



**REPUBLIC OF KENYA**

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

**PETITION NO.6 OF 2015**

**DR. FREDRICK NJERU KAMUNDE.....PETITIONER**

**VERSUS**

**THARAKA NITHI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**S.M. RAGWA, GOVERNOR THARAKA NITHI COUNTY.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 23<sup>rd</sup> September, 2016)

**JUDGMENT**

The petitioner is Dr. Fredrick Njeru Kamunde. He filed the petition on 12.05.2015 through Kamau Kuria and Company Advocates. The petition was said to be in the matter of contravention of Articles 2, 10, 41, 47, 73 and 227 of the Constitution of Kenya. The petition named Tharaka Nithi County Government and S.M. Ragwa, Governor Tharaka Nithi County as the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively and who appointed Murango Mwenda & Company Advocates to act for them in the matter.

The petitioner prayed for judgment against the respondents for:

- a) A declaration that the respondents have contravened the petitioner's rights, under Articles 47 of the Constitution, to an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair by purporting to vary his terms of service without his consent, and to be informed in writing of the reasons of the intended alteration of the terms of his contract.
- b) A declaration that the purported reshuffle, on 24<sup>th</sup> April, 2015 of the Executive Committee Officers is, in so far as it affects the petitioner, null and void for contravening Article 47 of the Constitution and being a breach of the contract entered into on 22<sup>nd</sup> August, 2014 by the petitioner with the 1<sup>st</sup> respondent.
- c) A declaration that in making the purported reshuffle on 24<sup>th</sup> April, 2015, of the 1<sup>st</sup> respondent's Executive Committee, the 2<sup>nd</sup> respondent offended the national values and principles set out in Article 10 of the Constitution.
- d) A declaration that the 2<sup>nd</sup> respondent has contravened the guiding principles of leadership and integrity under Article 73(2) of the Constitution.
- e) [Abandoned prayer]

f) [Abandoned prayer]

h) [Abandoned prayer]

i) An order of certiorari do issue to remove to the High Court for quashing, the purported circular dated 24<sup>th</sup> April, 2015 communicating the purported reshuffle of Chief Officers of the 1<sup>st</sup> respondent.

j) A permanent injunction restraining the respondents from contravening Articles 10, 47, 73 and 227 of the Constitution.

k) A permanent injunction restraining the respondents from advertising, nominating or appointing or filling anyone to the post of County Secretary.

Costs of the suit.

The petitioner's submissions on the petition were filed on 05.06.2015 and supplementary submissions filed on 08.07.2015. The petitioner also filed on 29.07.2016 the submissions in reply to the respondent's submissions dated 18.07.2016.

The respondents filed on 28.05.2015 the replying affidavit of Samuel M. Ragwa, the 2<sup>nd</sup> respondent, to oppose the petition. The respondents also filed on 28.05.2015 the answer to the petition and prayed that the petition be dismissed with costs. The respondent's submissions to the petition were filed on 08.06.2015 and further submissions dated 18.07.2016 were filed on 19.07.2015.

By consent of the parties as recorded in court on 17.06.2016, the issues and questions for determination are as follows:

1. Whether the 2<sup>nd</sup> respondent acted lawfully and within his administrative powers by carrying out a government reshuffle that affected the petitioner in the manner it did.
2. Whether the petitioner is entitled to any of the reliefs sought in the petition.
3. What is the court's order on costs in the circumstances herein?
4. Did the 2<sup>nd</sup> respondent have authority to so reshuffle the executive committee as to contravene or breach the contract of employment entered into by the petitioner with the 1<sup>st</sup> respondent?
5. Is the petitioner entitled to the reliefs which he has claimed in the petition?

The facts of the case are clear. Between March 2013 and August 2014 the petitioner was seconded by the Transitional Authority from his service at the Ministry of Education to serve as the Interim County Secretary for Tharaka Nithi County. Prior to the secondment the petitioner had served as a civil servant in the Ministry's Directorate of Policy and Planning effective 15.09.2010.

Sometimes in 2014 the 1<sup>st</sup> respondent decided to recruit a substantive holder to the office of county secretary which the petitioner had held on interim basis effective March 2013. Under section 44 of the County Governments Act, 2012 the county secretary is competitively recruited from candidates who are university graduates with at least 10 years' experience in administration and management, is nominated by the Governor from amongst the candidates, approved by the County Assembly and appointed by the Governor. The petitioner had been competitively appointed as the interim county secretary in interviews conducted by the Transitional Authority following the petitioner's application in February 2013. In August 2014 the 2<sup>nd</sup> respondent nominated the petitioner and the County Assembly of the 1<sup>st</sup> respondent approved the nomination for appointment to the office of the county secretary. The letter appointing the petitioner substantively to the office of county secretary was dated 22.08.2014 and it stated as follows:

**“Dear Dr. Kamunde,**

**RE: APPOINTMENT AS COUNTY SECRETARY – THARAKA NITHI COUNTY**

**In exercise of the powers conferred to me by the CGA Section 44(2) (b), and having been competitively sourced and vetted by the County Assembly, you are hereby appointed as the County Secretary for Tharaka Nithi County.**

**Your duties and responsibilities are as stipulated under CGA, 2012 Section 44(3). In exercise of the functions of this key Public Office, you will be expected to adhere to the values and principles of Public Service and demonstrate commitment and integrity as the County Secretary.**

**The salary and remuneration assigned to this position is Kshs.246, 000 per month. You will serve on Five (5) year contract and will qualify for service gratuity of 31% of your basic salary at the end of the employment term.**

**I take this opportunity to congratulate you on this well deserved appointment.**

**Signed**

**S.M. Ragwa**

**H.E. THE GOVERNOR**

**THARAKA NITHI COUNTY GOVERNMENT”**

By the circular dated 24.04.2015 addressed to County Executive Committee Members and the Chief Officers the 2<sup>nd</sup> respondent conveyed his decision on **“County Executive Committee and Chief Officers Reshuffle”**. In that circular, one Mr. Ahmed Hemed was designated County Secretary in Acting Capacity and the petitioner was deployed as the Director of Education in charge of ECDE and Vocational Training.

The claimant was dissatisfied and injured by that deployment and he filed the petition. The petitioner’s case is that the deployment as conveyed in the circular on reshuffle contravened his right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as per Article 47(1) of the Constitution. The petitioner’s further case is that he was not given, in writing, reasons for that action that affected him adversely.

The 2<sup>nd</sup> respondent’s case is that as Governor he is entitled to perform functions and to exercise powers as are conferred in sections 30 and 31 of the County Governments Act, 2012. In his understanding and as by law, the powers and functions require him to provide leadership in the county’s governance and development; to provide democracy and good governance; and to provide accountability to the management and use of the county resources. The 2<sup>nd</sup> respondent’s further case is that the petitioner while being the holder of the office of the county secretary has performed duties in a manner that is an affront to the national values and principles of good governance and has acted in a manner that offends the provisions of Article 73 of the Constitution. In particular the 2<sup>nd</sup> respondent alleges thus, that the petitioner has absented himself from duty without permission or reasonable cause; that the petitioner has failed to account for moneys and imprest; that the petitioner has acted incompetently; and that the petitioner has arrogated upon himself duties that are clearly exercisable by other officers of the county; and that the petitioner took away a motor vehicle meant for another department for 30 days thereby denying the relevant officers use of the said motor vehicle. Accordingly, the 2<sup>nd</sup> respondent’s view is that the alleged actions on the part of the petitioner do not bring honor to the office of the county secretary, do not promote public confidence in the office and the county government and clearly are in contravention of Article 73 of the Constitution.

Thus the 2<sup>nd</sup> respondent wrote to the petitioner the letter dated 15.04.2015 setting out particulars of misconduct and asking him to show-cause why disciplinary action would not be taken against him. Further, the 2<sup>nd</sup> respondent had discussed with the petitioner about the alleged absenteeism, casual manner of working and inefficiency including the short text message (SMS) of 10.03.2015 at 2.56pm thus, **“These days you work in Nairobi, unless you take your work in the county seriously, then we may not be able to work with you.”** The 2<sup>nd</sup> respondent’s case was that at the time of the SMS the petitioner had been absent from duty for many days making the functioning of the county government difficult and the petitioner failed to explain his absence from the office or to reply the SMS.

The 2<sup>nd</sup> respondent’s further case is that the reshuffle of 24.04.2015 was done in exercise of the statutory powers. Further, in view of the allegations as leveled against the petitioner in the letter of 15.04.2015 and awaiting the petitioner’s response to enable the 2<sup>nd</sup> respondent to make appropriate decision (which includes dismissal under section 44 (1) (c) of the County Governments Act, 2012), during the reshuffle the 2<sup>nd</sup> respondent had decided to deploy the petitioner out of the busy and sensitive office of the county secretary. Thus, the deployment of the petitioner to the Directorate of Education did not infringe upon the claimant’s rights under Article 47 of the Constitution.

The court has considered the pleadings, the parties’ respective cases, the submissions and the agreed issues for determination. The findings by the court on the matters in dispute are as follows.

The **1<sup>st</sup> issue** for determination is whether the 2<sup>nd</sup> respondent acted lawfully and within his administrative powers by carrying out a government reshuffle that affected the petitioner in the manner it did. Once the county secretary has been appointed, the powers of the governor over the county secretary’s tenure are provided for in section 44(2) (c) of the County Governments Act, 2012, thus, **“44 (2) (c) The County Secretary may, subject to the conditions and terms of appointment, be dismissed by the governor.”** There is no provision that the governor may bring the tenure of a county secretary to an end by way of reassignment. In section 45 (5) of the Act, the governor may re-assign a county chief officer. It is the court’s opinion and holding that the governor’s power to reassign chief officers does not spread to the office of the county secretary and even then, reassignment of the chief officers is limited to deployment of a chief officer to another portfolio of chief officer and not to a lower position say of a director as the 2<sup>nd</sup> respondent purported to act against the petitioner.

The court has considered the powers of the governor to reorganize 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.”**

In view of the two provisions of the Act, the court holds that the power and function to reorganize the departments of the county government is shared between the governor and the county executive committee and in this case it was not shown that the committee discharged its roles as envisaged in section 46 of the Act prior to the reorganization of 24.04.2015 so that the 2<sup>nd</sup> respondent appears to have acted unilaterally contrary to provisions of section 46 of the Act.

The circular said it was a reshuffle, meaning a reorganization of the departments of the county government, but which the court has found that it has not been shown that the county executive committee had discharged its statutory functions as per the provisions of the law quoted earlier in this judgment. Even if it is considered that circular dated 24.04.2015 fell short of reorganization of the departments of the county government, the court has already found that the 2<sup>nd</sup> respondent lacked authority to reshuffle the holder of the office of the county secretary in the manner it was done for want of the relevant legislative or constitutional authority. The court finds that the 2<sup>nd</sup> respondent acted in clear breach of the petitioner’s contract of service under which he was appointed to the specific office of county secretary for a definite term. Thus the petitioner as holder of the office of county secretary was not amenable to cease holding that office by way of a reshuffle. In making that finding the court upholds the opinion in Mundia Njeru Gateria – Versus- Embu County Government and 3 Others [2015]eKLR where this court stated thus,

**“Article 179(1) of the Constitution is clear that the executive authority of the county is vested in, and is exercised by, a county executive committee; Article 179(5) provides that the county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively; and Article 183 (1) provides that a county executive committee shall implement county legislation; implement, within the county, national legislation to the extent that the legislation so requires; manage and coordinate the functions of the county administration and its departments; and perform any other functions conferred on it by this Constitution or national legislation. The court has considered those provisions and holds that the executive powers in a county government is vested in the county executive committee and with the governor as the chief executive to whom the executive committee members are accountable to as provided in Article 179(6). The court further holds that under Article 183, the function of the county executive committee is chained to implementing county and national legislation so that the committee or its members, including the governor and deputy governor as per Article 179(2), must show that the executive actions or omissions are founded upon some legislative provision. It is therefore the holding of the court that the governor, the deputy governor, the members of the county executive committee and indeed the county executive committee do not enjoy inherent executive powers outside of legislative provisions as may be provided in national or county legislation. To safeguard interests of the executive arm of the county governments, where it is desired to do that which is not provided in the legislation, Article 183 (2) of the Constitution provides that a county executive committee may propose legislation for consideration by the county assembly. It is the opinion of the court**

**that until such legislation is prepared and enacted, the governor, the deputy governor and the members of the county executive committee by themselves or as a committee may not implement that which is not provided for in legislation; they do not enjoy inherent executive powers by which they can purport, by way of filling real or perceived gaps in the legislation, to act outside the law or where the law is silent or so to say, absent.”**

The court adds, and needless to do so, that legislation by the County Assembly is subject to the Constitution and national legislation.

Thus to answer the 1<sup>st</sup> issue for determination the court returns that the 2<sup>nd</sup> respondent did not enjoy power or authority to reassign or deploy the petitioner out of the office of the county secretary as was done. The court holds that the appointment to the office of the county secretary is personal to the holder duly appointed to the office and the holder should serve and may be dismissed only in accordance with the provisions of section 44(2) (c) of the Act. The court further holds that in reorganizing the county government, there must be compliance with the provisions of section 46 of the Act. The court further holds that the dismissal under section 44(2) (c) of the Act must be consistent with due process as envisaged in Articles 10, 47, 236 and other relevant provisions of law which prescribe fairness including section 41 of the Employment Act, 2007 on notice and hearing; and section 43 of the Employment Act, 2007 on genuine or valid reason for termination. Thus, as submitted for the petitioner, in **Margaret Lorna Kariuki –Versus- Embu County Government [2015]eKLR** this court held that the office of the county secretary was not excluded from the application of the Employment Act, 2007. The court held thus, **“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.”**

The 2<sup>nd</sup> issue for determination and which is related to the 1<sup>st</sup> issue is whether the 2<sup>nd</sup> respondent had authority to so reshuffle the executive committee as to contravene or breach the contract of employment entered into by the petitioner with the 1<sup>st</sup> respondent. First, the petitioner was not a member of the executive committee of the county government and second, he was not a chief officer of the county government. Thus, his inclusion in the circular on reshuffling of chief officers and members of the executive committee of the county was clearly a misconception. Third, the petitioner’s terms of service included that he would serve for a term of 5 years per the letter of appointment and by the statutory provisions he could be dismissed from office by the governor subject to the terms and conditions of service. Such terms and conditions of service included applicable constitutional, statutory, contractual and lawful policy provisions. In the court’s opinion, the safeguards included Article 47 of the Constitution on fair administrative action and giving of reasons for any adverse decision. The court has found that Article 236 of the Constitution as well as sections 43 and 41 of the Employment Act, 2007 applied to the petitioner’s employment. The reshuffle failed to consider that it amounted to termination of the petitioner’s employment as the county secretary and in contravention of the cited constitutional and statutory provisions that by law were incorporated or implied in the contract of employment as minimum terms and conditions of service. It is obvious that the petitioner’s deployment as director in the department of education was not only a demotion but also lacked legal basis and undermined his continued appointment to the office of county secretary in a substantive capacity. The court further finds that the appointment of one Mr. Ahmed Hemed to the office of county secretary in an acting capacity

lacked legal basis because the substantive office holder, the petitioner, had not lawfully relinquished or lawfully terminated his tenure of service in the office as there was no vacancy to justify the acting appointment. Further, the court upholds the opinion in **Mundia Njeru Gateria –Versus- Embu County Government and 5 others [2015]eKLR** thus, “...As the 2<sup>nd</sup> respondent did not enjoy constitutional or statutory power to make such acting appointment, the court returns that the appointment was null and voided as it was founded upon the exercise of fictitious authority. The court has considered the provisions of section 64(2) of the County Government Act, 2012 that acting appointments shall be made only by the lawful appointing authority and for a specified period. Further, the court has considered the provisions of section 64 (1) of the Act that a person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding that office. The court finds that in view of those provisions, the acting appointment was defective because it was indefinite and for want of approval by the county assembly as provided for in section 58(1) of the Act.”

To answer the 2<sup>nd</sup> issue for determination, the court returns that the 2<sup>nd</sup> respondent had no authority to so reshuffle the executive committee as to contravene or breach the contract of employment entered into by the petitioner with the 1<sup>st</sup> respondent.

The 3<sup>rd</sup> issue for determination is whether the petitioner is entitled to the remedies as prayed for. The court finds that the petitioner has established that the deployment to director from the position of county secretary as conveyed in the circular of 24.04.2015 contravened the petitioner’s right to fair administrative action. First the decision was unreasonable in so far as the petitioner held the position of county secretary personal to himself and he was not amenable to reshuffle or redeployment in the manner it was purportedly done by the 2<sup>nd</sup> respondent. Secondly, the decision was unreasonable as it amounted to unlawful and unjustified termination of the petitioner’s service as the county secretary contrary to the contractual tenure of 5 years. Thirdly, the deployment was an adverse decision as it amounted to some kind of constructive termination from the office of county secretary, and it was a demotion. Such adverse decision would require the 2<sup>nd</sup> respondent to give reasons as provided for in Article 47 of the Constitution but which was not done.

Rule of law and human rights are some of the national values and principles of governance under Article 10 of the Constitution and the court finds that the same were violated as found in this judgment.

The court finds that the petitioner is entitled to an order of certiorari to quash the offending reshuffle decision and further to an order of a permanent injunction preserving his continued service as county secretary and in terms of the prayers made in the petition.

The petitioner did not make specific submissions on the quantum of damages for violation of Article 47 of the Constitution. The court has considered that pending the hearing and determination of the petition the petitioner, in line with the interim orders on record, continued to work as the county secretary and with full pay and other benefits. Accordingly, in the circumstances of this case, damages for violation of the rights would be declined.

As elaborate submissions were not made on the prayer for a declaration that the 2<sup>nd</sup> respondent had contravened the guiding principles of leadership and integrity under Article 73(2) of the Constitution, the prayer will be declined. In particular, there were no submissions on the specific provisions of Article 73(2) that may have been violated.

While making the findings, the court has considered the numerous allegations by the 2<sup>nd</sup> respondent against the petitioner and finds that the same were not shown to have been handled in a due process as envisaged in Article 236 of the Constitution and in any event, the same were not referred to as a justification in the reshuffle of 24.04.2015. Accordingly, the court finds that the allegations did not serve to sanitize the otherwise offending reshuffle or deployment decision.

As the petitioner has substantially succeeded in his claims and prayers, the respondents will pay the

petitioner's costs of the petition.

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

- a) The declaration that the respondents have, by reason of the reshuffle of 24.4.2015, contravened the petitioner's rights, under Article 47 of the Constitution, to an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair by purporting to vary his terms of service without his consent, and to be informed in writing of the reasons of the intended alteration of the terms of his contract.
- b) The declaration that the purported reshuffle, on 24<sup>th</sup> April, 2015 of the Executive Committee Officers is, in so far as it affected the petitioner, null and void for contravening Article 47 of the Constitution and being a breach of the contract entered into on 22<sup>nd</sup> August, 2014 by the petitioner with the 1<sup>st</sup> respondent.
- c) The declaration that in making the purported reshuffle on 24<sup>th</sup> April, 2015 and in so far as the petitioner was affected, the 2<sup>nd</sup> respondent offended the national values and principles set out in Article 10 of the Constitution, namely failing to uphold rule of law and human rights.
- d) The order of certiorari hereby issued to remove to this Court for quashing, the purported circular dated 24<sup>th</sup> April, 2015 communicating the purported reshuffle of Chief Officers of the 1<sup>st</sup> respondent in so far as it affected the petitioner; and for that purpose the petitioner reverts to the office held of county secretary unless lawfully removed per applicable constitutional, statutory, and contractual provisions.
- e) The permanent injunction hereby issued restraining the respondents from contravening Articles 10 and 47 of the Constitution.
- f) The permanent injunction hereby issued restraining the respondents from advertising, nominating or appointing or filling anyone to the post of County Secretary for as long as the petitioner holds that office of County Secretary as already duly appointed to hold the office.
- g) The respondents to pay the petitioner's costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 23<sup>rd</sup> September, 2016.**

**BYRAM ONGAYA**

**JUDGE**