



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

KISUMU

PETITION NO. 12 OF 2016

**IN THE MATTER OF: ARTICLES 1,10(2),20(1),27(1),28,41(1),47(2),50(1),165,200,236 & 258 OF
THE CONSTITUTION**

AND

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT OF THE FUNDAMENTAL
RIGHTS OF THE PETITIONER**

AND

IN THE MATTER OF: SECTION 31 OF THE COUNTY

GOVERNMENT ACT, NO. 17 OF 2012

AND

IN THE MATTER OF: THE INDUSTRIAL COURT ACT,

AND

IN THE MATTER OF: SECTIONS 41(2) & 49 OF THE

EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: COUNTY GOVERNMENT OF SIAYA

AND

**IN THE MATTER OF: THE EXECUTIVE COMMITTEE MEMBER, AGRICULTURE,
LIVESTOCK & FISHERIES**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS &
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

PHILGONA ATIENO OOKOPETITIONER

AND

HIS EXCELLENCY THE GOVERNOR, SIAYA COUNTY.....1ST RESPONDENT

THE COUNTY SECRETARY, SIAYA COUNTY2ND RESPONDENT

THE COUNTY GOVERNMENT OF SIAYA3RD RESPONDENT

THE HON. SPEAKER, SIAYA COUNTY ASSEMBLY.....4TH RESPONDENT

COUNTY ASSEMBLY OF SIAYA5TH RESPONDENT

RULING

1. Philgona Atieno Ooko (Petitioner) was appointed by the Governor, County Government of Siaya (1st Respondent) as County Executive Member for Agriculture, Livestock and Fisheries with effect from 22 November 2013. The appointment was for 5 years (to last during the term of the Governor in office).

2. The 1st Respondent through a letter dated 29 March 2016 informed the Petitioner that she was being relieved of her duties with immediate effect, and that she would be paid *one month gross pay in lieu of notice as stipulated under section 36 of the Employment Act, 2007 and gratuity for the months worked in accordance with Section 35(5) of the Employment Act, 2007.*

3. The Petitioner was aggrieved with the action of the Governor and on 7 April 2016 she lodged a Petition before this Court in Kisumu alleging violation of her constitutional rights.

4. At the same time, she lodged a motion under certificate of urgency seeking several conservatory orders pending the hearing and determination of the Petition (the orders sought in the motion were quite verbose in deed, and appeared to be duplicitous).

5. Because the Presiding Judge in Kisumu was on leave, the motion was placed before the Deputy Registrar, Kisumu and she directed that the file be placed before Court in Nakuru (it was stated from the bar that the Judge in Kericho was also not available).

6. When the motion was placed before me on the same day, I granted orders 1,2,3,4 and 5 as sought in the motion and set the motion for *inters partes* hearing on 25 April 2016 (the orders were interim in nature to preserve the Petitioner in office pending *inter partes* hearing).

7. While granting the orders, I also disclosed that I am known to one of the parties (parties agreed that I proceed to hear and determine the motion).

8. The motion was served upon the Respondents and the firm of Otieno Ogola & Co. Advocates filed a Notice of Appointment on behalf of the 1st, 2nd and 3rd Respondents.

9. The Acting County Secretary of the 3rd Respondent filed a Replying Affidavit on behalf of the 1st, 2nd and 3rd Respondents on 22 April 2016. The 4th and 5th Respondents did not file any papers.

10. The motion was taken as scheduled on 25 April 2016, and ruling was reserved for 9 September 2016, the long interlude was due to the fact that I was proceeding on leave for 2 months.

11. However, during the break, I managed to conclude the pending judgments and rulings hence the

decision to bring forward the delivery of this ruling.

12. At the outset, the Court notes that the orders sought in the motion are similar to the prayers outlined in the Petition and that the facts are the same on the part of the Petitioner.

13. In this respect, the Court must caution itself not to delve too much on the facts and issues as there is a danger of encroaching on the discretion of the ultimate trial Court.

14. The primary statute governing the appointment and terms and conditions of County Executive Committee members is the County Governments Act and not the Employment Act, 2007. The Employment Act, 2007 would come into play where there are voids in the County Governments Act.

15. On the same note, the Constitution of Kenya 2010 has extended certain protections to public officers and some of the protections include *right to fair labour practices* (Article 41(1) of the Constitution); *right to fair administrative action* (Article 47 of the Constitution) and *observance of due process before removal from office* (Article 236(b) of the Constitution).

16. The Court has keenly and severally gone through the Replying Affidavit by the Acting County Secretary of the 3rd Respondent and the termination letter by the Governor and has not been able to discern whether any process which would amount to a fair labour practice was followed, or suggesting that due process was observed by the 1st Respondent.

17. The Court has already indicated that at this stage of the proceedings, it must tread with caution as it has not heard the main dispute on the merits but in the same vein, the Court is satisfied that the Petitioner has satisfied the test for grant of orders 7, 8, 9 and 10 as sought in the motion filed in Court on 7 April 2016, but as amended hereunder in light of the verbose nature of orders in the motion.

18. In arriving at the resolution of the motion, the Court has kept in mind the holdings by the Court of Appeal in *County Government of Nyeri & Ar v Cecilia Wangechi Ndungu* (2015) eKLR and *Narok County Government & Ar v Richard Bwogo Birir & Ar* (2015) eKLR, where the Court addressed the question of removal from office of a County Executive Committee member.

19. The Court has also kept at the back of its mind the test set out by the Supreme Court for grant of conservatory orders in *Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others* (2014) eKLR that

‘Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable’ harm occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

20. The Respondents have an obligation to respect, uphold and defend the Constitution and the national values set therein.

Conclusion and Orders

21. The upshot of the above is that the Court orders that

(a) A Conservatory order is granted restraining and or prohibiting the 1st Respondent from terminating the service of the Petitioner/Applicant as the Executive Committee Member, Agriculture, Livestock and Fisheries, County Government of Siaya pending the hearing and determination of the Petition herein.

(b) A conservatory order is granted protecting, preserving and or conserving the status of the Petitioner/Applicant as the Executive Committee Member for Agriculture, Livestock and Fisheries, County Government of Siaya pending the hearing and determination of the Petition herein.

(c) An order of injunction is granted prohibiting and or restraining the 1st Respondent from appointing, proposing and or constituting any other person as the Executive Committee Member for Agriculture, Livestock and Fisheries, County Government of Siaya pending the hearing and determination of the Petition herein.

22. And to enable the expeditious determination of the Petition, the Court directs that

(a) The Respondents file and serve an Answer to Petition and any other appropriate process before 29 July 2016.

(b) The Petitioner files and serves any reply thereto and written submissions before 12 August 2016.

(c) The Respondent files and serves their written submissions before 26 August 2016.

(d) The submissions to be highlighted on a date convenient to the Court and parties.

23. Costs in the Cause.

Delivered, dated and signed in Nakuru on this 15th day of July 2016.

Radido Stephen

Judge

Appearances

For Petitioner - Mr. Oguttu Mboya instructed by Oguttu- Mboya & Co. Advocates

For 1st, 2nd & 3rd Respondents - Mr. Orwenjo instructed by Otieno Ogola & Co. Advocates

Court Assistant - Nixon