



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**OF KENYA AT NAIROBI**  
**PETITION NO. 46 OF 2015**

(Before Hon. Justice Hellen S. Wasilwa on 27<sup>th</sup> October 2016)

**IDRIS ADEN MUKHTAR ..... 1<sup>ST</sup> PETITIONER**  
**MUKHTAR BULALE..... 2<sup>ND</sup> PETITIONER**  
**SALAH YAKUB FARAH..... 3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF GARISSA.....1<sup>ST</sup> RESPONDENT**  
**THE GOVERNOR –GARISSA COUNTY .....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. Before the Court is a Petition under Article 1,2,3(1),10,19,20,21,22,27(1)(2) & (3), 28, 41(1), 47(1) & (2), 48, 165(3)(b),191 & 258(1), of the Constitution of Kenya (2010), Rules 4,10,11,13, and 20 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules 28<sup>th</sup> June 2013, and Sections 31 and 40 (1) & (2) of the County Governments Act No. 17 of 2012, Laws of Kenya.

2. The Petitioners seek:

***a. A declaration that the act of the 2<sup>nd</sup> Respondent in relieving the Petitioners of their duties is a breach of the latter's Constitutional Rights under Article 27(1), (2) and (3), 28, 41, 48 and 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.***

***b. An order of Judicial Review of Certiorari to quash the decision of the 2<sup>nd</sup> Respondent made by letters dated 22<sup>nd</sup> May 2015, relieving the Petitioners of their duties as County Executive Committee Members.***

***c. An order of Judicial Review of Prohibition to prohibit the Respondents from appointing any fresh nominee for Approval by the Garissa County Assembly for appointment as members of the Garissa County Executive.***

***d. In alternative and without prejudice to payer (b) and (c) above, an order of payment of all dues to***

***the Petitioners in the period that they would have served between now and the end of the term.***

***e. Any other relief or order that this Honorable court may deem fit to grant.***

### **Facts**

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners are adult Kenyan Citizens resident in Garissa and Members of the Garissa County Executive Committee being responsible for (1) Youth, Sports, Trade, Investment, Enterprise Development and Cooperatives, (2) Water and Environment and (3) Energy and Tourism respectively.

4. The first Petitioner was nominated on the 29<sup>th</sup> of April 2013 and took oath to office on the 3<sup>rd</sup> of June 2013. The 2<sup>nd</sup> Petitioner took office on the 3<sup>rd</sup> of June 2013, and the 3<sup>rd</sup> Petitioner also took office on 3<sup>rd</sup> June 2013.

5. The Petitioners felt that the budget allocation process was mismanaged and estimates would be presented to the assembly without approval of the County Executive Committee as required. This led to a mismanagement of funds, and resources being unavailable for day to day running of the office as well as various development projects forcing the contractors to turn to the media and hold demonstrations.

6. The Petitioners wrote a Memorandum raising various issues with the budget however, it was still approved. Shortly thereafter, a motion was tabled at the County Assembly questioning an authorised foreign trip made by the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners. The first Petitioner was later summoned by the Garissa County Assembly Ad Hoc Committee but could not appear as he was away on official business.

7. Further, on the 24<sup>th</sup> of May 2015, he received a letter at 8.57 pm via email that his employment had been terminated due to:

***i. Travels to destinations outside the country without proper sanctions.***

***ii. Unauthorized regular absence from the office.***

8. On the other hand, the 2<sup>nd</sup> Petitioner received a call from the Governor who informed him that he had been thinking of parting ways with him, but would instead like him to resign from his position. He found this very strange as there had been no issue as to performance nor had he ever received a warning letter questioning his duties.

9. The 2<sup>nd</sup> Petitioner received a further call from the Governor asking if he made up his mind, he refused to give in to such threats labeling them acts of intimidation. On the 24<sup>th</sup> of May he received an email attaching his termination letter dated 22<sup>nd</sup> May 2015, which gave his reason for termination as the failure to implement key decisions relating to his department and further failure to supervise the administration and service delivery of the Water Department and other related agencies of the County. There were no said policies in the Water ministry at the given time.

10. The 3<sup>rd</sup> Petitioner received his termination letter on the 22<sup>nd</sup> of May 2015 citing reasons for dismissal as foreign trips and regular absenteeism from the office. The trips were sanctioned by the Governor and they were supposed to seek investors for the County, moreover, the accusation of absenteeism hold no water as every time he was away was with good reason.

11. The Petitioners were never asked to respond to any of the issues raised and was only aware that they were still under investigation. They were never served with a show cause letter or accorded any form of hearing. The foreign trips he took were within full knowledge and sanction of the Governor and were fruitful as they were for various investment opportunities within the county. The accusations herein are therefore malicious and termination was unlawful.

12. The Governor has further acted discriminatorily as the first and third petitioners hail from the Abduwak Sub Clan while the 2<sup>nd</sup> one is from the Abdalla Sub Clan both of the larger Talimuge of the Ogaden Clan, while the Governor and the unaffected executive committee members hail from the Auliyen Sub Clan of the Ogaden and none of their positions were terminated despite serious allegations being levelled against them.

13. In response to the Petition, the Respondents have filed a Replying Affidavit deposed to by one Mohamud H. Mursal. They admit that the Petitioners were in their employment until the 22<sup>nd</sup> of May 2015.

14. They aver that the 2<sup>nd</sup> Respondent in exercise of his constitutional and/or statutory rights terminated and/or caused, communicated and/or effected the termination of the Petitioners' services as County Executive Committee Members of the 1<sup>st</sup> Respondent for their incompetency and failing to perform work entrusted to them by the 2<sup>nd</sup> Respondent. Further, on 25<sup>th</sup> May 2015, the 2<sup>nd</sup> Respondent in exercise of his statutory powers appointed persons to fill the positions previously held by the Petitioners.

15. They aver that by a letter dated 19<sup>th</sup> February 2015 addressed to the deponent, the County Assembly of Garissa inquired about foreign trips made by 1<sup>st</sup> and 3<sup>rd</sup> Petitioners, and he in turn asked them to explain the trips. The Petitioners refused, failed and/or neglected to respond to his inquiry letter dated 23<sup>rd</sup> February 2015 as required despite several oral reminders and those of the County Assembly of Garissa.

16. They aver that Article 42(2) of the Vienna Convention stipulates that 'All official business with the receiving state entrusted to the mission by the sending state shall be conducted with or through the Ministry for Foreign Affairs of the receiving state or such other ministry as may be agreed' moreover Article 42(2) of the Vienna Convention applies to the Petitioners by virtue of Article 42(2) of the Vienna Convention applies to the Petitioners by virtue of Article 2(5) & (6) of the Constitution of Kenya 2010. The foreign trips by the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners were not authorized by the 2<sup>nd</sup> Respondent or the National Government as required by the said Vienna Convention, Constitution law and/or Public Service Regulations.

17. They aver, that the neglect and/or refusal by the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners to respond to lawful enquiries was an act of gross misconduct calling for summary dismissal. Further, the deponent received a complaint of absenteeism of the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners from their respective ministries.

18. The complaints have since been cross-checked with the official motor vehicle Transport Daily Work Ticket and confirmed that the 1<sup>st</sup> Petitioner together with 3<sup>rd</sup> Petitioner were indeed absent for the period complained of in the Complaint letter in paragraph (15) above as it is during this time the said Petitioners had undertaken the foreign trips among other personal errands.

19. They aver that the 2<sup>nd</sup> Petitioner herein was in charge of Water Health and Sanitation in the 1<sup>st</sup> Respondent's jurisdiction in which he consistently failed to discharge his work as entrusted to him by the Governor. Via a letter dated 8<sup>th</sup> September 2014, the 2<sup>nd</sup> Respondent requested the 2<sup>nd</sup> Petitioner to give an explanation of his failure and/or delay in advancement of a Water Project proposed by the Garissa County Assembly. He neglected/failed to respond to the letter.

20. They aver that as a direct consequence of the negligence, the people of Garissa were constrained to use muddy water for drinking which is a dangerous health risk to the lives of the people of Garissa.

21. They aver that Petitioners have defied lawful summons by Garissa County Assembly and have instead rushed to this court and obtained a protection order in bad faith and without disclosing material facts which is a requirement when one is seeking equitable remedies.

22. Further, the 2<sup>nd</sup> Respondent lawfully exercised his statutory powers and dismissed the three

petitioners herein from office for their continued failure to perform their primary duties as entrusted to them by the Respondents and for their insubordination thereof.

**Evidence.**

23. The Petitioners presented before this Honourable Court eight witnesses.

24. PW1 Aden Idriss Aden is the 1<sup>st</sup> Petitioner; he relied on all the Affidavits in support of the Petition, various Affidavits in support to various Applications filed by Petitioners and in response to the Applications filed by the Respondents.

25. In cross-examination, he reiterated that he was appointed by the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> June 2016 as a County Executive Committee Member of Garissa County. That he indeed went for foreign trips after receipt of invitations from the countries being Israel and Netherlands through the office of the 2<sup>nd</sup> Respondent sanctioned by the Governor. The trips were successful cumulating in a trip to the Netherlands for the Governor and the formulation of a task force for implementation of various responsibilities after the trip.

26. He explained that had received summons to appear before an Adhoc Committee but that the notice that was given was too short that he sought an extension due to the fact that he could not properly compile all the documents that the committee required within the unreasonably short notice that he had been given which extension was issued, but was surprised to later receive his termination letter.

27. PW2 was Mukhtar Bulale the 2<sup>nd</sup> Petitioner herein, he relied on all the Affidavits as PW1 hereinabove and further on his own Supporting Affidavit to the Petition.

28. On cross-examination he reiterated that he was the Executive Committee Member in charge of Water. Went on to reiterate that prior to his dismissal from employment, his Department was the leading department in terms of projects that were being undertaken and those that had been completed so much so that the Governor commended him during various Committee meetings. He was equally supposed to receive his termination letter.

29. PW3, Salah Yakub Farah relied on all the Affidavits as PW1 hereinabove and further on his own Supporting Affidavit to the Petition. He further testified that he was a hard worker and believed in service to the people that when he was appointed to a ministry in which he felt that he was not completely utilizing his skills, he implored the governor to terminate his services.

30. PW4 Abdullahi Omar was the driver of the 1<sup>st</sup> Petitioner who had driven him all the days that they had allegedly been out of the office. He also explained that he was paid all his dues and the payment of which was approved by the Chief Officer in charge of his department who then went ahead and purportedly wrote a letter claiming that the 1<sup>st</sup> Petitioner had been absent from office and absconded duty.

31. PW5 was the legal officer of the National Assembly took the court through the provisions of Section 31 and Section 40 of the County Government Act. He confirmed that indeed the Petitioners appeared before the Committee on 3<sup>rd</sup> June 2016 but the Committee was not sitting and the County Clerk signed on the various letters that the Petitioners had indeed appeared before him. He further confirmed that the National Assembly had not accorded the Petitioners herein any sort of hearing.

32. PW6 Abdikadir Sugow was the Communications Officer in the office of the Governor. He stated that the Governor used him to communicate to other Executive Committee Members and other departments together with other parties that would engage with the County in official capacity. He stated that the Governor gave him instructions to nominate the petitioners to travel abroad which he did.

33. PW7 Ahmed Adan is the Director of Water Services. He relied fully on his affidavits, he also went on to say that the accusations leveled against him were baseless. He stated that projects were delayed

because of the incompetence of the 2<sup>nd</sup> Petitioner which cannot be further from the truth owing to the recognition of the achievements of the 2<sup>nd</sup> Respondent by the County Government itself as can be seen in the County Advert and Newsletter including the digging of 15 boreholes in different part of the County, bringing 40 water pans to function county wide (both new and de-silting of old ones), the extension of water services to 22 urban centers and towns of the County and the Commissioning of Masalani water treatment and water supply project worth 170 million.

34. He further went on to state that the pilot project being Banane Water Project had not been commissioned which fact was contrasted by **DW1** who is the County Secretary who stated that the said project had already been commissioned by the Governor.

### **Submissions**

35. The Petitioners submit that the notices that were sent out to them were dated 18<sup>th</sup> May 2015 and it required the Petitioners to appear before the committee on 22<sup>nd</sup> May 2015. This, they submit was not adequate time. It was unreasonably short owing to the fact that the committee required various documents which would take the Petitioners a while to compile and hence they sought an extension which was granted.

36. After filing of this petition, they were later summoned via letter dated, 29<sup>th</sup> May 2015. The Petitioners appeared before the Adhoc Committee only to be informed that the Committee would not be sitting and this information and evidence of their appearance captured in their various summons by the County Assembly Clerk.

37. They submit that they were then not given an opportunity to be heard, which goes against the rules of natural justice. They further submit that it is trite law that since the decision of the County Government is of the effect of taking away or adversely affecting the rights of the Petitioners, they are amenable to the rules of natural justice. It provides as follows (**5th Edition 2010 Vol. 61 at paragraph 639**) :

***“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”***

38. They rely on the case of **JMK vs. MWM & Another (2015) eKLR**, the Court of Appeal stated as follows regarding the right to be heard which includes the right to have a sufficient notice of hearing whether before a court of law or anybody exercising quasi-judicial functions:

**“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.....The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”**

39. In this instance, they submit that while it is true that a notice issued, however, in the circumstances, it cannot be the case that the Petitioners were granted the right to be heard since the opportunity, not due to a fault of their making, did not materialize.

40. Moreover, in **Narok County Government & another v Richard Bwogo Birir & another [2015] eKLR** the Court of Appeal expressed itself as follows regarding the question of natural Justice and more specifically the right to be heard:

*“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”*

41. They submit that that the right to fair hearing in this instance goes hand in hand with the right to Fair Administrative action. Article 47 enshrines the right of every person to fair administrative action, that the said Article is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law to be measured against the standards established by the Constitution.

42. They submit that the **Fair Administrative Actions Act No. 4 of 2015** which stems from Article 47 of the Constitution. S.2 of the Act and applies to all state and no state parties, defines an administrative action to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

43. They submit that the County has an obligation to act fairly, and rely on the case of In **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR**, Kiage J authoritatively quoted Lord Denning in **Selvarajan vs. Race Relations Board [1976] 1 ALL ER 12 at 19** when he stated that:

*“...in all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it.”*

44. The Petitioners submit that the evidence shows that all the County Executive Committee Members who had their employment terminated were from particular clan as opposed to those who have continued in their portfolios which shows that both limbs of the rule of natural justice have been flouted by the first and second Respondents.

45. In support of the foregoing, they rely on Article 236 of the Constitution which provides that **A public officer shall not be:-**

*a. Victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or*

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

46. They further submit that the actions of the Respondents in terminating the employment of the Petitioners runs against the provisions of Article 236 of the Constitution and the Employment Act as read *pari materia* with the provisions of the County government Act.

47. As to the power of the Governor to dismiss at his pleasure, they submit that this no longer exists. They state that the pleasure powers were reposed in the president by Sections 24 & 25 of the former Constitution and therefore bad law in the new dispensation. Public Service was modeled under this doctrine because section 24 and 25 provided as follows respectively:

***“Subject this Constitution and any other written law, the power of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment shall vest in the President.***

***and***

***Save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President”.***

48. However, the new Constitution does not have such a provision. The Current Constitution reposes all power in the people and none among the public servants can hire and fire at their pleasure a fellow public officer. This point receive judicial expression in the case of **Richard Bwogo Birir v Narok County Government & 2 others [2014] eKLR** which also involved the termination of the employment of a County Executive Officer. Regarding the pleasure doctrine, the Court stated as follows:

***“Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic”.***

49. Another bench of the Court of Appeal in Nyeri when determining the case of **The County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** held that the pleasure doctrine does not apply in Kenya and it relied on the Indian decision of **B.P. Singhal -vs- Union of India & Another** where the Supreme Court of India observed:-

***“There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. In the nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure does not mean a license to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good.”***

50. The Court proceeded to dismiss the Appeal by the County Government of Nyeri and held that the powers granted to the governor had to be exercised for public good and were subject to the reasonable expectations in law. The Judges expressed themselves thus:

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

51. They conclude by submitting that this case is one of violation of rights as none of the allegations leveled against the Petitioners has been proved. Further, that the due process was not followed in

terminating of the Petitioners and to that end, the court should grant the reliefs sought.

52. The Respondents have filed the following written submission in support of the response.

53. They submit that the Petitioners have omitted to frame their case or complaint with precision as required under the High Court's pronouncement in ***Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272***. *This Court is therefore at a loss in so far as any declaration of the infringement of the Petitioners' rights can be made.* The petition provides little or no particulars as to the allegations and the manner of the alleged infringements. The *viva voce* evidence of the Petitioners exacerbated the situation. The Petitioners failed with tremendous success to demonstrate how any of their rights under Articles 27(1), (2) and (3), 28, 41, 48 and 50 of the Constitution of Kenya were breached.

54. Further, they submit that Apart from citing omnibus provisions of the Constitution such as articles 28, 41, 48 and 50, the petition does not provide either particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the Court. Such failure to draft the petition with precision has greatly prejudiced the Respondents. The Petition at hand does not conform with the requirement of the holy trinity of Constitutional Petitions and on this limb alone, we humbly submit that the same should collapse on its fours.

55. The Respondents submit that the Governor like the President of the Republic has no obligation to give reasons for dismissal. The Petitioners occupy offices akin to Cabinet Secretaries at National Level. Article 132 of the Constitution gives the President the power to hire and fire Cabinet Secretaries and Principal Secretaries at any time, and it is their submission that the same power is extended to the Governor of the County. The Governor, like the President has the People's mandate. The County Governor, just like the President, may dismiss a County Executive Member without having to justify the decision, on reasons such as gross misconduct.

56. Section 31 [a] of the County Governments Act 2012, allows the Governor to dismiss a Member of the County Executive Committee, like the President is allowed to dismiss Cabinet Secretaries under Article 152 [5], if the Governor considers it appropriate or necessary to do so. He is not required under this law, to justify his decision. The Governor can also dismiss a Member of the County Executive Committee under Section 31 [b], if required to do so by a resolution of the County Assembly made under Section 40 of the Act.

57. To this end, they rely on the case of In **Tom Luusa Munyasya & another vs. Governor, Makueni County & another [2014] eKLR**, the Court (Justice Rika) was of the view that the Members of the Executive at both National and County levels are political appointees, whose assumption of, tenure, and removal from office, hinges on the political mandate granted to the appointing Authorities by the People.

58. They submit that the Constitution itself does not contemplate that Cabinet Secretaries, who are removed from Office by the President under Article 152 [5], could sue the President disputing their removal. County Executive Committee Members similarly, cannot validly challenge the decision of the Governor to remove them under Section 31 [a] of the County Governments Act 2012. The President and the Governor retain the prerogative.

59. The pleasure doctrine has been preserved, with respect to these special categories of Employees. Removal of Cabinet Secretaries or Members of the County Executive Committees, whether by the CEOs or through the respective Assemblies, cannot be treated as Claims for unlawful and unfair termination, which are remediable under the contract of employment, or the Employment Act 2007, at the Industrial Court of Kenya.

60. The Respondent submits that the Communications Officer PW6 did not have authority to give the Petitioners' permission to travel outside the country. The Governor, Deputy Governor, and Chief Officers were the only officials with authority to grant the permission and as such none was given for the trips.

61. The Respondents submit that the right to be heard is at the touchstone of any fair administrative

process. In this regard, the Petitioners were afforded an opportunity to be heard in line with the rules of natural justice. On 3 occasions, the Petitioners were summoned by the County Assembly of Garissa to shed light on their foreign travels. In all these occasions, the Petitioners did not offer any explanation with regard to their unauthorized foreign trips. Therefore the termination of the Petitioners' termination was lawful, justified and the same should be upheld by this Honourable Court.

62. As to the remedies sought, the Respondents submit that the scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

***“...These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons ...”.***

63. Further, the Respondents state that the parameters for the grant of judicial review orders were stated in the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** where it was held:

***“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”***

64. As none of the Petitioners' rights was breached, they submit that the judicial review orders of certiorari and prohibition cannot issue.

65. The Respondents submit that the Petitioners are not entitled to the relief of dues they would have earned until the end of their terms for the following reasons:

***1. Granting this prayer would amount to unjustly enriching the Petitioners as they will be paid for work not done.***

***2. Granting this relief would amount to wastage of public resources as the Petitioners will be paid and at the same time the holders of their various dockets will similarly be paid. This will amount to double payments.***

**3. The employment of the Petitioners was not for a fixed term. It was anticipated that the same could be brought to an end. The respondents relieved the Petitioners from their employment according to the law.**

66. As to costs, the Respondents submit that they ought to be borne by the Petitioners, as they never served them with a demand letter depriving the Respondent any opportunity to make good the matter, nor did they ask for costs in their Petition.

67. The Respondents conclude by submitting that the Petitioners have not made out a case to warrant the granting of the prayers they are seeking in their Petition dated 27<sup>th</sup> May 2015, and therefore it ought to be dismissed with costs to the Respondents.

68. Upon considering the evidence adduced by the parties and their submissions, this Court narrows down issues for determination as follows:

- 1. Whether there were valid reasons to dismiss the Petitioners herein.**
- 2. Whether the Respondents followed due process before terminating the Petitioner.**
- 3. Whether the Respondents breached any constitutional rights of the Petitioners.**
- 4. What remedies if any to give in the circumstances.**

69. On the 1<sup>st</sup> issue, the Petitioners as stated in their evidence were all dismissed for various reasons. The 1<sup>st</sup> and 3<sup>rd</sup> Petitioners were apparently dismissed for absenteeism and making unauthorised foreign trips which they both denied stating that they had permission to make those trips which permission was given by the Governor through the Director for Communication.

70. What is the position in the public service for officers travelling out of the Country on foreign trips? The Respondent cited Regulation K4 of the Public Service Code of Regulations 2008 which states as follows:

***“Travelling by Air***

***K4 (1) when travelling on duty to another Country an officer should normally travel by air. Air travel on duty within Kenya will require the prior approval in writing of the Permanent Secretary/head of Department-----“.***

71. This regulation had been cited by Respondent as one breached by the 1<sup>st</sup> and 3<sup>rd</sup> Petitioner but my reading of the said regulation does not state when travelling out of the County, an officer must get written permission from his supervisor.

72. The Respondents insisted that the Petitioners breached the regulation on foreign travel which regulations were not placed before this Court to ascertain whether or not there was breach. In any case the Petitioners insisted that they had permission to travel received through the Director of Communication.

73. The Respondents on their part insist that this permission was irregular and that the only person authorised to give the permission was the Governor of the County of Garissa.

74. Again to this, I say the Court is entitled to be issued with the documents detailing the breach complained of to ascertain whether there was any such breach or not. It is not the norm for this Court to go on a fishing expedition looking for Government circulars or documents unless their source is pointed out. Unfortunately the Respondent's submission was limited to but just a submission without drawing what they alleged.

75. Under Section 107 of Evidence Act:

***“Whoever desires any Court to give Judgment as to any legal right or liberty as dependent on the existence of facts which he asserts must prove that those facts exist...”***

76. Indeed he who alleges must prove. However the Respondents have not proved that there was indeed a requirement on written permission from the Governor before travel out of the County by the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners.

77. This is good practice and brings order in a work situation but unfortunately there is no evidence of the existence of such a directive which was brought to the attention of the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners and which they breached.

78. Under Section 43(1) and (2) of Employment Act:

***“(1) ...” In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

79. Again here, reasons for termination must be proved but I find that the Respondents failed to prove these reasons of travel without permission. On absenteeism, the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners have wavered this reason by submitting that they travelled on official duties and this is evidenced from the work tickets submitted and in some cases the places they visited or meetings attended and the fact that they were even given per diem by the Respondent, an indication that they were on official duty.

80. On the 2<sup>nd</sup> Petitioner, the reason given for his termination is that he failed to implement key policy decisions relating to his department and failure to properly supervise the administration and service delivery of the Water Department and other related agencies in the County.

81. To this, the 2<sup>nd</sup> Petitioner pointed out that he performed his duties well and was even congratulated for this work in some water projects he implemented and the Governor commended him during various committee meetings.

82. Again on this reason, it is my view that the Respondents ought to have placed before Court valuable documents such as the performance targets and how they were either implemented or not implemented after the normal performance target. The appraisal reports conducted if any would also have been very material.

83. It is therefore my finding that in all the cases of the Petitioners, there were no valid reasons for the termination.

84. On the 2<sup>nd</sup> issue, the Petitioners have all alluded to the fact that they were not given a fair hearing before termination. They were all served with termination letters via email without any notice.

85. I have looked at the preceding engagement between the Petitioners and Respondents and I find no proceedings for termination. There are 2 scenarios for dismissal in the circumstances as provided for under the County Government Act 2012.

86. Section 31(a) of the County Government allows the Governors to dismiss officers such as the Petitioners without observing any procedures or assigning any reasons. However in this case as seen from the **Court of Appeal No. 2/2015 County Government of Nyeri and Another vs. Cecilia**

**Wangech Ndungu (supra)** the Court of Appeal made a finding that the pleasure doctrine no longer applies in Kenyan Public Service and rendered itself as follows:

***“the Court upholds its opinion in Richard Bwogo Birir vs. Narok County Government and 2 others (2014) eKLR thus:***

***“to answer the 1<sup>st</sup> issue for determination being whether the pleasure doctrine applies in Kenya’s public service and particularly in this case, the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010. The court further finds that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the Petitioner (Respondent) by the 2<sup>nd</sup> Respondent (2<sup>nd</sup> Appellant) as was purportedly advanced for the Respondents. Finally, the Court holds that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The Court further holds that it is through the application of the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subdued by the people who are the holders of sovereign power in the new Republic”.***

.....

***And again the Court upholds the opinion in Birir’s case on the demise of the pleasure doctrine and the doctrine of the servants of the crown, thus,***

***“.....in the new Republic, the Court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the Court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic’s constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the constitution”.***

87. Under Section 40(1) of County Government Act however the Governor can only dismiss a County Executive Committee Member after a resolution by the County Assembly for such dismissal.

88. In the case of the Petitioners there was no such resolution by the County Assembly and therefore in either case, the dismissal of the Petitioners fail the test both under Section 31(a) and 40(1) of County Government Act and I therefore find the dismissal was unfair and unjustified as envisaged under Section 45 (2) of Employment Act which states as follows:

**(2) “...A termination of employment by an employer is unfair if the employer fails to prove:**

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason:-***

***(i) related to the employee’s conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure.”***

89. In addition to failure to follow the provisions of the County Government Act and Employment Act the Respondents also flouted the provisions of Article 50(1) of Constitution on right to fair hearing which Constitution provides as follows:

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”.***

90. Article 47 of the Constitution provides that:

***“Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.***

91. By failing to follow the laid down procedures under Section 41 of Employment Act, Section 30(1) of County Government Act and Section 40(1) of County Government Act, the Respondents failed and subjected the Petitioners to unfair administrative action.

92. Having found as above, I make the following determination:

***1. A declaration that the act of 2<sup>nd</sup> Respondent in relieving the Petitioners of their duties is a breach of the latter’s Constitution Rights under Article 47 and 50 (1) of the Constitution.***

***2. That the Petitioners are henceforth entitled to damages equivalent to 12 months’ salary as damages for unlawful termination as per their payslips***

***= 12 x 339,375 = 4,072,500/= each.***

***3. Prayer for reinstatement will not suffice given the short length of service to be served from this point.***

***4. The termination will be considered a normal termination and the Petitioners are also entitled to 1 months’ notice in lieu of notice, and any other benefits under the contract including gratuity for the period todate and any accrued leave not taken.***

***5. Respondents to pay costs of this Petition.***

Read in open Court this 27<sup>th</sup> day of October, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kohen with Mokuu for Respondent – Present

Marwa holding brief for Kanjama for Petitioner – Present