



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 17 OF 2016

**IN THE MATTER OF ARTICLES 10, 27, 28, 41, 50, 176, 179, 232 AND 236 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27, 28, 41 AND 50 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012 (ACT NO. 17 OF 2012)

AND

**IN THE MATTER OF THE PURPORTED TERMINATION OF THE ENGAGEMENT OF THE
PETITIONER TO AND/OR REMOVAL OF THE PETITIONER FROM OFFICE OF THE
EXECUTIVE MEMBER OF BOMET COUNTY GOVERNMENT**

BETWEEN

ELIZABETH CHEPKOECH LANGAT..... PETITIONER

VERSUS

BOMET COUNTY GOVERNMENT..... 1ST RESPONDENT

THE GOVERNOR, BOMET COUNTY..... 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL..... 3RD RESPONDENT

JUDGMENT

[1] Elizabeth Chepkoech Langat (Petitioner) was appointed by the Governor, County Government of Bomet (2nd Respondent) as a member of County of Bomet Executive Committee in charge of *Agriculture and Fisheries* through a letter dated 29 April 2013.

[2] The term of the appointment was until the constitution of a new executive committee after the 2017 elections and the Petitioner subscribed to an oath of office on the same day as Executive Committee member for *Agriculture and Fisheries*.

[3] Sometime in March 2014, the Petitioner was transferred to be the County Executive Committee member for Public Health and Environment. She was transferred back to Public Health and Environment in March 2015.

[4] On 18 March 2016, the 2nd Respondent issued a show cause notice to the Petitioner to appear before him on 29 March 2016 to respond to some 6 allegations.

[5] Although the show cause was dated 18 March 2016, it was only received by the Petitioner on 27 March 2016 and on 28 March 2016, her legal adviser wrote to the 2nd Respondent challenging the show cause as *outrageous* and a *non-starter* and setting out generic allegations.

[6] The legal advisor informed the 2nd Respondent that the Petitioner would only attend before him as a matter of courtesy pending the giving of better particulars.

[7] Despite the letter from the legal advisor, the Petitioner responded to the show cause notice in writing on 28 March 2016.

[8] On 31 March 2016, one of the daily newspapers carried out a news item that the 2nd Respondent had re-organised his Executive Committee and fired *two non-performing county executives* (including the Petitioner).

[9] The Petitioner was therefore prompted to move Court on 5 April 2016 under certificate of urgency seeking that the action of the 2nd Respondent to dismiss/remove her from office be stayed and/or conservatory orders restraining the Respondents from filing the position of County Executive Committee member.

[10] On 6 April 2016, the Petitioner was served with a letter dated 30 March 2016 informing her that she had been removed from office of county Executive Committee member and the grounds were *Poor performance of your duties and responsibilities; absence from duty without justifiable reasons; misconduct in managing and handling staff matters within your department. In particular, appropriating staff allowances to yourself. This is demeaning to the Office of a CEC Member in the County Government.*

[11] The Court heard the application *ex parte* on the same day and granted orders (a), (b) and (d) and directed that the application be served for *inter partes* hearing on 26 April 2016.

[12] On 25 April 2016, the Respondents filed an application seeking review of the interim orders granted on 5 April 2016.

[13] When the Petitioner's application came up for *inter partes* hearing, the parties informed the Court that they had agreed that the interim orders be extended until the hearing and determination of the Petition, and that the 2 applications on record be abandoned.

[14] The Court therefore gave directions as to the filing and exchange of process and submissions. The process and submissions were exchanged and highlighted on 12 July 2016 (3rd Respondent only filed an Appearance).

[15] The Petitioner identified 2 questions for determination

(1) Whether the Petitioner was accorded fair administrative action.

(2) Whether the termination/dismissal of the Petitioner was fair,

While the Respondents identified 5 issues

- (1) Whether the 2nd Respondent exercised his powers in accordance with the law when dismissing the Petitioner.
- (2) Whether the Petitioner was accorded fair administrative action before being removed from office.
- (3) Whether the Respondents action amounted to unfair labour practice.
- (4) Whether Court has jurisdiction and
- (5) Appropriate remedies.

[16] Save for language and the jurisdiction issue, the issues for determination are essentially two, to wit, *whether the removal of the Petitioner from office was unconstitutional/unfair and or unlawful and appropriate remedies.*

Jurisdiction

[17] Jurisdiction, it has been held time without number is everything and without it, a Court must down its tools.

[18] The Court has gone through the Respondents submissions severally and has not been able to decipher or follow the logic of the contentions on jurisdiction.

[19] The Respondents have in the submissions made reference to Article 23(3)(e) of the Constitution to urge that since the Petitioner had not sought damages, an order of reinstatement was not available.

[20] In my humble opinion, the question of jurisdiction as posed is not capable of being determined as one properly of jurisdiction as the contentions go to whether the Petitioner has established a case for the grant of the remedies sought and whether in deed the remedies are appropriate.

Lawfulness and/or fairness of the removal of the Petitioner

[21] The primary statute governing the removal of a County Executive Committee member is the County Governments Act.

[22] Under the statutory framework established by the Act, there are 2 avenues for removing a county executive committee member.

[23] One avenue, and this can be gleaned from section 31(b) as read with section 40(2), (3), (4), (5) & (6) of the Act, is when the Governor is acting pursuant to a resolution of the County Assembly.

[24] The Act has in section 40(1) set out the grounds upon which the county Assembly may pass a resolution for the removal of a County Executive Committee member and these are, *incompetence, abuse of office, gross misconduct, failure to attend 3 consecutive meetings of the county cabinet, physical/mental incapacity and gross violation of the Constitution or any other law.*

[25] That was not the avenue taken or applicable in the case under consideration.

[26] The second option or avenue is under section 31(a) which provides that

The governor – 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;

[27] The Respondents admitted that this was the avenue taken by the 2nd Respondent in removing the Petitioner from office.

[28] In the Court's view, the removal of a county executive committee member by a governor in exercise of the power under section 31(a) of the County Governments Act must be measured against applicable constitutional and statutory provisions which afford protections to all state/public officers as employees or office holders.

[29] To start with there is Article 236 of the Constitution which is to the effect that

A public officer shall not be-

(a)

(b) dismissed, *removed from office*, demoted in rank or otherwise subjected to disciplinary action *without due process of law*.

[30] Secondly, Article 41(1) which provides that Every person has the *right to fair labour practices*.

[31] Thirdly, there is Article 47 which provides that Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

[32] The right to fair administrative action has now been given textual content through the Fair Administrative Action Act.

[33] Having set out the constitutional and statutory context, it is my view that a brief examination of case law flowing from the said framework would be in order.

[34] The Court of Appeal in *Narok County Government v Richard Bwogo Birir* (2015) eKLR examined the issue of removal of an Executive Committee member.

[35] The Court noted that the pleasure doctrine had been sounded a death knell by the Constitution 2010 and held thus *the Governors contention that his power to dismiss can be exercised without any reasons being advanced has no basis in law. It is the reasons for dismissal that determine whether the power was exercised reasonably, and the reasons ought to be valid and compelling*.

[36] In the instant case, the Respondents urged that the Court ought only to look at the process of removal of a County Executive Committee member and not delve into the merits or reasons.

[37] That submission appears not to be based on sound reasoning considering the above quoted excerpt from the Court of Appeal that the reasons considered by a governor should be valid and compelling.

[38] And it is with that in mind that the Court now proceeds to examine the lawfulness of the action of the 2nd Respondent and whether the reasons were valid and compelling.

[39] The Governor also urged that the trust expected of a Governor and a member of the County Executive (Petitioner) had broken down.

[40] Most of the reasons advanced by the Governor to remove the Petitioner fall within the rubric of *performance and misconduct*.

Performance

[41] The experience, academic and professional qualifications of persons called to hold the office of a county executive committee member are not run of the mill.

[42] The duties and responsibilities assigned to those offices are also not those performed by ordinary employees.

[43] Evaluating and measuring performance in such an office therefore ought to be objective, transparent and not arbitrary or subjective. There ought to be agreed performance understandings and evaluation criteria.

[44] In any case, performance within an employment relationship or public service ought to be pegged down on known targets within set periods.

[45] Now, in the case of the Petitioner, the Respondents did not even attempt or bother to explain what performance targets had been agreed with the Petitioner or how the measurement and or evaluation was conducted by the Governor.

[46] The Court is also aware that in performance of the responsibilities of a public officer such as a county minister, procurement plans ought to be prepared and approved, resources must be made available and/or budgeted for.

[47] The Respondents did not even remotely suggest that the Petitioner was facilitated with the requisite resources and or funds to carry out the activities the Governor were alleging she had failed to perform.

[48] No yearly work plans or the such, or budgets were disclosed and therefore, the validity and compelling nature of the reasons advanced by the Governor are questionable.

[49] It is an open secret at the National Government level that cabinet secretaries have clearly set out performance targets and the President calls them out annually to demonstrate that the agreed targets have been met in public.

Sufficiency of time to respond to show cause

[50] Coupled with the above, the Court also notes that the show cause notice was delivered to the Petitioner on 27 March 2016, a Sunday. 28 March 2016 was Easter Monday and the Petitioner was expected to show cause on 29 March 2016.

[51] The Petitioner's legal advisor sought for better particulars through a letter dated 28 March 2016.

[52] The Petitioner responded to the show cause through a letter dated 28 March 2016. She also lamented about a hostile work environment and failure to facilitate her with the resources to perform.

[53] The time given to the Petitioner, by the stretch of any imagination and considering the position that the Petitioner held in the County Government and the seriousness of the allegations, could not have been sufficient.

[54] Affording an employee or public officer sufficient time and facilities to respond to a show cause notice is an ingredient of both the right to fair administrative action and fair labour practices.

Misconduct

[55] Two of the allegation related to unjustifiable absence and misappropriation of funds.

[56] The show cause notice did not give particulars of the dates when the Petitioner was absent nor did it give details of the misappropriated funds.

[57] The Petitioners letter of 28 March 2016 sought those particulars but they were not supplied.

[58] In the view of the Court, the lack of particulars must have prejudiced the Petitioner.

Removal through re-organisation of Cabinet

[59] The Court also notes that the 2nd Respondent re-organised his cabinet on 30 March 2016 (published in the County Gazette of 4 April 2016), and the functions and responsibilities of each Executive Committee member was defined.

[60] In the re-organised cabinet, the name of the Petitioner was missing.

[61] However, the functions and responsibilities which were assigned to the Petitioner before the re-organisation were not disclosed except to refer to Articles 73, 179 & 183 of the Constitution and the County Governments Act.

[62] The Constitution and the County Governments Act provide for generic functions and unless specific functions and responsibilities are assigned and or agreed, it may not be easy to impartially determine that a particular Executive has failed to perform her functions.

[63] It is equally accepted that a Governor has a wide discretion to re-organise his or her government and that in exercising that function, the doctrine of separation of powers may restrain the nature and scope of the Court's intrusion.

[64] In the case at hand, the Governor re-organised his cabinet on 30 March 2016, which is also the date when the decision to remove the Petitioner from office was taken.

[65] The parties did not specifically address the legal implications of a Governor's action of removing a county Executive from office through (or under the guise of) a re-organisation of the cabinet without taking into consideration the protections afforded public officers and persons likely to be affected by administrative action or labour practice.

[66] But the text and spirit of the constitutional and statutory framework appear to frown upon such an exercise, but that is all that the Court wishes to state at this particular time.

[67] The Court is satisfied that the Petitioner has demonstrated that her removal from office was without due process of law and also an unfair labour practice.

Appropriate remedies

Declaration removal unconstitutional

[68] The Petitioner sought a declaration that her removal from office was through a press briefing was unconstitutional.

[69] But the fact remains that after the press briefing, the Governor issued a letter and attempted to set out the reasons for the removal.

[70] The Court would taking into account all the factors alluded to in the body of the judgment, issue a declaration that the removal of the Petitioner was unconstitutional, unlawful and unfair.

Certiorari

[71] The Petitioner also sought an order of certiorari to quash the decision to remove her from office.

[72] A governor is elected into office on a stated platform. He or she appoints members of the Executive to assist in achieving the promises made under that platform.

[73] It therefore becomes an extremely delicate balancing act for a Court to decide whether to quash an unlawful removal and reinstate the Executive or to issue a declaration and award damages and/or compensation.

[74] Some of the factors the Court may consider include the need to ensure that state officers hold office in trust and that the responsibility of the state office should be exercised in a manner consistent with the requirements of chapter 6 of the Constitution.

[75] Objectivity, impartiality, accountability and promotion of public confidence in the action of the public officer (read Governor) are all considerations to be put in perspective.

[76] In the Court's view, having issued a declaration as sought, it would not be appropriate to issue an order of certiorari.

Declaration Petitioner still lawfully in office

[77] Equally, in the Court's view this is not an appropriate or effective remedy in the circumstances of this case.

Compensation and general damages

[78] This remedy has disturbed the Court in no small measure.

[79] This is because any compensation or damages would be paid from public funds for the unconstitutional and/or unfair actions of the holder of a state/public office.

[80] The Petitioner did not expressly allege or prove bad faith on the part of the Governor.

[81] Had such bad faith been proved, the Court would not have hesitated to order that the Governor personally pay for any compensation or damages.

[82] And all state/public officers must be put on notice that flagrant failure to comply with the Constitution and other written laws relating to holding of state/public office would attract award of personal damages and costs.

[83] Considering all that has been stated while discussing appropriate remedy, the Court would award the Petitioner damages equivalent to the 1 year's gross wages.

[84] The Petitioner's gross wages are currently Kshs 380,000/-.

Conclusion and Orders

[85] The Court finds and holds that the removal from office of the Petitioner was unconstitutional and unfair and awards her

(a) Damages **Kshs 4,560,000/-**

[86] Petitioner to have costs.

Delivered, dated and signed in Nakuru on this 23rd day of September 2016.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates

For 1st & 2nd Respondent Mr. Matwere, Advocate, County Government of Bomet

For 3rd Respondent Vincent Wohoro, Chief State Counsel, Office of Hon. Attorney General (no pleadings filed)

Court Assistant Nixon