetings to frustrate the functioning of the 4<sup>th</sup> respondent. One such irregular deployment to the 4<sup>th</sup> respondent's offices was one Asnino Ali Dabaso who previously worked at the 3<sup>rd</sup> respondent's house. The petitioner states that the said Asnino Ali Dabaso is the complainant in a criminal case in which the petitioner says he was arraigned in court on a false and malicious charge of assault causing actual bodily harm. Subsequently the petitioner states that he received the suspension letter dated 25.04.2016 by the 2<sup>nd</sup> respondent being upon the grounds of the pending criminal case and that five members of the 4<sup>th</sup> respondent had made grievous and damaging allegations of the petitioner's inability and refusal to cooperate with other members of the 4<sup>th</sup> respondent and that the petitioner had mistreated and disrespected junior members of the 4<sup>th</sup> respondent's secretariat.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not filed their respective affidavits to rebut the petitioner's case against them. It is the petitioner's case that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have engaged in irregular and illegal actions towards frustrating his performance as the chairman of the 4<sup>th</sup> respondent.

At this interlocutory stage, the court returns that taking into account the material on record, the petitioner cannot be said to lack a reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their private capacity in civil liability. It is clear that the facts of the petitioner's case disclose circumstances which when not rebutted at the full hearing of the petition, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent may not afford themselves the immunity under the said section 133 of the Act because the section would only apply if the act, matter or thing done or omitted to be done by the 2<sup>nd</sup> or 3<sup>rd</sup> respondent was done or omitted in good faith in execution of a duty or under direction. In the opinion of the court that is a matter to be determined at full hearing and taking into account the petitioner's case as pleaded, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are proper parties to the suit because a reasonable cause of action has so far been disclosed against them.

The **2<sup>nd</sup> issue** for determination is whether the petitioner is entitled to the orders as prayed for. The suspension letter is dated 25.04.2016 and in paragraph 2 it states thus, **“ As the County Secretary and the Head of Public Service Board of Isiolo County Government as per section 56 (2) of the County Governments Act, 2012 and pursuant to Regulation 2 (b) of the Public Service Commission and County Assembly Boards on Discipline of seconded office to the county Governments, you are hereby suspended from the office of the Chairman of the County Public Service Board pending the hearing and determination of the Criminal Case No. 189 of 126 as per the provisions of section 76(6) of the County Governments Act, 2012.”**

The court has carefully considered the quoted substance of the suspension decision. The court makes the following pertinent findings.

**First**, the county secretary purports to be the head of the County Public Service Board pursuant to provisions of section 56 (2) of the County Governments Act, 2012. The section provides that the county public service shall be headed by a county secretary appointed under section 44 of the Act. Section 2 of the Act states that **“county public service”** means the collectivity of all individuals performing functions within any department of the county government or its agency but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly.

The court finds that the public service board is an agency of the county government performing functions on behalf of the county government pursuant to section 59 of the Act. The court further finds that section 56 (2) of the Act does not vest in the county secretary any powers of disciplinary control over the chairperson and other members of the County Public Service Board. Under section 2 of the Act, **“disciplinary control”** means the imposition of any punishment against a public officer on account of breach of a code of conduct. As head of the county public service the county secretary can perform duties and exercise authority as expressly vested in him by legislation and must not purport to do anything which by legislative provision is vested in another office, person or body. Section 58(5) is clear on the manner of removing any member of the Board from office and the court holds that the provision is the only and exclusive manner of the disciplinary control of the members of the board including the chairperson. The court finds that the county secretary is not the head of the county public service board but as the head of the county public service he must operate within the law without undermining the lawfully established institutions such as the board. The court returns that to that extent, the suspension letter was founded upon a misdirection and misconception by the county secretary.

**Second**, it is clear that the **“Regulation 2 (b) of the Public Service Commission and County Assembly Boards on Discipline of seconded office to the county Governments”** applied only to officers seconded to the county government by the national government and the petitioner was not one such officer and the regulations could not validly be invoked against the petitioner.

**Third**, in view of the foregoing findings the court returns that the petitioner has demonstrated that he has a prima facie case with a likelihood of success and if the orders are not granted, then he will suffer irreparable prejudice of being kept away from the office of the chairman of the board in circumstances whereby the suspension is prima facie, illegal. While making that finding the court further upholds its opinion in 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 suspension letter was issued without authority or legal basis and on that basis, the prima facie case as established by the petitioner has a high likelihood of success.

**Fourth**, the court has considered the wide ranging allegations made against the petitioner in the replying affidavits together with the pending criminal case. It is constitutionally understandable that as relates to the criminal case, the petitioner is innocent until otherwise established. As relates to all the wide ranging allegations, the court’s opinion is that in absence of any other material, the legitimate procedure for imposing a disciplinary measure against the respondent is by invoking section 58(5) of the County Government Act, 2012 on removal of the members of the county public service board.

**Finally**, the court draws the attention of the members of the 4<sup>th</sup> respondent to provisions of section 57 of the County Governments Act, 2012. The section confers the board with an autonomous legal personality as a body corporate with perpetual succession and a seal; and with capacity of suing and being sued in its corporate name. As a body corporate, the members are the true building blocks of the board; they are the mind, body, heart and spirit of the board. By that establishment the board is carefully designed to perform human resource functions on behalf of the county government as per section 59 of the Act but with such autonomy as a body corporate independent of the county government it serves. The court holds that the board is the master and captain of its own decisions; it is held accountable for its own decisions. In that way, the court considers that the members of the 4<sup>th</sup> respondent must now wake up to their crucial statutory calling and mandate towards discharging its functions in accordance with the constitutional and

statutory provisions within the idea of the servants of the people as per the clear provisions of Chapter six of the Constitution. The members must now move away from their divided past as elaborated in their respective affidavits and come together to work as a team in the best interests of the County of Isiolo.

The court now advises and directs the members of the 4<sup>th</sup> respondent to forthwith revisit the provisions of the said chapter six of the Constitution and to file in court, pending the hearing and determination of the petition, measures taken on their part towards performance of their statutory functions in compliance with the provisions of the chapter. Such measures should include resolutions on procedures the 4<sup>th</sup> respondent will apply in the discharge of its functions such as venue of meetings, sittings, decision making procedures, frequency of meetings, convening of meetings, conveying of decisions, channels of communication with national government and its agencies, county executive and county assembly, role and procedures of the secretariat, committee systems, and such other matters as are necessary to achieve good corporate governance of the 4<sup>th</sup> respondent. In view of that advisory and direction by the court, prayers 4 and 5 in the notice of motion will be declined in the interests of sound and unbroken public service delivery by the members of the 4<sup>th</sup> respondent and to put in place such measures in their own voluntary desire to serve in accordance with the law as it is their statutory and constitutional responsibility to do so and to comply accordingly.

In conclusion, the petitioner's application filed and dated on 24.05.2016 is hereby allowed with orders as follows:

- 1) There is hereby issued the temporary order of injunction as well as an order of prohibition restraining and prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents as well as their agents, officers, servants or employees from effecting, implementing, enforcing or in any other manner whatsoever or howsoever acting on the purported letter of suspension dated 25.04.2016 pending the hearing and determination of this petition as the operation of the letter is hereby stayed pending determination of the petition.
- 2) There is hereby issued the temporary order of injunction as well as an order of prohibition, restraining and prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents as well as their agents, officers, servants or employees or anyone acting on their behalf from preventing, restricting or in any other manner whatsoever interfering with the petitioner in his performance, discharge, undertakings and execution of his duties as the chairperson of the 4<sup>th</sup> respondent, pending the hearing and determination of the petition.
- 3) That pending the hearing and determination of the petition, the members of the 4<sup>th</sup> respondent are hereby directed to file and serve not later than 01.09.2016, a memorandum of resolutions signed by each and every member of the 4<sup>th</sup> respondent on measures of good corporate governance put in place by the 4<sup>th</sup> respondent's members to serve the people of the County of Isiolo as a team in accordance with the provisions of Chapter six of the Constitution of Kenya, 2010 and in view of the provisions of sections 57, 56, and 59 of the County Governments Act, 2012 and the conventional principles of good corporate governance.
- 4) The respondents to jointly or severally pay the costs of the application.
- 5) The parties are invited to take directions on the further steps towards the hearing and determination of the main petition.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 22<sup>nd</sup> July, 2016.**

**BYRAM ONGAYA**

**JUDGE**