



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.8 OF 2015

JOHNSON MUEMA MUSOMI.....PETITIONER

VERSUS

EMBU COUNTY GOVERNMENT.....1ST RESPONDENT

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

(Before Hon. Justice Byram Ongaya on Friday 16th December, 2016)

JUDGMENT

The petitioner filed the petition on 04.06.2015 through Kinoti & Kibe Company Advocates. The petitioner invoked Articles 10, 20, 21, 22, 23, 235, 258 and 259 of the Constitution of Kenya, 2010. The petitioner alleged contravention of fundamental rights and freedoms under Articles 27, 28, 41, 47, and 50 of the Constitution and further invoked the County Governments Act, 2012. The petitioner prayed for orders:

- a) That a declaration be issued to declare that under section 35 of the County Governments Act, 2012 read with Articles 27, 41, 47, and 174 of the Constitution the 2nd respondent has no power to transfer or redeploy members of the county executive committee without regard to their respective knowledge, experience and career.
- 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 decisions of the 2nd respondent contained in the letters dated 26.05.2015 violated 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 issue a disciplinary notice to show-cause to the petitioner contained in the letter dated 26.05.2015.
- e) That a declaration be issued that the envisaged institution of the purported disciplinary action 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.
- f) That an order of certiorari be issued to bring into the Honourable Court and quash the decision of the 2nd respondent contained in a letter dated 25.07.2014 to transfer or redeploy the petitioner as a

member of the county executive committee for health.

g) That compensation for the violation of the petitioner's respective rights and fundamental freedoms under Articles 27, 28, 41 and 50 of the Constitution.

h) Costs of the petition be borne by the respondents.

The respondents filed the replying affidavit of Raymond Kinyua on 06.08.2015 through Ndegwa & Ndegwa Advocates. The petitioner filed a further supporting affidavit on 17.12.2015 and the petitioner's final submissions were filed on 05.05.2016. The respondents failed to file the final submissions and despite service failed to attend the hearing.

By the letter dated 15.06.2013 the petitioner was appointed to hold the office of the 1st respondent's county executive member for health. The appointment followed a competitive recruitment process and approval by the county assembly in accordance with section 35 of the County Governments Act, 2012. The appointment took into account the petitioner's wide knowledge and experience as a medical doctor.

By the circular letter dated 28.07.2014, the 2nd respondent redeployed the petitioner to the docket of Investment and Industrialization from that of health for which the petitioner had been initially interviewed and appointed to. It was not clear under what statutory powers or provisions the redeployment was effected. Following the redeployment the petitioner raised a grievance with the 2nd respondent that the redeployment had failed to take into account section 35 of the County Government Act, 2012 which provides that a person may be appointed as a member of the county executive committee if that person has knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.

The 2nd respondent responded to the grievance by indicating that he would provide the requisite support by hiring technical staff. Instead of redeploying the petitioner back to the health docket, by the circular letter dated 09.01.2015 (erroneously dated 09.01.2014) the 2nd respondent retained the petitioner as the executive member for Investment Trade with added docket of Trade and Tourism. The petitioner complained at meetings of the county executive committee that he had no experience in the four departments placed under him.

The 2nd respondent acted upon the petitioner's complaint by issuing a letter dated 26.05.2015. The letter stated as follows:

“RE: COMPLAINS AGAINST YOU IN RESPECT OF YOUR UNDER PERFORMANCE IN YOUR CAPACITY AS CEC/TRADE, TOURISM, INVESTMENT AND INDUSTRIALIZATION”

You will recall that you have communicated to me verbally in my Cabinet Meetings that you are not able to cope up with the duties and responsibilities of CEC/ Trade, Tourism, Investment & Industrialization (TTII) as your specialization is in the health sector. My subsequent responses to your attention has been that at the level of the County Executive your role is primary that of policy formulation in consultation with other members of the County Executive Committee and oversight role of your portfolio. Hence you should be able to perform those roles in any portfolio you are deployed to head.

Notwithstanding my explanations you have continued to complain that you cannot cope with your responsibilities as CEC/TTII. Your attitude has unfortunately been manifested in your extreme under-performance as the Head of your current portfolio.

In view of the foregoing, this is to urge you to cause why disciplinary action should not be taken against you within seven (7) days of the date of this letter.

Yours sincerely,

Signed

Hon. Martin N. Wambora

GOVERNOR

EMBU COUNTY

The petitioner replied by his letter dated 31.05.2015 as follows:

- a) Section 35(5) (d) of the County Government Act, 2012 had to be taken into account in his appointment and subsequent deployment in order to achieve the objects of devolution set out in Article 174 of the Constitution. In his initial application he had applied for the county executive member for health in view of his knowledge and experience as a medical doctor with a view to contributing towards better and quality health care for the people of the Embu County. It was therefore not proper to deploy the petitioner to portfolios that he had no knowledge, experience and distinguished career.
- b) While continuing to serve as redeployed, the petitioner stated that he had raised his concerns at the cabinet meeting (essentially at the county executive committee meetings) in good faith with the desire to get some assistance.
- c) There had been no performance contract evaluation of the petitioner's new docket that disclosed extreme underperformance as alleged in the show cause notice.
- d) It was unfair to invoke a legitimate and honest complaint as stated by the petitioner in the manner the 2nd respondent had invoked the complaint to initiate disciplinary action against the petitioner.
- e) The notice to show cause had not disclosed any ground for removal as envisaged in section 40 of the County Government Act, 2012.

The 2nd respondent's case was that it was within law for disciplinary action to be taken against the petitioner due to sloppy performance of duties and failure to discharge duties in accordance with the Constitution, the County Government Act, 2012 and section 41 of the Employment Act, 2007 prescribing notice and hearing in event of such disciplinary action. The 2nd respondent's further case was that notwithstanding the provisions of section 40 of the County Governments Act, 2012, the 2nd respondent 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 Government Act, 2012. It was urged that under section 39 of the County Government Act, 2012 the petitioner was accountable to the 2nd respondent in the execution of his duties as a county executive member. Thus the show-cause letter dated 26.05.2015 was properly issued against the petitioner. As at time of filing the petition the disciplinary process was underway and no punishment had been imposed against the petitioner. In absence of an administrative decision that was adverse, Article 47 of the Constitution on the right to fair administrative action had not been contravened. The respondents further stated that after the petitioner had replied to the show-cause notice by his letter of 31.05.2015, a hearing was going to follow and the petition was therefore premature. Whereas the inhabitants of Embu County were the Embu, Mbeere and Akamba, whereas the petitioner was Akamba, and whereas the 2nd respondent was from the populous Embu community, the respondent's case was that the petitioner's predicament had nothing to do with the petitioner's ethnic community as was alleged for the petitioner.

The **1st issue** for determination is whether the 2nd respondent was entitled to remove the petitioner from the office 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. 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.

The 2nd **issue** for determination is whether the petitioner has established that the 2nd respondent moved against the petitioner with a show-cause notice because the petitioner belonged to the Akamba community and the 2nd respondent to the populous Embu community. The court finds that the petitioner did not provide evidence to establish the allegation and the court returns that the differences in the ethnic community between the petitioner and the 2nd respondent has not been shown to have contributed to the petitioner's predicament.

The 3rd **issue** is whether the petition is premature. The respondents' case is that the 2nd respondent served the show-cause notice upon the petitioner within the framework of section 31(1) (a) of the County Government Act, 2012 as read with section 41 of the Employment Act, 2007. The court finds that to that extent the 2nd respondent was acting lawfully as far as procedure invoked was concerned. The petitioner's case is that the reason for the show cause notice was illegal in so far as it was propagated by the 2nd respondent in clear contravention of section 35(5) (d) of the County Government Act, 2012 which had to be taken into account in his appointment and subsequent deployment in order to achieve the objects of devolution set out in Article 174 of the Constitution. The court finds that the petitioner in that regard had a valid grievance and which ought to have been resolved through a fair and genuine grievance management procedure. The court finds that a valid or genuine grievance on the part of the employee does not constitute a valid reason for termination or dismissal and where the only reason for initiating a disciplinary process is an illegal or unfair ground as envisaged in section 46 of the Employment Act, 2007, then the employee is entitled to invoke the court's jurisdiction without having to await continuation and conclusion of the employer's internal disciplinary process. In the opinion of the court, the petitioner's valid grievances would not constitute a valid reason for termination or initiating disciplinary process because a valid grievance amounted to unfair reason for termination under section 46(h) of the Employment Act, 2007. The court returns that the petition was not premature.

The 3rd **issue** for determination is whether the court can interfere in the respondent's on-going disciplinary process as initiated against the petitioner. In such cases seeking to interfere with employer's powers, the court follows **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, "The principles are clear.

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present case the petitioner has established that the respondents were proceeding in clear contravention of section 35(5) (d) of the County Government Act, 2012. The respondents have not established the legal provisions under which the petitioner could be redeployed in the manner the 2nd respondent proceeded to do. The court returns that it would be proper to interfere with the disciplinary proceedings as they were initiated upon unreasonable ground in contravention of the statutory provisions and considerations that governed the petitioner's initial appointment.

The 4th **issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings as follows:

a) The petitioner prayed for a declaration to be issued to declare that under section 35 of the County Governments Act, 2012 read with Articles 27, 41, 47, and 174 of the Constitution the 2nd respondent has no power to transfer or redeploy members of the county executive committee without regard to their respective knowledge, experience and career. The court finds that the 2nd respondent's action was unreasonable and contravened the petitioner's rights in Article 47 and 41 in so far as the disciplinary action was in contravention of section 35 of the County Governments Act, 2012 and section 46 (h) of the Employment Act. The court finds that the claimant is entitled to the declaration that under section 35 of the County Governments Act, 2012 read with Articles 27, 41, 47, and 174 of the Constitution the 2nd respondent has no power to transfer or redeploy members of the county executive committee without regard to their respective knowledge, experience and career.

b) The petitioner prayed for a declaration 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. The court has found that the governor was entitled to procedurally move against the petitioner under section 31(1) (a) of the County Government Act, 2012 independent of section 40 of the Act. It has not been shown how section 55 on objectives of the county public service was contravened. The court finds that the sections were unnecessarily invoked in the present case. The prayer will therefore fail.

c) The petitioner prayed for a declaration to be issued to declare that the decisions of the 2nd respondent contained in the letters dated 26.05.2015 violated Articles 10 (1), 174, and 235 of the Constitution. There were no submissions made for the petitioner in that regard and the prayer will fail as the court deems that it was abandoned.

d) The petitioner prayed for an order of certiorari to be issued to bring into the Honourable Court and to quash the decision of the 2nd respondent to issue a disciplinary notice to show-cause to the petitioner contained in the letter dated 26.05.2015. The court has found that the letter was founded upon a valid grievance by the petitioner and the disciplinary processes had therefore been initiated upon unfair ground. The order of certiorari will therefore issue as prayed for.

e) The petitioner prayed for a declaration to be issued that the envisaged institution of the purported disciplinary action 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. The court has found that the initiated disciplinary process contravened Articles 27, 41 and 47 and the declaration will issued accordingly.

f) The petitioner prayed for an order of certiorari to be issued to bring into the Honourable Court and quash the decision of the 2nd respondent contained in a letter dated 25.07.2014 to transfer or redeploy the petitioner as a member of the county executive committee for health. The proceedings were filed on 04.06.2015 and therefore the prayer will not issue as it would be outside the statutory time of limitation of 6 months from the date of the decision to be quashed. The prayer will therefore fail.

g) The petitioner prayed for compensation for the violation of the petitioner's respective rights and fundamental freedoms under Articles 27, 28, 41 and 50 of the Constitution. There were no submissions on the prayer and the court deems that the same was abandoned. It will therefore fail.

h) As the petitioner has substantially succeeded in the petition he is awarded costs of the petition.

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

a) The declaration that under section 35 of the County Governments Act, 2012 as read with Articles 27, 41, 47, and 174 of the Constitution the 2nd respondent has no power to transfer or redeploy members of the county executive committee without regard to their respective knowledge, experience and career.

b) The order of certiorari hereby issued bringing into the Honourable Court for quashing the decision of the 2nd respondent issuing a disciplinary notice to show-cause to the petitioner contained in the letter dated 26.05.2015.

c) The declaration hereby issued that the envisaged institution of the purported disciplinary action against the petitioner by the 2nd respondent constituted violation of the petitioner's rights under Articles 27, 41 and 47 of the Constitution.

d) The respondents to pay the petitioner's costs of the petition.

Signed, dated and delivered in court at Nyeri this Friday, 16th December, 2016.

BYRAM ONGAYA

JUDGE