



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 1 OF 2014

CECILIA WANGECHI NDUNGU..... CLAIMANT

VERSUS

THE COUNTY GOVERNEMENT OF NYERI.....1ST RESPONDENT

THE GOVERNOR, NYERI COUNTY.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th May, 2015)

RULING

The court delivered its judgment in this matter on 5.12.2014 for the petitioner against the respondent for:

- a. **The declaration that the act of the 2nd respondent in relieving the petitioner of her duties is a breach of the petitioner's constitutional rights under Article 27(1) (2) and (3), 28, 41 & 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.**
- b. **The order of judicial review of certiorari is hereby issued to remove into the honourable court for quashing the decision of the 2nd respondent relieving the petitioner of her duties as the county executive in charge of culture, gender and social development and as conveyed by each and every letter issued by the 2nd respondent and addressed to the petitioner on 24.06.2014 including the one erroneously dated 24.06.2013.**
- c. **The petitioner is entitled to remain in the service of the respondents and to be allowed by the respondents to continue in the respondents' service forthwith as the Nyeri County Executive Member in charge of culture, gender and social development, and to perform the attached duties in accordance with the relevant provisions of the Constitution, statutes or as lawfully assigned, unless the petitioner otherwise lawfully ceases to hold the office.**
- d. **The respondents to pay costs of the suit.**

The respondents being dissatisfied appealed against the judgment and the Court of Appeal upheld this court's judgment in the judgment delivered on 18.03.2015.

In the press briefing on 18.04.2015, the 2nd respondent reorganised the government of the County of Nyeri and the reorganisation was said to be in accordance with the provisions of section 30(2) of the County Governments Act, 2012 which provides that the governor bears the function and responsibility of constituting the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county. In the process of that reorganisation, the department of Gender, Culture and Social Development which was held by the petitioner was absorbed under the new department called Special Programs and assigned as an office held by a different person.

The petitioner was aggrieved and on 15.04.2015 she filed the notice of motion brought under order 40 rules 2 and 3, sections 1A & 1B of the Civil Procedure Act and Rules 2010, and Article 23(3) (b) (c) & (e) of the Constitution of Kenya , 2010. The petitioner prayed for orders:

1. That the honourable court be pleased to order that the current application is extremely urgent and that the same be heard ex-parte in the 1st instance.
2. That the honourable court be pleased to issue an order of injunction and conservatory orders against the 1st and the 2nd respondents from in any way interfering with the petitioner or applicant's contractual rights as envisaged by the Constitution and the rules of natural justice in as far as the same relates to her employment, pending the hearing and final determination of the application.
3. That the honourable court be pleased to grant an order of injunction against the respondents from reorganising the county government portfolio structure pending the hearing and final determination of the application.
4. That the honourable court be pleased to issue orders committing the 2nd respondent and attaching the property of the 1st respondent for disobeying orders of the court.
5. That in alternative and without prejudice to the foregoing, the honourable court be pleased to order that the applicant or petitioner be compensated on all dues to her for the remainder of the period between the granting of the order and the end of the term.
6. That the costs of the application be borne by the respondents.

It was urged for the petitioner that in reconstituting the county government, the 2nd respondent had failed to gazette the same as provided for in section 30(1) (i) of the County Government Act. Further in reconstituting the government the 2nd respondent had failed to involve the participation of the Nyeri County Assembly in contravention of section 30(3) (c) and (g) of the County Government Act. Finally, the reconstitution of the county government was in disobedience of the court's order in the judgment that the petitioner remains in the service of the 1st respondent as lawfully assigned unless the petitioner lawfully ceases to hold the office. In the submissions and without stating the same in the supporting affidavit by the applicant filed with the application or the grounds in the body of the application, but by raising it in the applicant's further affidavit filed on 27.04.2015, it was submitted for the applicant that the reorganisation had the effect of removing the petitioner, a woman, from office. It was urged that by that action, the executive committee was thereby left with only one woman. By that reason it was submitted that the two thirds constitutional rule prescribing at least a third of either gender to be present in the executive committee had been contravened.

The respondents opposed the application by filing on 24.04.2015 the replying affidavit of Wambui Kimathi, the respondents' County Secretary. It was submitted for the respondents as follows:

1. In reconstituting the county government the 2nd respondent had acted in accordance with section 30(2) of the County Government Act.
2. The issue of reorganisation of the county government constituted a new cause of action different from the petitioner's dismissal under section 31 of the County Government Act that was in issue in the determined petition as per the judgment on record. Thus the application was misconceived as it was necessary for the petitioner to file a fresh suit.
3. The respondents had obeyed the court's orders in the petition and as upheld by the Court of Appeal.
4. The petitioner had been informed by the letter dated 8.04.2015 about the reorganisation and she would be paid her dues. The petitioner's salary would be stopped because the reorganisation had the effect of bring the petitioner's service to an end.
5. The injunctions as prayed for had been overtaken by events because once the 2nd respondent reorganised the government there was nothing left to be subject of the injunction or conservatory orders as prayed for in the application.
6. The petitioner was entitled to seek her terminal dues through the established respondents' internal systems.
7. In reorganising the county government the respondent had acted in good faith as the

reorganisation touched on the entire county executive committee and there was no malice, ill will or vendetta towards any person.

The court has considered the submissions made for the parties and makes findings as follows:

1. The applicant has failed to establish that the respondents have disobeyed the court orders made in the judgment in this matter in any specific respect or generally.
2. The applicant has prayed for compensation for loss of employment. As submitted for the respondents that would constitute a fresh cause of action to be heard and determined in a new suit filed in that respect. Indeed throughout the hearing of the application there was no submission or material before the court to enable the making of the orders as prayed for.
3. The applicant prayed for injunctions against the respondents from interfering with her contractual rights and from reorganising the county government. In the opinion of the court, upon conclusion of the reorganisation in issue the applicant's contractual rights were one way or the other interfered with and the reorganisation having concluded, there is nothing left of the same subject of an injunction as prayed for. Accordingly, the court finds that it would be futile to issue such orders and the court will not act in vain.
4. As submitted for the respondents, the applicant's concerns would be best canvassed at a full hearing in a suit filed for the applicant in that behalf. In making that finding, the court considers that as submitted for the applicant it would be necessary to make full investigation into the lawfulness of the 2nd respondent's action of reorganising the county government. Thus as things stand, that particular issue remains unresolved. It will be open for the applicant to file appropriate legal proceedings for that purpose as the applicant may deem appropriate.
5. As submitted for the respondents, the issue of the two thirds gender rule under Article 197 of the Constitution is a substantive fresh issue which would require appropriate investigation in a legal proceeding filed for that purpose.
6. The court finds that the 2nd respondent subsequent to the decision to reorganise and reconstitute the county government, published the same in the gazette and in the opinion of the court, such publication could not be made prior to the making of the decision. The court finds that the publication as made meets the legal requirement so that on that account alone, the reorganisation cannot be faulted.
7. Finally, the court finds that the application and the prayers as made cannot be said to have been in the nature of an execution application or an application to satisfy the judgment and decree in the petition as it did not relate to the decree and judgment but it raised a new cause of action.

In conclusion, the application filed for the petitioner on 15.04.2015 is dismissed with costs.

Signed, dated and delivered in court at Nyeri this Friday, 8th May, 2015.

BYRAM ONGAYA

JUDGE