



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 3 OF 2014

(Formerly Petition No. 13 of 2015 in the High Court at Nyeri)

SHADRACK WANGOMBE MUBEA PETITIONER

VERSUS

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

THE GOVERNOR NYERI COUNTY2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th July, 2015)

JUDGMENT

The petitioner filed the petition on 14.04.2015 through H.K. Ndirangu Advocates. The petitioner prayed for:

- a. A declaration that the act of the 2nd respondent in relieving the petitioner of his duties is a breach of the latter's constitutional rights under Article 27(1) (2) and (3), 28, 41 and 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.
- b. That pending the hearing and final determination of this application inter-parties, conservatory orders of stay do issue staying the decision of the 2nd respondent dismissing the petitioner.
- c. An order of judicial review to remove into this honourable court and quash the decision of the 2nd respondent relieving the petitioner of his duties as county executive in charge of agriculture, fisheries, livestock, and co-operative development.
- d. An order of judicial review of prohibition to prohibit the respondents from appointing any fresh nominee for approval by the Nyeri County Executive in charge of culture, agriculture, fisheries, livestock and co-operative development.
- e. In alternative and without prejudice to prayer (d) above, an order of payment of all dues to the petitioner in the period she would have served between now and end of the term.
- f. Any other relief or order this honourable court may deem fit to grant.

The respondents filed on 15.04.2015 the grounds of opposition through Wahome Gikonyo & Company Advocates. The respondent filed on 21.04.2015 the replying affidavit of Wambui Kimathi, the County Secretary for the 1st respondent. The petitioner filed his affidavit on 23.04.2015 in further support of the petition. The respondents filed the further affidavit of Wambui Kimathi on 26.05.2015.

The petitioner was on 22.10.2013 appointed the Nyeri County Executive Secretary in charge of agriculture, livestock, and co-operative development. The petitioner was terminated from service by the letter dated 7.04.2015. The letter which was addressed to the petitioner stated as follows:

“RE: Termination of Service

This is to thank you for the services rendered so far to the County Government of Nyeri since you were appointed in 2013.

However, I regret to inform you that as I continue to streamline the manner of service delivery and in accordance with powers given to me under section 31(a) of the County Government Act, 2012 I have decided to terminate your services for the reasons that under your stewardship the Department of Agriculture, Livestock and Co-operative Development, which is a critical docket for Nyeri County, you were unable to, or you neglected to provide the kind of strategic leadership and people management skills that this crucial sector needed to give it a strong foundational takeoff.

So far, key deliverables that should have been in place for this sector that is key driver to the economy of Nyeri, including an overarching policy on agriculture, bills specifying how the County Government should drive the key functions in the sector, and implementation of the recommendations of the Task Report on Horticulture are either non-existent, incomplete or in an utilizable state.

To serve the interests of the people of Nyeri effectively and to deliver on the remit that as the Governor I signed on to, this state of affairs is unacceptable. I have therefore decided to terminate your services with immediate effect.

Meanwhile, I have instructed the County Secretary to take the necessary action relating to your duties.

Sincerely,

Signed

Hon. Nderitu Gachagua

Governor, County Government of Nyeri”

The petitioner was dissatisfied with the termination of his service and he filed the present petition. The petitioner invoked Articles 1, 2, 3(1), 10, 19, 20, 21, 22, 27(1) (2) and ((3), 28, 41(1), 47(1) and (2), 48, 165(3) (b), 191 and 258(1) of the Constitution of Kenya, 2010. The petitioner further cited 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 of 28.06.2013 together with sections 30 and 40(1) and (2) of the County Government Act No. 17 of 2012. The petitioner alleged contravention of fundamental rights and freedoms under Articles 27(1), (2) and (3), 28, 41(1) and 47(1) of the Constitution of Kenya, 2010. The petitioner pleaded as follows:

1. In terminating the petitioner’s services the respondents were bound to comply with Article 10 of the Constitution of Kenya to uphold human rights, non-discrimination, equity, social justice, rule of law, good governance, and integrity in exercise of their functions.
2. Article 47(1) of the Constitution entitled the petitioner to the fundamental and inalienable right to a lawful and procedurally fair administrative action.
3. In terminating the petitioner’s services, the respondents violated the provisions of Articles 10 and 47(1) of the Constitution.
4. Section 30(2) (a) of the County Government Act No. 17 of 2012 enjoins the 2nd respondent to perform his duties diligently as provided for in the Constitution and legislation. Section 40(1) of the Act provides that the 2nd respondent may remove a member of the county executive committee from office on any of the following grounds thus, incompetence; abuse of office; gross misconduct; failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee; physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

gross violation of the Constitution or any other law. The petitioner's case was that the respondent had been relieved from service in violation of the cited sections of law. The petitioner's further case was that he was terminated without being given a fair hearing or any hearing at all, there were no valid reasons for the claimant's removal, and the procedure for the termination of duties as provided for in the law was not followed.

5. The petitioner pleaded that by being dismissed with immediate effect the respondents had thereby violated the petitioner's right to a fair hearing and fair labour practices contrary to provisions of Article 41(1) of the Constitution. It was urged that failure to give reasons for the termination violated Article 47 of the Constitution on fair administrative action.
6. The petitioner further pleaded that by the 2nd respondent announcing the petitioner's dismissal at a press conference and to the public of Wambugu Farmers Training Centre without any notice to the petitioner, the 2nd respondent exposed the petitioner to unfair, degrading and inhuman action contrary to Article 28 of the Constitution of Kenya in respect to protection of his human dignity. The petitioner stated that the termination letter was handed to him by the 2nd respondent during a Tea Director's meeting at Wambugu Farmers Training Centre and that prior to the termination letter the petitioner had not been informed of any misdeed, inaction, incompetence or any other failure in his duties.
7. The petitioner's case was that he had performed his duties as assigned details of which he set out in his further affidavit filed on 17.04.2015.

The respondents' case was that the petitioner was appointed as a county executive member as per the letter dated 20.10.2013 with specific duties and responsibilities entailing but not limited to the following:

- a. Formulation, presentation and articulation of executive committee memoranda, sessional papers and other policy issues emanating from the department to the executive committee, county assembly, senate or any other fora as may be appropriate.
- b. Responding to county assembly questions touching on policy issues to be implemented.
- c. Providing policy direction and guiding the department on policy issues to be implemented.
- d. Appointing board members for institutions falling under the department in accordance with their respective statutes.

The respondent's case was that the petitioner failed to perform as set out in the letter of appointment. The respondents stated that the petitioner had not prepared 6 policy documents, 7 bills and a strategic plan as alleged by the petitioner and even if he had done so, the documents had not passed the test by the county executive committee or progressed to committees of the county assembly and in which event, they could not constitute evidence of performance. The respondents' further case was that the petitioner having failed to perform, it became increasingly unsustainable to have him as a high level state officer retained in the service under constant direction and leadership of the 2nd respondent. It was further stated that the petitioner had failed to deliver on two major items of promise by the 2nd respondent to the people of the Nyeri County under the department of agriculture namely improved incomes from agricultural value addition and job creation; and food security and improved household incomes. It was stated that at the 12th county executive committee meeting held on 26.11.2013 it was agreed that each department was to develop sector strategic plan against which delivery targets would be based but the petitioner's department of agriculture had submitted a draft belatedly in late March 2015.

The respondents' further case was that the petitioner was terminated by the letter dated 7.04.2015 and before the dismissal the 2nd respondent held a meeting with the petitioner in presence of the county secretary at which the 2nd respondent informed the petitioner that the 2nd respondent wished to relieve the petitioner because the petitioner's performance was wanting despite previous warnings and that termination would follow because the 2nd respondent had lost confidence in the petitioner. It was the respondents' case that the petitioner had failed to explain his otherwise poor performance. The county secretary stated in affidavit that he personally delivered the termination letter to the petitioner on 7.04.2015 and by 8.04.2015 when the 2nd respondent announced the petitioner's termination at the press conference the petitioner had already been informed about the termination in writing. The respondents further pleaded as follows:

1. The termination letter set out clear reasons for the termination, the 2nd respondent gave the petitioner a hearing before the termination followed, and the law on due process was therefore followed.
2. The section applicable to the petitioner's termination was section 31(a) and not section 40(1) of the County Governments Act, 2012.
3. That the petitioner being a state officer, Article 41(1) of the Constitution and the Employment Act, 2007 did not apply to the petitioner's service as a member of the county executive committee.
4. The petitioner was not discriminated against because the termination was in good faith in view of the poor performance and there was no personal vendetta, grudge, or ill will towards the petitioner on the part of the 2nd respondent.
5. The petitioner had failed to put forward sufficient material to show violation of his fundamental rights and freedoms as alleged in the petition so that the petition should fail.

The 1st issue for determination is whether the 2nd respondent gave a reason for termination of the petitioner's service. It is not disputed that the petitioner received the letter of termination. The letter of termination stated thus:

“However, I regret to inform you that as I continue to streamline the manner of service delivery and in accordance with powers given to me under section 31(a) of the County Government Act, 2012 I have decided to terminate your services for the reasons that under your stewardship the Department of Agriculture, Livestock and Co-operative Development, which is a critical docket for Nyeri County, you were unable to, or you neglected to provide the kind of strategic leadership and people management skills that this crucial sector needed to give it a strong foundational takeoff.

So far, key deliverables that should have been in place for this sector that is key driver to the economy of Nyeri, including an overarching policy on agriculture, bills specifying how the County Government should drive the key functions in the sector, and implementation of the recommendations of the Task Report on Horticulture are either non-existent, incomplete or in an utilizable state.”

The court finds that the petitioner was given the reason for the termination. The court finds that the termination as an administrative decision communicated the written reasons as the justification of the termination as envisaged in Article 47(2) of the Constitution.

The 2nd issue for determination is whether the reason given for termination of the petitioner's services was a valid reason. Section 31(a) of the County Government Act, 2012 provides that the governor may, despite section 40 of the Act, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so. Section 40(1) of the Act as earlier cited in this judgment enumerates grounds upon which the governor may remove a member of the county executive committee from office in accordance with the resolution of the county assembly as provided for under the section.

First, the court holds that the removal under section 31(a) is exclusive from a removal under section 40(1) of the Act so that a dismissal under section 31(a) may be upon such consideration that is appropriate or necessary other than any of the grounds for removal set out in section 40(1) of the Act. Thus in a section 31(a) dismissal, the governor is not required to show that any of the removal grounds in section 40 existed but that there existed considerations that made the dismissal appropriate or necessary. The court upholds the holding by the Court of Appeal in County Government of Nyeri and Another –Versus- Cecilia Wangechi Ndung'u [2015]eKLR that in a dismissal under section 31(a) of the Act appropriateness or necessity is not arbitrariness or whimsical but that appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. The court upholds its opinion in Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR on the application of sections 31(a) and 40 of the Act thus, **“The court has considered the provisions of the two sections and is of the opinion that both sections prescribe a disciplinary action in a due process that may conclude into imposition of the punishment of dismissal. Under section 31, the procedure is initiated by the governor and concluded by the governor as an in-house executive process. Under**

section 40, the process is initiated by a member of the county assembly.

In the opinion of the court, the mischief is obvious; there may be instances of adverse circumstances against a given county executive committee member and the governor fails to invoke the executive disciplinary process under section 31(a) and in which event a county assembly member may invoke the oversight jurisdiction of the county assembly under section 40 to deal with the mischief. In the considered opinion of the court, that is where the difference in the provisions of the two sections ends. Otherwise they are both disciplinary proceedings that demand due process of law. The governor's executive disciplinary process under section 31(a) and the county assembly's process under section 40 of the Act must comply with the established rules of natural justice; the due process of law."

While upholding that opinion, the court further holds that due process would be necessary towards establishing the reasons for the dismissal for without such process, it would be difficult to show the fair administrative mechanism leading to the stated reason for the removal. In this case, the petitioner has established that the petitioner's performance was discussed in county executive committee meetings where the parties also set performance targets. In particular the respondents have shown that over time the 2nd respondent raised at such meetings want of better performance such as at the meeting of 18.04.2014 where the petitioner tabled generic bills of the model laws drafted by the Council of Governors and the 2nd respondent asked the petitioner to improve the same by incorporating provisions unique to the needs of the people of the county of Nyeri. The respondents have also showed that before the termination the 2nd respondent discussed the issues and gave the petitioner a hearing. In all, the court finds that the petitioner had clear knowledge of the concerns raised about his level of performance, he was given a hearing, he offered no justifiable explanation to remedy the concerns and the court finds that the reasons for termination and the termination decision were arrived at after due consideration as envisaged in section 31(a) of the Act.

Second, the court finds that in the present case the respondents have established that the reason for the termination existed at the time of termination. The reason for the termination was that the petitioner had failed to provide strategic leadership in the department of agriculture and in particular the relevant policies, bills and implementation of the relevant recommendations by the Task Force Report on Horticulture were non-existent, incomplete or not in an utilizable state.

The petitioner did not file a supporting affidavit together with the petition and the affidavits the petitioner subsequently filed did not exhibit any policy document or bill or implementation report. The court finds that the respondents have established the reasons that led to the termination and the court further finds that the reasons were valid. It was not disputed by the petitioner that the meetings of the county executive committee as enumerated for the respondents were held and the performance targets were agreed upon as submitted for the respondents. It could be that the performance targets could have been set out more elaborately, in a more measurable manner, parties' obligations better set out, with a review or monitoring and evaluation system and the entire performance system better documented than it has been shown to have been done in this case. However, taking all the circumstances and material on record into account, the court finds that the petitioner knew the specific performance expectations and the respondents have shown that the expectations were not met in view of the petitioner's exhibited level of performance.

The 3rd issue for determination is whether the provisions of the Employment Act, 2007 and Article 41 on labour relations applied to the petitioner as a state officer. The first consideration in answering that question is to answer the question whether the state officers are in employment. The court considered that issue in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR**. The court upholds its opinion in that case thus,

"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.”

And further upholding the opinion in the cited **Birir’s case** thus,

“Prior to the new Republic, the relationship that accrues when a person is engaged in the public service in Kenya’s circumstances was considered in the case of Mburugu Muguna Geoffrey – Vs- Attorney General Civil case No. 3472 of 1994 at Nairobi Ojwang J stated that employment in the public service both provides a machinery of serving the public interest and benefits the individual employee who is compensated by approved methods, for work done. The employee thus acquires an interest that evolves into a legal right, within the terms of employment. That it is in the interest both of the public, to whom services are rendered and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office be fulfilled. In that case, the court stated that the law will be in the form of statutory enactments, subsidiary legislation, judicial precedents and administrative practices. Further, purpose of the law was to ensure a correct delivery of a good public service. In that case, the court found that it would be a distortion of the quality of public service when self-interested individuals, purportedly in the name of public interest, jettison the law to the four winds and impose their subjective inclinations to the delivery process. ”

The court upholds that opinion that public officers or state officers as employees of the people are in an employment relationship governed by relevant provisions of the Constitution, legislation, judicial precedents and administrative practices. The court further follows the holding of the Court of Appeal in County Government of Nyeri and Another –Versus- Cecilia Wangechi Ndung’u [2015]eKLR that a state officer’s terms and conditions of service are regulated by the Constitution or relevant statute, principles of fair administrative action, and rules of natural justice. In matters of dismissal or removal of members of the county executive committee, it is clear that the County Government Act, 2012 makes relevant provisions in sections 31 and 40 and the Employment Act, 2007 would therefore not apply. Nevertheless the court holds that public officers and state officers are employees within the definition of “**employee**” in the Employment Act, 2007 because they are employed for a salary or wage as set out in the Act.

Section 3(3) provides that the Act binds the Government and section 3(1) excludes the application of the Act to armed forces under the Armed Forces Act; the Kenya Police, the Kenya Prisons Service or the Administration Police Service; the National Youth Service; and employees and employers in a family undertaking. In consultation with the National Labour Board, section 3(5) provides that the Minister may exclude application of the Act or part of the Act to employees whose employment is governed by special arrangements provided such special arrangements provide for protection equivalent to or better than the Act or the parts of the Act so excluded. Further under section 3(4) of the Act the Minister may in consultation with the Board exclude application of the Act or part of the Act to categories of employees in respect of whom special problems of a substantial nature arise.

It is the opinion of this court that the provisions of the Employment Act, 2007 would not apply to state officers only to the extent within the exclusions under section 3 of the Act or if there are express provisions in the relevant legislation conferring upon the state officer terms and conditions of service that are superior to the provisions of the Act. Where the Constitution or relevant legislation is silent, the Act will apply as the residual law on employment as there would be no justified constitutional or legislative bar to state officers enjoying the minimum terms and conditions of service set out in the Act. As per section 3(6) of the Act, an agreement to relinquish, vary or amend the terms and conditions in the Act

would be null and void.

Needless to state, provisions in Article 41 of the Constitution conferring the fundamental right to fair labour practices are universal as they apply to all employees including public and state officers as employees of the people and the Article applies to public and state officers subject only to such qualifications or limitations that may be enacted as provided for in Articles 24 and 25 of the Constitution. To the extent that the Employment Act, 2007 implements the right to fair labour practices as enshrined in Article 41 of the Constitution, in absence of an express relevant Constitutional or legislative provision or qualification, in the opinion of this court, there would be no justification to bar public and state officers from enjoying the minimum terms and conditions of employment as provided for in the Act.

The **4th issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court has found that the petitioner has failed to show that the respondents violated any of the fundamental rights and freedoms as alleged in the petition. The court has found that the termination was with due reasons as the 2nd respondent has showed that he considered that the termination was appropriate or necessary. The court finds that the petition will therefore fail. The petition was filed without the relevant supporting affidavit and in this court's opinion that serves as an impetus for its dismissal.

In conclusion judgment is entered for the respondents with orders that the petition is dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 10th July, 2015.**

BYRAM ONGAYA

JUDGE