



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 122 OF 2015

CECILIA WANGECHI NDUNG’UCLAIMANT

-VERSUS-

THE COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

THE GOVERNOR NYERI COUNTY.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd September, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 21.07.2015 through Ng’ang’a Munene & Company Advocates. The claimant prayed for judgment against the respondents for:

1. Kshs.9,310,914.90 being lost future earnings for unexpired term of the contractual five years of service.
2. Costs of the suit and interest at court rates.
3. Any other or further relief this honourable court may find fit and just.

The response to the claim was filed for the respondents on 19.10.2015 through Wahome Gikonyo & Company Advocates. The respondents prayed that the suit be dismissed with costs.

The parties to this suit were also the petitioner and respondents respectively in Petition No. 1 of 2014 at Nyeri, **Cecilia Wangechi Ndungu –Versus- The County Government of Nyeri [2014]eKLR**. In the judgment delivered by this court on 05.12.2014, judgment was entered for the petitioner, now the claimant in the present suit, against the respondents for:

- a) **The declaration that the act of the 2nd respondent in relieving the petitioner of her duties is a breach of the petitioner’s constitutional rights under Article 27(1) (2) and (3), 28, 41 & 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.**
- b) **The order of judicial review of certiorari is hereby issued to remove into the honourable court for quashing the decision of the 2nd respondent relieving the petitioner of her duties as the county executive in charge of culture, gender and social development and as conveyed by each and every letter issued by the 2nd respondent and addressed to the petitioner on 24.06.2014 including the one erroneously dated 24.06.2013.**

c) The petitioner is entitled to remain in the service of the respondents and to be allowed by the respondents to continue in the respondents' service forthwith as the Nyeri County Executive Member in charge of culture, gender and social development, and to perform the attached duties in accordance with the relevant provisions of the Constitution, statutes or as lawfully assigned, unless the petitioner otherwise lawfully ceases to hold the office.

d) The respondents to pay costs of the suit.

That judgment was upheld by the Court of Appeal in Civil Appeal No. 2 of 2015 at Nyeri, **The County Government of Nyeri and Another –Versus- Cecilia Wangechi Ndungu [2015]eKLR.**

The claimant's case is that subsequent to the judgment in the said Civil Appeal No.2 of 2015, the defendants immediately scrapped her docket of County Executive Member for Culture, Gender and Social Services which according to the claimant she had been appointed to hold for a term of five years. The claimant's further case is that the respondent's action of abolishing the office she held was unlawful, unconstitutional and full of spite as was without lawful reasons as the action was meant to defeat justice.

The claimant was appointed by the letter of appointment for county executive members dated 27.09.2013 and signed by the 2nd respondent. The appointment was effective 28.09.2013. The term of service was not stated in the letter. The remuneration and benefits were set and to be reviewed by the Salaries and Remuneration Commission.

By a press briefing of 8.04.2015, the 2nd respondent published the re-organisation of the county government of Nyeri. The government's departments headed by the county executive members were reduced from 10 to 9 and the functions previously performed by the claimant's Department of Gender, Culture, and Social Development were absorbed in a new department of Special Programs, and in a contradictory manner, the function of Culture was also stated to have moved to Trade, Industrialization and Tourism. The 2nd respondent then addressed to the claimant the letter dated 08.04.2015. The letter stated as follows:

“RE: RE-ORGANISATION OF THE COUNTY GOVERNMENT OF NYERI

This is to notify you that in exercise of powers provided to me in section 30(2) (e) of the County Governments Act, 2012, relating to the constitution of the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to the county, I have decided that the County Government of Nyeri will, going forward, be structured into nine (9) key delivery units (Departments).

Amongst other changes that have become necessary as my government continues to streamline its delivery structure for efficiency and effectiveness, I have abolished the Department of Gender, Culture and Social Development. Henceforth function previously performed in this Department will be delivered as sub-functions within other departments.

These changes are also necessitated by reasons that we omitted in my last letter to you; that under your stewardship, the Department lacked the kind of strategic leadership and drive needed to create meaningful programs in what are largely emerging issues of gender and culture. Consequently, the department's foundation remained weak making the continued resource investment there infeasible and dearly not in the best interest of the people of Nyeri.

To conclude this matter therefore, I have instructed the County Secretary to take the necessary action relating to your dues.

I wish you well in your next assignment.

Sincerely,

Signed

H.E. HON. NDERITU GACHAGUA

GOVERNOR, NYERI COUNTY

Copy to: County Secretary”

By the letter dated 8.04.2015, the county secretary instructed the chief officer for Administration, Information and Communication to remove the claimant from the payroll of the county government effective 8.04.2015.

The 1st issue for determination is whether the current suit is *res judicata* in view of the earlier petition 1 of 2014, civil appeal no.2 of 2015 between the same parties and the notice of motion dated 14.04.2015 filed in petition no. 1 of 2014 decided on 8.05.2015.

The claimant’s case is that this Court and the Court of Appeal found the claimant’s initial dismissal to have been unconstitutional and unlawful and thereafter that the office she held was abolished thereby leading to her removal from office. The reorganisation was on 8.04.2015 and the claimant’s removal from office was on 8.04.2015. The Judgment in petition no.1 of 2014 was delivered on 05.12.2014 and judgment in civil appeal no. 2 of 2015 was delivered on 18.03.2015. The court returns that the claimant’s subsequent removal from office on 8.04.2015 was a matter which could not, even with due diligence, be decided upon in the petition and the civil appeal. Indeed, in the said notice of motion, the court found that the subsequent removal constituted a new cause of action and could not be decided upon by way of an application in the petition. Accordingly, the court returns that the present suit is founded upon the cause of action sprouting from the claimant’s removal from office on 8.04.2015 and the suit is not *res judicata*.

The 2nd issue for determination is whether the removal of the claimant from office on 8.04.2015 was unlawful. In removing the claimant from office on 8.04.2015, the 2nd respondent amongst other matters stated thus, **“These changes are also necessitated by reasons that we omitted in my last letter to you; that under your stewardship, the Department lacked the kind of strategic leadership and drive needed to create meaningful programs in what are largely emerging issues of gender and culture. Consequently, the department’s foundation remained weak making the continued resource investment there infeasible and dearly not in the best interest of the people of Nyeri.”**

The last letter that had been written to the claimant was the letter dated 24.06.2013 which was found unlawful and unconstitutional and quashed by an order of certiorari in the petition no.1 of 2013 and upheld in civil appeal no.2 of 2015 at Nyeri. The court finds that it was unreasonable and in clear disregard of the findings by the courts in the previous cases, the petition and the civil appeal, for the respondent to have referred to that previous letter in removing the claimant from office. In so far as that reference was contrary to the findings by the courts, the court finds that the removal was founded upon unlawful considerations. The considerations were first, part of the matters in the earlier letter that the courts had found offensive and quashed, and then further matters that the claimant had not been invited to address in a due process, and more important, the respondents had failed to establish as valid reasons for the termination as envisaged in sections 43 (1) and 47 (5) of the Employment Act, 2007. The claimant’s termination was therefore unfair and unjustified for want of a valid reason as the case of poor performance or misconduct as levelled against her remained mere allegations; not shown to have been established at the time of the offending reshuffle or even before this court at the hearing.

Further, the court has considered the powers of the governor to re-organise departments of the county government. Section 30(2) (e) of the County Government Act, 2012 provides that subject to the Constitution, the governor shall constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county. Section 46 of the Act provides as follows

“46.1) The county executive committee shall determine the organization of the county and its

various departments and for that purpose may—

- (a) establish, continue or vary any department, and determine the objects and purposes of the department;
 - (b) determine the number and nature of departments at the decentralized units;
 - (c) abolish any department; and
 - (d) determine or change the name of any department.
- (2) When establishing and organizing the county, the county executive committee shall take into account, and be guided by, the need to —
- (a) be responsive to the needs of the local community and the functions and competencies assigned to and transferred to the county;
 - (b) facilitate a culture of public service and accountability in the county public service;
 - (c) be performance oriented and focused on the objects of devolved government set out in Article 174 of the Constitution;
 - (d) ensure that the county departments align their roles and responsibilities with the priorities and objectives set out in the county’s policies and plans;
 - (e) organise its departments and other structures in a flexible way in order to respond to changing priorities and circumstances;
 - (f) assign clear responsibilities for the management and coordination of departments and functions;
 - (g) allow participatory decision making as far as is practicable; and
 - (h) provide an equitable, fair, open and non-discriminatory working environment.”

The court considers that in view of the provisions of section 30(2) and section 46 of the Act, the power and function of reorganising the departments of the county executive are shared between the governor and the executive committee. In the present case it was not shown that prior to the reorganisation in issue, the committee performed the roles as envisaged in section 46 of the Act. The court particularly holds that a resolution by the committee in terms of the functions set out in section 46 of the Act was a mandatory precondition before the reorganisation could be valid and lawful and the governor’s unilateral decision as it happened was not legitimate.

Accordingly, the court finds that the removal founded upon the reorganisation and the abolition of office was unlawful, unfair and unjustified.

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. The prayer is for lost salaries, allowances and gratuities for the period from removal April 2015 to date the term of five years would have lapsed in August 2017 plus gratuity since appointment in September 2013 to March 2015. The claimant’s remuneration is set out in Gazette Notice No. 2888 of 01.03.2013 by the Salaries and Remuneration Commission on the **“Remuneration and Benefits of State Officers serving in the County Government”**. Salary scale, allowances, additional benefits and retirement benefits are set out and of relevance is the retirement benefits where it is stated thus, **“A County State Officer shall serve on contract and be paid a service gratuity at the end of the term at the rate of 31% of annual basic pay for every year served.”**

The court has considered the provision on gratuity and finds that the claimant is entitled to 31% of total basic pay in gratuity from 28.09.2013 to 8.04.2015 and the claimant is awarded Kshs. **1,038,552.30** as pleaded and computed for the claimant in the statement of claim; being Kshs. 607,281.10 for September 2013 to March 2015, plus, Kshs.431,271.20 for September 2014 to March 2015 respectively.

The claimant has prayed for the unpaid salaries and allowances for the remainder of the five year term being April 2015 to August 2017 on account of the unfair termination. It is true as submitted for the respondent that the term of service was not stipulated in the contract of service and is also true that in absence of any other adverse matter, the claimant's term of service would end sometimes in August 2017. There is no material on record to show that the claimant could not mitigate her losses in view of the unlawful, unfair and unjustified termination. It is not safely predictable that the claimant would have served the entire unexpired period. In the circumstances the court considers that an award of 12 months compensation at the rate of last gross salary in view of lost earnings and the unlawful and unfair termination will meet the ends of justice.

In absence of any other material, contractual or statutory, the court has been guided by the provisions of section 49 of the Employment Act, 2007. In awarding the 12 months' gross salaries the court has considered the 12 months' gross pay under the section as the maximum compensation in cases of unfair or unjustified or unlawful termination. In this case the claimant had served with dedication but for the unsubstantiated allegations leading to her removal and, she had no desire to leave employment. The offensive reorganisation of the county government in contravention of the cited statutory safeguards thereby abolishing the office the claimant held was clearly outside the claimant's control so that she did not contribute to her termination on that account. The claimant was not given a removal notice or prepared for the removal in any other manner. The court has considered the aggravating factor that the respondents, and particularly the 2nd respondent, acted to remove the claimant despite the clear guidance by the courts in the earlier petition and her last monthly gross pay being Kshs.284,375.00 and taking the enumerated factors into account the claimant is hereby awarded **Kshs.3, 412,500.00** for the lost earnings and the unlawful, unfair, and unjustified termination. In the opinion of the court, in compensating the claimant for unlawful removal that was unjustified or unfair, the court is bound by the legislative policy in section 49 of the Employment Act, 2007 which limits such compensation to a maximum of 12 months' gross salaries. To go beyond such compensatory limits in a case of lost future earnings founded upon unfair, unlawful or unjustified removal or termination of the contract of employment, in the opinion of the court, the claimant will have to establish a basis for such a claim such as demonstrated inability of the claimant to mitigate her losses by finding alternative gainful engagement or a legislative or contractual provision that reserves such full payment of the lost future earnings. Further, in making the award, the court has followed **Stephen Otieno Oroti & 4 Others –Versus- Jacktone N. Ranguma and Another [2016]eKLR** (Maurine Onyango J) where the petitioners being members of the county executive committee were awarded 12 months' salaries in a case of a removal from office that was found offensive.

While making that award, the court further holds that contrary to parties' submissions, in absence of any other applicable law and better contractual terms of service, the Employment Act, 2007 applied to the state officers like the claimant. Thus, the court upholds the opinion in **Margaret Lorna Kariuki – Versus- Embu County Government [2015]eKLR** where this court stated, **"The second issue for determination is whether the office of the county secretary was excluded from the application of the Employment Act, 2007. The parties were in agreement that the office had not been excluded by the Minister under section 3 of the Act. The court finds as much and further holds that even if it had been excluded, the better or similar terms under the special arrangements as submitted for the claimant would need to be established so that the court would determine the case upon such special terms of service. Such better or similar terms, in the opinion of the court, would include the minimum safeguards of valid reasons; and notice and a hearing as provided in sections 43 and 41 of the Employment Act, 2007. In the opinion of the court, the import and scope of the proviso to section 3(5) of the Act is that if the terms and conditions of the special arrangement of an excluded office are inferior to the terms and conditions provided under the Act, then the provisions of the Act will swiftly apply to the case by default. The court further holds that if an office is excluded from terms of the Act under section 3 of the Act, the court's jurisdiction is not thereby ousted; the court will hear and determine that excluded employment dispute on the basis of the better terms of**

service as provided for in the special arrangement. Thus, the specific contractual terms would apply in determining the dispute.”

Thus, whereas the service by state officers or public officers is governed by special provisions as may be contained in individual contracts of service, the constitutional or legislative provisions, and lawful circulars or policy provisions, where there is no specific provision or inferior provisions exist, the court holds that the minimum terms and conditions of service and the minimum principles governing employment as provided in the Employment Act, 2007 and other statutes as may generally apply to employment and labour relations will be invoked to apply to the service of state officers or public officers as the case may be.

For avoidance of doubt, the amount payable to the claimant by the respondents will be less the lawful taxes as will be computed administratively.

In conclusion, judgment is hereby entered for the claimant against the respondents for:

1. The respondent to pay the claimant **Kshs.4,451,052.20** by 01.12.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
2. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 23rd September, 2016.

BYRAM ONGAYA

JUDGE