



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW NO. 4 OF 2016

IN THE MATTER OF: AN APPLICATION BY HON. EVANS ONDIEKI TO APPLY TO THE HIGH COURT FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

IN THE MATTER OF: THE SECTION 8 AND 9 OF THE LAW REFORM ACT, (CAP 26) LAWS OF KENYA

IN THE MATTER OF: THE LABOUR RELATIONS ACT, (NO 14 OF 2007) LAWS OF KENYA

IN THE MATTER OF: THE CONSTITUION OF KENYA ARTICLE 10,19,21,22,23,25,26,27,28,47,73,75,159,165,230,232,236,OF THE CONSTITUION OF KENYA

AND

IN THE MATTER OF: LEGAL NOTICE NO 6 OF 2006

BETWEEN

REPUBLICAPPLICANT

VERSUS

HON EVANS ODHIAMBO KIDERO

(GOVERNOR NAIROBI COUNTY).....1ST RESPONDENT

NAIROBI CITY COUNTY2ND RESPONDENT

VERSUS

EX-PARTE.....HON EVANS ONDIEKI

JUDGMENT

1. Pursuant to the leave of court granted to the ex-parte applicant on 2nd February 2016, the ex-parte applicant filed a substantive notice of motion on 4th February 2016 seeking for orders that:

- i. This application be certified as urgent and be heard ex-parte in the first instance

ii. Leave be granted to the ex-parte applicant to apply for an order of Certiorari to remove to this Court and quash the decision of the 1st respondent to dismiss the ex-parte Applicant from Nairobi City County as County Executive Committee Member in charge of Environment, Water, Energy, Forestry and Natural Resources made on 26th January 2016.

iii. Leave be granted to the ex-parte applicant to apply for an order of Mandamus to compel the 1st respondent to restore and/or reinstate the applicant to his position as County Executive Committee Member in charge of Water, Energy, Forestry, Environment and Natural Resources.

iv. Leave be granted to the ex-parte applicant to apply for an order of prohibition to stop and/or restrain the 1st Respondent from appointing any other person to the post of county executive committee member in charge of water, energy, forestry, environment and natural resources until this matter is adjudicated.

2. The application is based upon the grounds set out in the statutory statement and verifying affidavit of Hon. Evans Ondieki in support of the application for leave and the submissions and list of authorities filed before court.

3. The application is opposed vide the replying affidavit of the 1st and 2nd respondents filed on 23rd February 2016 which is undated and not sworn by the intended deponent Hon. Dr. Evans Kidero.

4. At the time of the hearing, the ex-parte applicant informed the court that he has abandoned prayers 2 and 3 of the notice of motion because the orders sought have been overtaken by events, in that the position previously held by the ex-parte applicant being that of county executive committee member in charge of environment, water, energy, forestry and natural resources had already been filled by another person. In the circumstances, it would not be possible to reinstate ex-parte applicant to the position nor is it practical to stop and / or restrain the 1st respondent from substantively appointing a replacement of the ex-parte applicant.

5. The issues for determination therefore are;

i. Whether, an order of a certiorari to remove to this court and quash the decision of the 1st respondent to dismiss the ex-parte applicant from Nairobi city county as county executive committee member in charge of environment, water, energy, forestry and national resources made on 26th January, 2016, should issue; and

ii. Whether an order for;

a. Compensation for damage suffered

b. Payment of CBA loan of Kshs 2 million

c. Car loan

d. Housing loan and

e. Gratuity should be granted to the ex-parte applicant

Brief facts of the case

6. On 24th January 2016, the Claimant attended a church function with the former Cabinet Secretary Anne Waiguru at Liberty Christian Centre South B. The prayers were conducted by Bishop Kepha Omae. The 1st respondent was unhappy with the meeting and raised the issues during a special county cabinet meeting on 26th January 2016. Thereafter the ex-parte applicant received a dismissal letter dated 26th

January 2016.

7. The Claimant states that he was not charged with any misconduct or work related offence prior to the dismissal nor was he given a letter or notice to show cause why he should not be summarily dismissed from employment. That the dismissal was not preceded with any notice nor was any disciplinary hearing held to give the ex-parte applicant an opportunity to explain himself regarding any reasons given for the intended dismissal.

8. That the decision to dismiss him was informed by emotions other than reason. The decision was therefore unreasonable arbitrary and malicious and therefore illegal null and void. The respondents on the other hand state that the dismissal of the ex-parte applicant was appropriate in that several complaints had been made against the ex-parte applicant with regard to waste management and disposal including the management of the designated dumpsite within the city. That the ex-parte applicant made not the slightest effort to attend to the complaints and when questioned about the complaints, he cited politics as being behind his being put to task to deliver.

9. That the city remained in dire want of waste management and disposal, a matter within public knowledge. This drove the office of the governor to the wall hence the decision to dismiss the ex-parte applicant summarily. That no due process was followed because none was required under the law and the governor was not obliged to give the ex-parte applicant notice of dismissal, any notice to show cause, any hearing or any reason for the decision to dismiss him because the ex-parte applicant was a political appointee and was lawfully removed from officer under section 31 (a) of the County Government Act No. 17 of 2012.

10. These facts by the respondents are not supported by any sworn affidavit or any oral and documentary evidence the respondent having filed undrafted, unsigned and unsworn replying affidavit.

Submissions by the Claimant

11. The applicant submits that Article 10 of the Constitution enjoins all state officers, state organs and all individuals to respect, fulfil, promote and preserve the principle and values of constitutionalism. That the Article is binding on all state officers including the 1st respondent, the Governor of Nairobi City. In this respect, the 1st respondent is enjoined by Article 47 (1) to carry out administrative action that is;

- a. Expeditious
- b. Efficient
- c. Lawful
- d. Reasonable and
- e. Procedurally fair

12. That the actions by the 1st respondent violates all the five procedural requirements in Article 47(1) rendering the decision invalid under Article 2 (4) of the constitution. Furthermore the claimant submits that Article 47(2) obliges the respondent to give reasons where an administrative action is likely to affect a person adversely. That no reasons were given for the summary removal of the applicant from office without following any due process.

13. That the applicant had legitimate expectation arising from Articles 10, 47 and 236 of the constitution that the respondents would follow the law, due process and constitutionalism in the discharge of their duties. The claimant submits that the action by the respondents was arbitrary, unreasonable unprocedural and illegal rendering the action invalid. That Section 4(3) of the Fair Administrative Act, 2015 provides that where an administrative action is likely to have adverse effects on any person, the administrator is obliged to give reasons and;

- a. Adequate notice on the nature and reasons of the administrative action
- b. An opportunity to be heard and make presentations
- c. A statement of reasons
- d. Information, materials and evidence to be relied on in making the decision

14. That the respondents never adhered to this elaborate procedure which is well established. For these reasons, the applicant prays that the application be allowed with costs.

Submissions by the Respondents

15. The counsel for the respondent in their very able submissions rely on the decision in **ELRC Cause 103 of 2014 Tom Luusa Munyasa & Another Vs Governor Makueni County & Another [2014] eKLR** in which the court held that removal of a County Executive Committee member is a political process which is not subjected to the Employment Act 2007 in the following terms;

“The two processes are political processes which cannot be challenged under the unfair termination law contained in the Employment Act 2007 and other Labour Legislations, which extended jurisdiction to the Industrial Court. The constitution itself does not contemplate that cabinet secretaries who are removed from office by the president under Article 52, 53 could sue the president disputing their removal”.

16. The counsel for the respondent further submitted that Section 31(a) of the County Government Act No 17 of 2013 gives the Governor the powers to dismiss a county executive committee member at any time without giving any reasons for the dismissal therein so long as he deems it necessary and appropriate to do so. That indeed, the members of the county executive committee serve at the pleasure of the Governor and that this power is exercised reasonably and not arbitrarily and when it is necessary or appropriate.

17. That whereas section 40 of the County Government Act provides for the reasons which may necessitate the dismissal of a county executive committee member, the section does not mandate the Governor to inform the dismissed member the reason for the dismissal. The counsel for the respondent further submitted that the conduct of Evans Ondieki made the office of the Governor lose confidence in him as a county committee executive member as he seemed totally disinterested in following up with the complaints that were made in relation to his department. That when questioned the officer became extremely rude and severed the working relationship that he had with the office of the governor making the office of the governor lose confidence in him in entirety and thus necessitating his dismissal therein.

18. That the applicant having been appointed by the Governor was directly answerable to the governor individually and to the residents of Nairobi collectively. That the moment the Governor felt that he was no longer answerable to him and to the complaints of the residents of Nairobi then his occupation of the office became untenable. That in **Nyeri Civil Appeal 2 of 2015, County Government of Nyeri & Another Vs Cecilia Wangechi Ndungu [2015] eKLR** the Court of Appeal held;

“As demonstrated herein above, the extent to which due process is applicable in a case such as this depends on the express and implied limitations by statute and the circumstances of the case. There are certain circumstances a Governor may lose confidence in a member of a county executive committee and due to the sensitivity and/or urgency of the matter at hand the Governor may dismiss the member without giving notice of his intention to do so. Further section 31(a) of the County Governors Act does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he can only dismiss if he considers it appropriate or necessary”.

19. The facts leading to the dismissal of the applicant are of course in contention, the applicant stating that he had provided exemplary service to the City of Nairobi and there was no record of complaint

whatsoever from the office of the governor to him regarding the discharge of his duties. The applicant attributed his dismissal to only one single incident on a Sunday morning when he attended a church service in the company of a perceived future competitor of the governor and a former cabinet secretary Mrs Ann Waiguru. The applicant attributes his summary dismissal to emotions, disregard of the law and therefore arbitrary conduct by the Governor.

20. In this regard the court was referred to the case of **Tom Luusa (supra)** where the court stated;

“This court is of the view that members of the executive at both national and county levels are political appointees whose assumption of tenure and removal from office hangs on the political mandate granted to the appointing authorities by the people. The President and the Governor have the prerogative in dismissing the members of the executive whenever they deem it appropriate or necessary to do so county executive committee member similarly cannot validly challenge the decision of the Governor to remove them under section 31(a) of the County Government Act 2012. The President and the Governor retain the prerogative. The pleasure doctrine has been preserved with respect to these special categories of Employees”.

21. For these reasons, the counsel for the respondents submitted that the remedies sought by the applicant are not available to him since a state officer cannot be reinstated to his position as provided for in the Employment Act 2007 and nor can the state officer be compensated for unfair termination of employment through the Employment Act of 2007. Furthermore, the relief sought to have the county pay the Loans granted to the applicant by the parties in addition to any damages is laughable to say the least. That the applicant took the loans for his own benefit irrespective of whether the Governor was his guarantor and cannot be converted to be a county debt. In this regard the court was referred to **cause 588 of 2010 Isaac Simiyu –Vs- Security Group (K) Limited & Another [2013] eKLR** where the court held that there was no basis for a former employer to pay an employee’s loan where the employee took the loan for his own benefit. That the entire application be dismissed with costs.

Determination

22. It is not in dispute that the ex-parte applicant is a state officer within the meaning of Article 260 of the Constitution. The Article provides;

“public officer” means

(a) Any state officer; or

(b) Any person other than a state officer who holds a public office;

“Public office” means an office in the national government, a County Government or the Public Service if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by parliament”.

23. It is not in dispute therefore that the ex-parte applicant was a public officer within the meaning of Article 236 of the constitution which provides.

“[236] A public officer shall not be-

(a) Victimized or discriminated against for having performed the functions of office in accordance with the Constitution or any other Law; or

(b) Be dismissed, removed from office demoted in rank or otherwise subjected to disciplinary action without due process of Law”

24. The exparte applicant was appointed as the county executive member of water, energy, forestry and natural resources pursuant to the provisions of Article 179 of the Constitution of Kenya 2010, Section 45

of the County Government Act 2015 and the County Standing Orders No 18564 of the Assembly and the Public Appointment (parliamentary approval) Act, 2011.

25. Having considered the competing submissions by the parties, the court defers to the decision of the court of appeal in **Cecilia Wangechi Ndungu case (supra)** when it stated;

“a Governor ought to exercise his power to dismiss a member of a county executive committee under section 31(a) of the County Government Act reasonably and for the public good”.

26. The Court of Appeal went on to find,

“We are of the considered view that the Employment Act does not apply to state officers. A state officer’s terms and conditions of service are regulated by the Constitution or the relevant statute principles of fair administrative action and rules of natural justice”.

27. The suit by the applicant is founded on section 8 and 9 of the Law Reform Act Cap 26 laws of Kenya and Article 10, 19, 21, 22, 23, 25, 26, 27, 28, 47, 73, 75, 159, 165, 230 and 236 of the constitution of Kenya, 2010. The exparte applicant does not rely on the Employment Act 2007 and to this extent this suit is distinguishable from the findings of the Court of Appeal aforesaid. The applicant challenges what he considers unreasonable and unconstitutional conduct by the Governor in dismissing him in his position and this court has jurisdiction over the matter by dint of Article 162 (2) (a) of the Constitution of Kenya 2010 and Section 12 of the Employment and Labour Relations Court Act No 20 of 2011 as amended by Misc Amendment Act 2014.

28. The fact of the matter is that the applicant was a state officer within the meaning of the constitution. It is also clear that a state officer is a public officer within the meaning of Article 236 of the Constitution and therefore an employer of a state officer is enjoined by the constitution not to dismiss, remove from office, demote in rank or otherwise subject to disciplinary action, the officer without due process of law. (emphasis mine). The provision of section 31(a) of the County Government Act 2012 is subservient to Article 236 (a) and (b) of the constitution of Kenya 2010. The Section must be read not to exclude application of due process of the law by the Governor in removing a county executive member from his office.

29. Furthermore the Fair Administrative Act 2015 is applicable to this matter. In this regard, Section 4(2) of the Act enjoins the employer to observe and uphold the rights of other persons by giving written reasons for any administrative action against whom an adverse administrative action is made. Section 4(3) also requires that notice of the intended administrative action, opportunity to be heard, statement of reasons and information and materials relied upon in indicting the targeted officer be provided.

30. For emphasis section 31 of the County Government Act states;

“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.....”*

31. This is without a doubt a short cut procedure given to the Governor to expediently remove a county executive committee member notwithstanding the rigorous procedure provided under section 40 of the Act under which participation of the county assembly is necessary in the removal of a county executive committee member. The Court of Appeal in **Cecilia Wangechi Ndungu case (supra)** upon evaluating various authorities on the pleasure doctrine concluded;

“the evolution of the doctrine of pleasure has been on the basis of firstly putting to an end arbitrary action by a public authority and secondly ensuing that such power is exercised reasonably and for the public good”.

32. In **David Dunsmuir –Vs- New Brunswick (2008) 1 S,C,R, 190**, the **Supreme Court of Canada** expressed itself as follows:-

“28. By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision making powers have legal limits derived from the enabling statute itself, the common law or civil law or the constitution”.

33. After a lengthy analysis of case law and various constitutional provisions, the Court of Appeal in **Cecilia Wangechi Ndungu case (supra)** held;

“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 or capriciously”.

34. Exercise of reasonableness was therefore found to be an essential ingredient of the action by the Governor. In **Dunsmuir –Vs- New Brunswick (supra)** the **Supreme Court of Canada** while discussing reasonableness observed:-

“[47] Reasonableness is a deferential standard animated by the principle that underlines the development of the two previous standards of reasonableness. Certain questions that come before administrative tribunals do not lend themselves to one specific particular result. Instead they may give rise to a number of possible reasonable conclusions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable referring both to the process of articulating the reasons and to outcome. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law”

35. The Court of appeal in **Wangechi case** therefore went on to say in view of the above expose,

“.....by virtue of the fact that a Governor ought to exercise his powers for the public good, he should not act on selfish motives but for the benefit of his/her county. We find that the reason for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently the power to dismiss a member of the county executive is qualified to the extent that the same ought to be for the benefit of the county and in accordance to the principles of devolution”.

36. In the present case the applicant has shown on a balance of probability that;

- a. No charge of misconduct, negligence or non-performance had been laid against him by the Governor prior to the summary removal from office or during his tenure in office.
- b. No reasons for the summary removal were given to the applicant before or after the removal.
- c. That only after this matter came to court were allegations of poor work performance made against the applicant in the replying affidavit which in any event was not sworn and could therefore not constitute evidence before court.
- d. That the applicant heard about these allegations of poor work performance against him for the first time in court.
- e. That the real reason the applicant was removed from office summarily was his perceived association with the former cabinet secretary Ann Waiguru after attending a church service on a Sunday in which the former cabinet secretary expressed a desire to vie for the seat of Governor.

37. In the court's considered view, on the facts of this case, the decision by the Governor was not for the good of the county and the process leading to the removal was not transparent. No reasons for the decision were provided to the applicant before or immediately after the removal. There is no evidence to show that the decision to remove the applicant was for the public good or the benefit of the county. Quite to the contrary, the removal points to arbitrary, capricious and unreasonable conduct by the Governor in attributing ill motive to the church service in which the applicant and former cabinet secretary Ann Waiguru attended.

38. No documentary evidence that remotely points to poor work performance by the applicant has been produced by the respondent in court. One can only assume none existed at all in absence of any evidence to the contrary. Article 236 of the Constitution cannot be allowed to remain as if it did not exist. In the court's view, the pleasure doctrine in Kenya must be exercised not only within the four corners of the enabling statutes but must also meet constitutional threshold articulated in all the relevant provisions of the Constitution of Kenya 2010.

39. In the final analysis, the application by Hon. Evans Ondieki succeeds and the court makes the following orders:-

- i. An order of certiorari is issued to remove to this court and quash the decision of the 1st respondent to dismiss the ex-parte applicant from Nairobi City County as County executive committee member in charge of environment, water, energy, forestry and natural resources made on 26th January 2016.
- ii. In view of the fact that the position of county executive committee member in charge of environment, water, energy, forestry and natural resources has been filled and the applicant in his submissions in court expressed desire not to be reinstated to the position, the court orders compensation to the applicant equivalent to full gross salary, less taxation, for the unserved term of the contract between the applicant and the 1st respondent.
- iii. That the applicant be paid gratuity at the rate specified in the contract in respect of the served term of the contract
- iv. That the respondent computes the award and file the same in court for consideration within 30 days of this judgement.
- v. That the computed award be paid with interest at court rates from date of this judgement till payment in full.
- vi. That costs follow the outcome.

Dated and Delivered at Nairobi this 5th day of August, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE