



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 9 OF 2015

PATRISIO NJERU NJIRU.....PETITIONER

-VERSUS-

EMBU COUNTY GOVERNMENT.....1ST RESPONDENT

HON. MARTIN NYAGAH WAMBORA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 20th December, 2016)

JUDGMENT

The petitioner filed the petition on 04.06.2015 through Kinoti & Kibe Company Advocates. The petition alleged contravention of Articles 10, 20, 21, 22, 23, 235, 258 and 259 of the Constitution of Kenya, 2010. It was stated to be in the matter of the County Governments Act, 2012; and in the matter of the purported disciplinary notice to show cause against the petitioner as the county executive committee member for Agriculture, Livestock Development and Fisheries in Embu County. The petition was supported by the petitioner's affidavit filed together with the petition. The petitioner prayed for judgment against the respondents for orders:

- a) That a declaration be issued to declare that the 2nd respondent has no power to subject the petitioner to disciplinary action in disregard of due process of law embodied in Articles 27, 41, 47, and 50 of the Constitution.
- b) That a declaration be issued to declare that the notice to show cause contained in the letter dated 26.05.2015 contravenes sections 40 and 55 of the County Governments Act, 2012.
- c) That a declaration be issued to declare that the decision of the 2nd respondent contained in the letter dated 26.05.2015 violates Articles 10(1), 174, and 235 of the Constitution.
- d) That an order of certiorari be issued to bring into the honourable court and quash the decision of the 2nd respondent to require the petitioner to show cause why disciplinary action should not be taken against the petitioner by the 2nd respondent constitutes violation of the petitioner's rights under Articles 27, 28, 41, 47, and 50 of the Constitution.
- e) That compensation for the violation of the petitioner's respective rights and fundamental freedoms enshrined in Articles 27, 28, 41, 47, and 50 of the Constitution.
- f) Costs of the petition to be borne by the respondents.

The respondents opposed the petition by filing on 06.08.2015 the replying affidavit of Raymond Kinyua, the 1st respondent's County Secretary. The respondents appointed Ndegwa & Ndegwa Advocates to act for them in the matter.

The petitioner was appointed on 11.07.2013 by the 2nd respondent with approval of the county assembly to serve in the office of the Embu County executive committee member for Agriculture, Livestock Development and Fisheries. By the letter dated 26.05.2015 the 2nd respondent demanded that the petitioner shows cause why disciplinary action should not be taken against the petitioner on account of dismal performance during the last one year; chronic absenteeism at the work place; and failure to consult or brief the relevant policy level colleagues before undertaking important decisions related to the petitioner's official work. On 25.05.2015 the petitioner and the 2nd respondent had held a meeting at which the petitioner says the 2nd respondent had asked him to submit the petitioner's up-to-date performance report and which the petitioner says he had submitted on 26.05.2015. The petitioner replied the letter dated 26.05.2015 stating as much and further that he had not been absent from duty without permission; he had already implemented over 90% of the target projects and they were at over 50% completion; it was impossible that he worked alone; and that he had not been given the evidence establishing the allegations. The petitioner concluded his reply thus,

“In view of the above issues, I strongly feel that I have done my duties professionally and diligently and I do not think I deserve any disciplinary action based on the allegations explained above.

Your show-cause letter did not indicate who has made complaints against me and what evidence they have to support those malicious allegations. Therefore, in view of the above response I humbly request you to thoroughly investigate the truthfulness or otherwise of those allegations before taking any disciplinary action because I believe there is no basis whatsoever for it. I wish to emphasise that on account of my professional standing and background and career stage, I take seriously allegations on my work performance and accountability. Accordingly, I trust that you will ensure that such allegations are not made frivolously or maliciously to achieve any short term political end or ethnic machinations. I look forward to your prompt response and thanks in advance.

Yours truly,

Dr. PARTRISIO NJIRU NJERU

CHIEF OFFICER AGRICULTURE, LIVESTOCK, FISHERIES, COOPERATIVE AND IRRIGATION

EMBU COUNTY”

The petitioner's case was that the show-cause letter contravened his right to fair administrative action as provided in Article 47 of the Constitution and further contravened the provisions of the County Governments Act, 2012 and the Employment Act, 2007. The petitioner's case was that he was entitled to fair labour practices as provided for in Article 41 of the Constitution as well as the provisions of the Employment Act, 2007. The petitioner urged that when performance evaluation is carried out by the 2nd respondent, it will show that the petitioner was competent, efficacious and with necessary capacity. By the letter dated 27.05.2015 the 1st respondent had scheduled performance evaluation for its senior officials between 10th and 12th June 2015; thus, it was not fair for the show-cause notice to allege poor performance before the scheduled evaluation had taken place.

The petitioner's further case was that the 2nd respondent's decision to issue the show-cause notice was motivated by political vendetta and malice because in the wake of the 2nd respondent's double impeachment by the Senate, the 2nd respondent held the Mbeere community responsible for his

predicament. The petitioner stated that after the 2nd impeachment the 2nd respondent had developed a hostile and vengeful attitude towards senior county government official from the Mbeere community. The petitioner stated that he believed that he was a victim of such 2nd petitioner's attitude. The petitioner urged the court to protect him from victimization and discrimination as envisaged in section 5 of the Employment Act, 2007 and Article 22 of the Constitution.

The respondents' case is as follows:

- a) After the petitioner replied to the show-cause notice he was going to be given a hearing as anticipated in the petitioner's own pleadings.
- b) Section 40 on removal of a county executive member involving the county assembly had not been instituted against the petitioner.
- c) The petitioner handed in his reply to the show-cause notice on 30.05.2015 and 3 days later on 03.06.2015 the petitioner moved to file the petition without giving the respondents an opportunity to conclude the disciplinary process.
- d) The respondents had not been discriminatory and have not breached section 5 of the Employment Act, 2007 which makes provision against discriminatory practices at the work place. It was the respondents' case that the disciplinary proceedings had not been commenced to victimize the petitioner on account of his ethnic background.

The court has considered the parties' respective cases and the material on record.

The **1st issue** for determination is whether the 2nd respondent was entitled to remove the petitioner from the office (by way of initiating disciplinary process) of the county executive member under section 31(1) (a) of the County Government Act, 2012, being an independent process from that under section 40 of the Act which involves the county Assembly in the disciplinary process. The court finds that the procedure under section 31 (1) (a) is initiated by the governor and concluded by the governor and is independent from a removal under section 40 of the Act. For that finding the court follows its holding in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** that the removal under the two sections is independent and separable. Thus, the court finds that the 2nd respondent acted within the law to issue the show-cause notice as was done for disciplinary action to be initiated against the petitioner on account of alleged poor performance or misconduct as was envisaged in Article 236 of the Constitution, section 31 (1) (a) of the County Governments Act, 2012 and section 41 of the Employment Act, 2007 prescribing notice and hearing in event of such disciplinary action. The court has found that the 2nd respondent, notwithstanding the provisions of section 40 of the County Governments Act, 2012, was entitled to dismiss the petitioner if the 2nd respondent considered it appropriate or necessary to do so per section 31(1) (a) of the County Governments Act, 2012. The court's opinion is that if a member of the county executive is dissatisfied with the disciplinary procedure as initiated, then the court would intervene only if the procedure as invoked is shown to be in contravention of the Constitution, statute or other law. If at the end of the process the punishment of removal is imposed by the governor under section 31(1) (a) of the County Government Act, 2012, it could be that the member may question the removal on account that the reason as advanced towards removal was not genuine or valid as envisaged in section 43 and of the Employment Act, 2007. Such is not the case in the present case and the court returns that the petitioner is not entitled as prayed for.

The respondents failed to file the final submissions and did not attend at the hearing as was scheduled and the court considers that there will be no orders on costs.

In conclusion, judgment is hereby entered for the respondents against the petitioner as the petition is hereby dismissed with no orders on costs.

Signed, dated and delivered in court at Nyeri this **Tuesday, 20th December, 2016.**

BYRAM ONGAYA

JUDGE