



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 20 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOHN LEWIS NDOMBICLAIMANT

-VERSUS-

- 1. COUNTY GOVERNMENT OF TRANSNZOIA**
- 2. GOVERNOR, TRANSNZOIA COUNTY**
- 3. THE HON. THE ATTORNEY GENERALRESPONDENTS**

J U D G E M E N T

The Petitioner is the County Executive Committee Member for the department of Health in Trans Nzoia county. He was first appointed on 29th July, 2013 as County Executive Committee Member in charge of Transport and Infrastructure, a position he held until 8th August 2014 when he was reassigned his current position in a reshuffle.

The 1st Respondent is County Government of Transzoia while the 2nd and 3rd Respondents are the Governor, Transzoia County elected pursuant to Article 180 of the Constitution and the Attorney General of Kenya, the legal advisor of the state respectively.

In the petition filed on the 7th September 2015, the petitioner seeks the following reliefs:-

1. A declaration that the suspension and the intended dismissal of the Petitioner from the position of the County Executive committee Member in charge of Health Services as communicated in the 2nd respondent's letter dated 7th August, 2015, is unconstitutional and unlawful on account of violation of Sections 31 and 40 of the County Government Act, 2012 as read with Articles 10, 41, 47 and 236 of the Constitution of Kenya and Section 41 of the Employment Act.
2. An order of Certiorari to issue to bring into this Honourable Court the decision of the 1st and 2nd Respondents dated 7th August, 2014 suspending the petitioner from the position of the County Executive Member in charge of Health Services, for purposes of being quashed for being in contravention of Sections 31 and 40 of the County Government Act, 2012 as read with Articles 10, 41, 47 and 236 of the Constitution of Kenya and Section 41 of the Employment Act.
3. A declaration to issue to declare that under Section 31 and 40 of the County Government Act, 2012 as read with Article 236 of the Constitution, the Petitioner remains the lawful holder of the position of the County Executive Committee Member in charge of Health Services.

4. The Honourable Court do find and uphold that the actions, conduct, decisions and omissions of the 2nd respondent in respect of the suspension and intended dismissal of the Petitioner from his position as County Executive Committee member in charge of Health Services, and the intended Surcharge of the petitioner to recover Money, constitute conduct that violates Articles 10, 41, 47 and 236 of the constitution of Kenya.

5. An order of Prohibition do issue directed at the 2nd Respondent to Prohibit the 2nd Respondent from proceeding with the disciplinary action against the petitioner by way of dismissal from the position of County Executive Committee member, or Surcharge to recover Money on account of the findings of the Forensic audit Report dated June, 2015.

6. The Honourable Court be pleased to issue a declaration that the conduct of the 1st and 2nd respondents of deliberately false implicating the petitioner in acts of gross misconduct and incompetence to cover up massive theft of Public Funds involving the 2nd respondent amounts to a breach of the contract of employment and has made it impossible for the Petitioner to continue working and the 1st and 2nd respondents do pay the petitioner full compensation for the remainder of the term of contract of employment as County Executive committee Member.

7. The Honourable Court be pleased to Order for compensation of the petitioner for violation of the Petitioner's rights.

8. An Order of certiorari do issue to bring into this Honourable Court the Forensic audit Report dated June, 2015 for purposes of being quashed to the extent that it wrongfully adversely mentions the Petitioner and contravenes Article 10, 47 and 236 of the Constitution of Kenya and Section 41 of the Employment Act and Section 31 and 40 of the County Government Act, 2012.

9. Costs of this petition be provided for:-

Background

On 12th August 2015 the petitioner was served with a letter dated 7th August, 2015 suspending him from his position as county Executive Committee Member in charge of Health Services on allegations of gross misconduct. The charges against the petitioner in the letter of suspension are the following;

1. Failed to ensure and provide proper supervision as the county Executive Committee member for Roads and Infrastructure in accordance to sections 5(i) and (ii) of the Government Finance Regulations and Procedures that led to committing government funds without budgetary allocation to the tune of Kshs.990,334,936.91.

2. Failed to prepare and maintain a roads maintenance plan for the Financial Year 2013/14 resulting in the award of contracts beyond the approved budget by Kshs.990,334,936.91.

3. Failed to put in place proper management systems for road maintenance and apply proper monitoring systems resulting in the double award of contracts occasioning multiple claims amounting to Kshs. 35,743,882.00

4. Failed to maintain a list of roads that were maintained through in- house arrangement resulting in awarding of in-house maintained roads to external contractors hence occasioning loss of public funds.

5. Engaged in improper conduct by permitting expenditures that were unlawful and not procedurally authorised for payment for works allegedly carried out on roads that had already been maintained by KERRA leading to a loss of Kshs.12,191,918.00 that was paid to contractors without provision of confirmatory certificates contravening section 14.7 of Government Regulations and Procedures and Public Finance Management Act guideline 18 of 2012 section 74(c).

6. Engaged as a supplier of services and were paid moneys on various dates namely; Kshs.699,000 on 15/1/2014 and Kshs.2,016,000 on 7/5/2014 contrary to service regulations and the Code of Ethics. You used your office for personal benefit.

The letter of suspension required the petitioner to show cause within 21 days why disciplinary action should not be taken against him.

The petitioner responded to the letter of suspension by his letter of 27th August, 2015 in which he denied all the allegations against him and enclosed several documents in support of his case. In the response he accused the 2nd Respondent of using the forensic audit report to fix him.

The petitioner filed this petition soon thereafter. The Petition was filed together with a motion under certificate of urgency seeking conservatory orders. By a ruling delivered on 4th December 2015 this court restrained the Respondents from taking any further disciplinary action against the Petitioner pending the outcome of the petition.

In the petitioner's affidavit in support of the petition, the Petitioner avers that the suspension was based on a special audit report of the Auditor General prepared on special request and instructions of the 2nd Respondent to cover up diversion of funds which the 1st and 2nd Respondents were unable to account for. He alleges that the special audit was informed by documents which were selectively availed to the Auditor or contrived by the Finance Department of the 1st Respondent to cover up financial improprieties unearthed by an earlier routine audit of the Auditor General. He further alleges that the 1st and 2nd Respondents concealed vital documents which would have disclosed mismanagement of funds through dubious contractors which are extraneous to the department of Transport, Infrastructure and Energy. He alleges that the allegations against him are intended to victimise him due to his refusal to condone corrupt deals, that he personally appeared before the public accounts committee of the County Assembly and made representations at his own request on 12th August, 2015 and that he was served with the letter of suspension on the same day whilst in the process of making his representations to the public accounts committee. He averred that although the 1st and 2nd Respondents reported to both the print and broadcast media that several officers had been suspended in a graft purge only the petitioner was suspended from duty.

The Petitioner filed a supplementary affidavit on 17th February, 2016 in which he states that his suspension was intended to sanitize documents and records and to prevent him from appearing before the Public Accounts Committee of the Assembly and the Ethics and Anti Corruption Commission Officers who were carrying out investigations into corruption in Road Works in the County. He further stated that the Finance and Investments Committee of the County Assembly did not implicate him in any wrong doing. He further stated that his suspension was being used as a cover up.

In the written submissions filed on behalf of the petitioner, it is submitted that his suspension is a violation of his right to lawful, reasonable and procedurally fair action in line with Article 47(1), Article 28, Article 41(1) and 2(b) and 236 of the Constitution. It is submitted that although the petitioner was given written reasons for his suspension the reasons cannot be said to have been lawful, reasonable or fair as envisaged under Article 47(1) or Article 236 of the constitution and are therefore invalid.

It is further submitted that the petitioner has demonstrated that the Respondents finance and investments committee absolved him from the allegations, and he has not been investigated by the Ethics and Anti Corruption Commission hence the action taken against him is arbitrary, inappropriate and unnecessary in the circumstances.

The 1st and 2nd Respondents opposed the petition and filed a replying affidavit of Pius Munialo, the 1st Respondent's Assistant County Secretary. The 1st and 2nd Respondents further filed Grounds of Opposition to the Petitioner's Notice of Motion and written submissions.

In the Replying Affidavit Mr. Munialo depones that the petition is incompetent and fatally defective for failing to comply with the requisite threshold of proof relating to constitutional petitions and also for

failing to comply with mandatory constitutional and legal provisions. It is deponed that the suspension of the petitioner resulted from an audit which disclosed massive financial and procurement malpractices that resulted or were likely to result in massive loss of public funds and that the petitioner has in his pleadings admitted the malpractices with his cohorts and that his suspension is justified. That the petitioner has only been suspended from duty to allow for investigations to be conducted into the financial and procurement impropriety and malpractices revealed in the audit. He depones that it is normal practice for public officers implicated in corrupt practices and economic crimes to step aside to allow for investigations and that the petitioner has neither challenged the audit report nor submitted another report vindicating him.

It is further deponed in the replying affidavit that the letter of suspension detailed the petitioner's wrongdoings and required him to respond to the show cause-cum-suspension letter and that after responding to the same he should have waited for feed back from the Respondents. That instead he rushed to court prematurely. That apart from being premature the petition is speculative, unnecessary, and intended to interfere with the 2nd Respondent's executive functions and its duty to protect public funds. It was deponed that the matter was pending before the Public Accounts Committee of the County Assembly and is also being investigated by the Ethics and Anti-corruption Authority, that the petitioner's motive in filing the petition is to scuttle the said investigative and oversight processes. It is submitted that this is not an employment matter and should not be handled by this court.

In the notice of preliminary objection the 1st and 2nd Respondents raised the following grounds of objections:-

- (1) The Application is misconceived, incompetent and fatally defective for violating and/or failing to comply with mandatory provisions of law.
- (2) The application is brought under the wrong provisions of law.
- (3) The orders therein are such as cannot be granted on an Application of this nature.

The 3rd Respondent the Attorney General did not participate in the proceedings. It is not clear why the 3rd Respondent was joined in the proceedings as it is not mentioned anywhere in the petition. It is this court's opinion that the Attorney General is an unnecessary party to this petition.

In the Respondents written submissions, it is submitted that the Petitioner's letter of suspension-cum-show cause letter merely required him to show cause why he should not be surcharged and dismissed from the service of the 1st Respondent, and suspended him on half salary pending satisfactory explanation to the satisfaction of his appointing authority following which he would be allowed to resume duty. The Respondents submitted that a show cause letter cannot be challenged and cannot amount to a violation of an employee's constitutional rights as alleged by the petitioner. The Respondents relied on the case of **Alfred Nyungu Kimungui v Bomas of Kenya (Cause No.620 of 2013)** as cited with approval in **Rebecca Anne Maina & 2 others v Jomo Kenyatta University of Agriculture & Technology [2014]eKLR**. It was submitted that the petition is premature and driven by impatience. The Respondents further submit that in the petitioner's supplementary affidavit he went beyond the leave of the court which allowed him to respond to issues of fact raised in the replying affidavit of the Respondents. It is argued that instead the petitioner introduced new documentary exhibits as well as new provisions of the law and the constitution, new facts and new grounds, the effect of which was to amend the petition through the back door. The Respondents prayed that the evidence be expunged from the record relying on the court's decision in **Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 others (2013)eKLR**. It was further submitted for the Respondents that constitutional petitions are special proceedings *sui generis*, governed by special rules under the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and that permitting the petitioner to adduce new evidence or new grounds should not be allowed at an advanced stage of proceedings, that the leave granted to the applicant to file a supplementary affidavit was not a blanket leave, and the petitioner violated Article 50(1) of the Constitution as the exhibits were filed at the submissions stage.

On the preliminary objection, it was submitted for the Respondents that the issues raised therein are within the threshold of the principles of a preliminary objection as set by the Court of Appeal in **Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited [1969] E. A. 696**.

It was submitted for the Respondents that this court lacks jurisdiction to determine a suit regarding the employment of county executive members as they are not hired competitively by the County Public Service Board but are hand picked by the Governor for reasons and considerations known only to him, and the Governor may remove them at will. That in the present case the petitioner has merely been given a show cause letter and suspended pending investigations. That once investigations are complete the petitioner will resume work as he has not been terminated.

On the substantive petition, it is submitted that the petitioner failed to cite in the body of the petition the constitutional provisions and demonstrate how they were violated by the Respondents. The Respondents relied on the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272** as cited with approval in **John Mining Temoi & another v Governor of Bungoma County & another**.

It was submitted that introducing certain articles in the supplementary affidavit cannot cure the defect in the petition. The Respondents submitted that the petition lacks merit as the show cause-cum-suspension letter issued to him resulted from an audit report that disclosed massive financial and procurement improprieties which the petitioner has admitted in the petition.

Determination

I have considered the pleadings filed by the parties both in support of and opposition to the petition. The issues arising from the totality of the pleadings and written submissions are in my view the following -

- (1) The jurisdiction of this court to try the petition.**
- (2) Whether the petition meets the constitutional threshold, and,**
- (3) Whether the petitioner is entitled to the orders sought.**

1. Jurisdiction

Jurisdiction is a fundamental issue as it gives a court the authority to determine a case. As was stated in the case of **Owner of the Motor Vessel Lillian "S" v Caltex Oil Kenya Ltd**,

"without jurisdiction a court has no power to make one more step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending before it. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Respondents have challenged the jurisdiction of this court to try this suit. The Respondents argument is that County Executive Committee Members "are not hired competitively by the County Public Service Board but are hand-picked by the Governor for reasons and considerations known only to him; and in terms of section 40 of the County Government Act the Governor may remove them at will."

For the petitioner it was argued that the issue of jurisdiction of this court to determine issues of employment of County Executive Members was dealt with in **Civil Appeal No.74 of 2014** between **Narok County Government & Another v Richard Bwogo Biriri** and **Civil Appeal No.2 of 2015** between **the County Government of Nyeri & Another v Cecilia Wangechi Ndungu**.

It is unfortunate that the petitioner's learned counsel Mr. Kraido did not file a list of authorities or annex his authorities to the written submissions as is the practice. Nevertheless I have considered the two cases he referred to and I find that in both cases the issue of jurisdiction of this court to try the two cases both of which were on first instance determined by this court, was not raised on the appeal or in the court of first

instance.

However in the case **Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another [2014]eKLR**, Nduma J considered the issue of this court's jurisdiction and stated as follows;

"The jurisdiction of the Court under *Article 162(2)* as read with *Section 12* of the *Industrial Court Act, 2011* is very clear and was well elaborated by **Hon. Majanja J.** in the matter of **United States International University (USIU) V. Attorney General (2013) e KLR**).

In the matter, counsel Kibe Mungai persuaded the Court to find;

- a. The Industrial Court has jurisdiction to determine applications for enforcement of rights and fundamental freedoms under Article 22 and 23 in relation to all matters within their jurisdiction under the Act;
- b. for purposes of all matters falling within the Industrial Court, reference to the "High Court" in the Constitution shall be deemed to refer to the "Industrial Court", and
- c. in order to avoid apparent conflict, the court having the status of the High Court should have all the powers of the High Court in determination of disputes.

The Honourable Judge relying on Kenyan and South African jurisprudence and statutory law found; at page 14:

"In light of what I have stated, I find and hold the Industrial Court as constituted under the Industrial Court Act, 2011 as a court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provision of Section 12 of the Industrial Court Act, 2011."

This decision was cited with approval by the Court of Appeal, at Nairobi in **Civil Appeal No.6 of 2012 Professor Daniel N. Mugendi Vs. Kenyatta University and 3 others**.

Section 12(1) of this Court's Act provides that the Court has jurisdiction to hear and determine disputes **relating to employment and labour relations including:**

- a. disputes relating to or arising out of employment between an employer and an employee Under *Section 2 of the Employment Act, 2007* a 'contract of service' is defined to mean;

"an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for the period of time."

Whereas an "employee" is defined as "a person employed for wages or a salary."

It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;

- (i) be having an oral or written contract of service;
- (ii) be providing a service to a real or legal person;
- (iii) be receiving a wage/salary for the services rendered.

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such dispute and has availed remedies to that purpose.

It is the Court's finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent.

This Court has therefore got jurisdiction over this matter."

The Respondents' argument that merely because the members of County Executive Committees are hand picked by the Governor, this court has no jurisdiction to determine the cases relating to their employment is in my view a very simplistic argument. Most private organisations do not source their staff competitively. A lot of the employees are head-hunted while others are referred by other employers. Others are hand picked much in the same way as the Governor picks County Executive Committee members. That does not place their employment outside the jurisdiction of this court. As stated by Nduma J. in the case of **Nick Githinji Ndichu (Supra)** it is not the manner in which an appointment is made that confers jurisdiction to this court, but the nature of the relationship. In **Cecilia Wangechi Ndungu's** case (Supra) the Court of Appeal held that it is the Employment Act that is not applicable to state officers as their terms and conditions of service are regulated by the Constitution or relevant statute, principles of fair administrative action and rules of natural justice.

For the foregoing reasons, I find and hold that this court has jurisdiction to hear and determine this petition as there was an employment relationship between the petitioner and the 1st Respondent.

The second issue is whether the petition meets the constitutional threshold. In my ruling on the petitioner's application herein, I held as follows ;

"I have considered the petition, the application and the affidavit in support thereof. The only action the Petitioner complains of is his suspension by the 2nd Respondent. He has however not stated how the suspension violates his constitutional rights. He has mentioned several sections of the constitution but failed to demonstrate how those sections of the constitution have been or are likely to be violated by the suspension.

My understanding of suspension is that it is resorted to by an employer where the employer wishes to carry out investigations but the employee who is suspended is likely to interfere with the investigations or if it would be embarrassing or uncomfortable to carry out the investigations in his presence. Suspension as I understand it is not a punishment as an employee would go back to work if he is absolved of the charge preferred against him after investigations while disciplinary proceedings would be instituted if the investigations find the employee to be culpable."

The effect of the ruling was that the petitioner did not meet the constitutional threshold for a constitutional petition as set in the case of **Anarita Karimi Njeru (Supra)** where the court stated that ;

"We would, however, stress that if a person is seeking a redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision, that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

In the case of **John Mining Temoi (Supra)** Mabeya J. stated that "as a basic minimum, the petitioners are required to not only cite the provisions of the constitution alleged to have been violated, but also the manner in which they have been violated ..."

Further in the case of Daniel Chacha Muiruri [2012]eKLR the court stated that;

"It is the petitioner's duty to specify and demonstrate with particularity the constitutional rights which have been violated, in what manner and by whom. He must also frame the reliefs he is seeking from the court. This is so where the petitioner has the benefit of legal counsel. For all the foregoing I find and hold that the petitioner has not set out either in the pleadings or argument in the written submissions the constitutional issues to be investigated and determined by this court

siting as a constitutional court ..."

The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Commonly referred to as "Mutunga Rules", provide at Rule 10(2) as follows;

The Petitioner shall disclose the following -

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

These details are lacking in the petition filed herein which contains only the facts relied upon and the reliefs sought. The petition does not contain the constitutional provisions violated or the nature of injury caused or likely to be caused to the petitioner. As correctly pointed out in the submissions of the Respondent, constitutional applications are *sui generis* and must meet the threshold as prescribed. The Rules only allow the court to make exceptions where parties fall within the vulnerable group as expressly provided in Rule 3(7) as follows;

The Court shall pursue access to justice for all persons including the -

(a) poor;

(b) illiterate;

(c) uninformed;

(d) unrepresented; and

(e) persons with disabilities

In the present petition however, even if the petitioner had been compliant with the foregoing, the court would only interfere in circumstances cited in the case of **Rebecca Anne Maina (Supra)** where the court stated;

*As held in the case of **Alfred Nyungu Kimungui Vs Bomas of Kenya (Industrial Court Cause No.620 of 2013)** the Industrial Court should not take over and exercise managerial prerogatives at the work place.*

However, in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the court will intervene not to stop the process altogether but to put things right. When the Claimants came before me, their boss Prof. Francis M. Njeruh had just been dismissed. Further, the Court took notice that since 15th August 2013, the Claimants had been transferred at a frequency that seemed somewhat

abnormal.

The petitioner herein was given an opportunity to show cause why disciplinary action should not be taken against him which he did. He further stated in the affidavit in support of the petition that he made representations to the County Public Accounts Committee both in writing and in person. He can therefore not complain about not having been accorded a fair opportunity to present his case. In any event, as the Respondents have stated in the Replying Affidavit of Mr. Munialo and in the submissions, the Petitioner would be allowed to resume duty if he satisfactorily showed cause why disciplinary action should not be taken against him.

I however find that the Respondent failed to prove that there is provision for suspension without pay. In the letter of suspension reference is made to "current service regulations". The letter states in the penultimate paragraph that;

"while on suspension you will be entitled to part salary in accordance with the current service regulations and you will be expected to leave your work station and report back as you will be instructed."

The service regulations referred to were not produced. For the Respondents to deny the Petitioner any part of his remuneration during suspension, they must prove that such denial is sanctioned by the said regulations and that the regulations apply to the petitioner.

Conclusion

I find that the petitioner has not proved that any of his fundamental rights have been infringed or threatened. He has further not proved that the petition conforms to the minimum standard of a petition as provided in Rule 10(2) of the "Mutunga" Rules.

The upshot is that the petition is dismissed save for the fact that the Respondents shall pay the petitioner full salary during the period of suspension. There shall be no orders for costs.

Orders accordingly.

Judgement Dated, signed and delivered this 22nd day of September, 2016

MAUREEN ONYANGO

JUDGE