



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.91 OF 2014

MARGARET LORNA KARIUKI..... CLAIMANT

-VERSUS-

EMBU COUNTY GOVERNMENTRESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2015)

RULING

The respondent filed a preliminary objection against the respondent's suit on 10.02.2015 through R.M Mugo & Company Advocates and Njoroge Advocate made the submissions at the hearing. The grounds of objection were as follows:

1. The Constitution of Kenya creates a pure presidential system of government and under Article 132 it confers the President the power to appoint cabinet secretaries and principal secretaries.
2. The Article recognises that the offices are political appointees subject to the politics of the country and the policies of the President and his political party. That formulation is replicated at county government level and any enabling legislation is required to respect and to conform to the same.
3. In consequence, the dismissal of the claimant as the respondent's county secretary by the respondent's governor was lawful and proper and in accordance with the Constitution of Kenya and the reliance by the claimant on the County Governments Act 2012 and other provisions was misconceived and without constitutional validity.
4. By virtue of the premises aforesaid, the Employment Act 2007 and other labour statutes have no application to the subject matter hereof and this court lacks jurisdiction to entertain the claim.

It was submitted for the respondent that the President enjoys prerogative powers to dismiss a cabinet secretary under Article 132(2) as read with Article 154(2) (b) of the Constitution. In dismissing the cabinet secretary under the Articles, it was urged that the President is entitled to do so without being answerable to any person and the President would so dismiss at his sole pleasure; without assigning reasons or due process of law. It was further submitted that section 31(a) of the County Governments Act entitled the Governor to dismiss a member of the county executive committee and under section 44 of the Act the governor was entitled to dismiss the claimant from the office of the county secretary in like manner the President would do to a cabinet secretary under the cited Article 132(2) as read with Article 154(2) (b) of the Constitution. Thus the claimant was removable at the governor's instance without explanation for such removal from office of the county secretary.

The respondent submitted that the claimant was an employee of the respondent but excluded from the provisions of the Employment Act, 2007 because in the opinion of the respondent, such employment ought to have been excluded from the Employment Act by the Minister under the powers of provisions of section 3 of the Act. The respondent's submissions were summed up thus: if the office of the county

secretary is excluded from Employment Act 2007, then the court lacked jurisdiction to hear and determine the suit. The respondent relied upon the ruling by Rika J. in **Tom Luusa Munyasya and Another Versus Governor, Makueni County and Another [2014]eKLR** . The respondent submitted that under paragraph 38 of that ruling the opinion was that constitutional provisions that protect public officers are not intended to limit the prerogative of the chief executive officer in acting against his appointees.

The claimant was represented by Waweru Macharia Advocate. For the claimant it was submitted that the court had jurisdiction to hear and determine cases involving public and state officers serving in the county governments and many decisions had been made by the court in that regard. Thus, the claimant submitted that the ruling in the cited **Makueni County** case was alone and against the prevailing judicial currents. It was further submitted for the claimant that the government was a creature of the Constitution and once established the government must play within the law and the supreme Constitution. In particular, it was submitted that Article 2 of the Constitution was clear that all state offices and organs operate and are bound by the Constitution. Thus, when a state organ or officer decides to transact with citizens or subjects in social, political, economic or any other sphere of life, the Constitution and the law established there under applies. That the Constitution provides for a government under the law; observing due process and the rule of law. It was further submitted that to suggest some employees are not protected by law or employed at whims or pleasure of state officers was not tenable.

The claimant further submitted that section 3 of the Employment Act 2007 clearly provided that the Act binds the government and the office of the county secretary had not been excluded from the scope of the Act. Further, under the proviso to section 3(5) of the Act, those excluded must have been employed under special arrangements that provide for terms and conditions of service similar to or better than those provided for in the Act but which had not been shown to be the case in the instant case. It was submitted that the claimant had been employed by contract and had reasonable expectation to serve without being terminated without due process. The jurisdiction of the court in labour matters had been established and the objections had no constitutional basis.

The claimant further submitted that the use of generalised political phrases such as pure presidential system was fallacious because the constitution had not expressly exposed any public or state officer to removal without the invoking of due process of law during the removal or disciplinary process. Further, removal at pleasure was espoused in feudal systems of governance of the 19th century and had no place in a functional modern democratic state like the Republic of Kenya. Thus, the claimant urged the court to dismiss the preliminary objection.

The **first issue** for determination is whether the pleasure doctrine applies in Kenya and in particular, the removal of the claimant as county secretary by the respondent's governor. The court upholds its opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** thus, **“To answer the 1st 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 by the 2nd respondent 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.”**

Further,

“The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The

court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. 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.”

The court further upholds its opinion in Cecilia Wangechi Ndungu –versus- The County Government of Nyeri and Another [2014]eKLR where the court stated thus,

“The court holds that elected and appointed leaders, state officers or public officers, do not hold individually generated goals that constitute political will and goals mysterious to the Constitution. The preamble to the Constitution is clear that the people of Kenya are committed to nurturing and protecting the well being of the individual, the family, communities and the nation; and the aspirations of all Kenyans is for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Constitution is replete with specific provisions that blend together towards the achievement of those provisions of the preamble. Article 1 vests all sovereign power in the people of Kenya to be exercised only in accordance with the Constitution. Article 10(1) provides that the principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Article 73(2) (b) and (d) provides that the guiding principles of leadership and integrity include objectivity and impartiality in decision making, and ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corruption; and accountability to the public for decisions and actions. Article 129 provides that executive authority derives from the people of Kenya, is to be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya and for their well being. All these provisions, in the opinion of the court, are not attainable in absence of giving of reasons and due process as it happened in the present case.

The court therefore holds that any public authority must be exercised in accordance with the Constitutional tests including the power to remove a public or state officer from office like it was anticipated and legitimately expected by the petitioner in the present case. In making that holding, the court further holds that statutes or other written laws and policies need not repeat the cited constitutional tests whenever authority or power is vested or conferred upon a person or body. The cited constitutional provisions are of universal application and not mere flowers in the constitutional text that readily wither in our constitutional practices; in the opinion of the court, they are provisions that must bloom into seeds of vitality that enhance our constitutional practices and lifestyle.”

To answer the **first issue** for determination, the court finds that the pleasure doctrine does not apply in Kenya’s constitutional and statutory dispensation and could not apply to the removal of the claimant, by the respondent’s governor, from the office of the respondent’s county secretary.

The **second issue** for determination is whether the office of the county secretary was excluded from the application of the Employment Act, 2007. The parties were in agreement that the office had not been excluded by the Minister under section 3 of the Act. The court finds as much and further holds that even if it had been excluded, the better or similar terms under the special arrangements as submitted for the claimant would need to be established so that the court would determine the case upon such special terms of service. Such better or similar terms, in the opinion of the court, would include the minimum safeguards of valid reasons; and notice and a hearing as provided in sections 43 and 41 of the Employment Act, 2007. In the opinion of the court, the import and scope of the proviso to section 3(5) of the Act is that if the terms and conditions of the special arrangement of an excluded office are inferior to

the terms and conditions provided under the Act, then the provisions of the Act will swiftly apply to the case by default. The court further holds that if an office is excluded from terms of the Act under section 3 of the Act, the court's jurisdiction is not thereby ousted; the court will hear and determine that excluded employment dispute on the basis of the better terms of service as provided for in the special arrangement. Thus, the specific contractual terms would apply in determining the dispute.

The court finds that the office of the county secretary held by the claimant at all material times was not excluded from the provisions of the Act.

The **third issue** for determination is whether the court lacks jurisdiction. There is no dispute that the parties are in an employer-employee relationship and the court finds that it has the constitutional and statutory jurisdiction to hear and determine the dispute. While making this finding, the court is guided by Article 165(5) of the Constitution which expressly bars the High Court from entertaining cases whose jurisdiction is vested in this court under Article 162(2) of the Constitution and under the Employment and Labour Relations Court Act.

In conclusion the preliminary objection filed for the respondent on 10.02.2015 is dismissed with costs. Parties are now invited to take directions on the hearing of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 6th March, 2015.**

BYRAM ONGAYA

JUDGE