



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

INDUSTRIAL CAUSE NO. 2108 OF 2014

JACOB NGWELE MUVENGEI CLAIMANT

VERSUS

SPEAKER NAIROBI CITY COUNCIL ASSEMBLY 1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD..... 2ND RESPONDENT

COUNTY ASSEMBLY OF NAIROBI 3RD RESPONDENT

RULING

1. By a Notice of Motion application dated 24th November 2014, the Claimant Jacob Ngwele Muvengei is seeking for orders that;

1. *Spent*
2. *Spent*
3. *That a conservatory order do issue staying of the decision of the 1st Respondent of 20th November 2014 suspending the Claimant pending the hearing and determination of this application*
4. *That a conservatory order do issue staying of the decision of the 1st Respondent of 20th November 2014 suspending the Claimant pending the hearing and determination of this suit.*
5. *That an order of prohibition do issue restraining the 1st, 2nd and 3rd Respondent from suspending, interdicting, terminating or otherwise however interfering with the contract of employment of the Claimant pending the hearing and determination of this application*
6. *That an order of prohibition do issue restraining the 1st, 2nd and 3rd Respondents from suspending, interdicting, terminating or otherwise howsoever interfering with the contract of employment of the Claimant pending the hearing and determination of the suit*
7. *That costs of this application be awarded to the applicant.*

2. The application is supported by the annexed affidavit of the Claimant and on the grounds that he is the Clerk of the Nairobi City County Assembly as an office established under section 13 of the County Government Act while the 1st Respondent is the Speaker of the 3rd Respondent an office established under article 178 of the Constitution and section 7 of the County Government Act and the 2nd Respondent is the Nairobi County Assembly Service Board, a body established under section 12 of the County Government Act. In this regard, the Claimant was on 25th February 2013 deployed by the Transition Authority (TA) to the position of interim clerk of Nairobi County Assembly of Nairobi County for purposes of establishing the requisite administrative structures for the Nairobi County Assembly in readiness for the operationalisation of County governments following the general elections on 4th March 2013. On 10th June 2014 the Claimant was appointed and confirmed by the 2nd Respondent as the Clerk

to the Nairobi City County Assembly and on 1st July 2014 he was designated as accounting officer for the Nairobi City County Assembly.

3. Other grounds to the application are that On 20th November 2014 the 1st Respondent purported to suspend the Claimant from office in a letter dated the same day which actions are unconstitutional, ultra vires and unlawful. That the 1st Respondent was not the appointing authority of the Claimant and had no power to suspend or terminate the claimant's employment. The 1st Respondent did not inform the Claimant of any charges made against him or give him the opportunity to defend himself and thus acted in breach of articles 10, 47, and 239 of the constitution. The 1st Respondent also acted in breach of section 12 and 13 of the County Government Act; acted contrary to the rules of natural justice; and in breach of the contract of employment for the claimant. that there is still threat for further breach in that the 1st Respondent had alleged wrongdoing by the Claimant with regard to accounts of the Nairobi City County Assembly held with Family Bank for mortgage and car loan for members of the County Assembly which allegations have no foundation and the 1st Respondent is acting unilaterally and without due authority.

4. The application is made seeking conservatory orders noting that under Standing Order 35 only the Claimant can prepare the order Paper showing the business to be placed before or taken by the County Assembly and unless such is done, the Nairobi County Government cannot transact business. Only the Claimant can sign correspondences, notices, invitations to meetings and summons and the actions of the 1st Respondent may paralyse the entire business of the Nairobi County Government.

6. In the affidavit by the claimant, he supports the application and the rounds upon which it is based upon. That the allegations made against him by the 1st Respondent have no basis to warrant the actions taken against him and in any case the 1st Respondent has no authority in fact or in law to suspend, interdict or terminate his employment and by such action, it is unconstitutional, and *ultra vires*. Such action if not urgently stopped shall affect the business of the 3rd respondent.

7. The Claimant also filed a **Further Affidavit on 28th November 2014** and avers that his advocates received a letter dated 24th November 2014 revoking his suspension by the 1st Respondent on the basis that it had since been established that he was not an employee of the County Government. The 1st Respondent also directed the 3rd Respondent to have a session with a Motion to confirm that the Claimant was the Clerk of the Assembly on 24th November 2014 but such session was not held. Unless the Court grants conservatory orders, the 1st Respondent will continue to act outside the law and in breach of the claimant's constitutional rights.

8. The Claimant further filed his Further Affidavit on 28th January 2015 and avers that on 12th November 2014 the 1st Respondent made a communication from the chair that the 2nd Respondent had confirmed and appointed him as the clerk of the County Assembly which and reconfirmed in another communication of 26th November 2014. On 2nd December 2014 the TA wrote and stated that the Claimant had been appointed and confirmed by the 2nd respondent. The Claimant has since had a contract of employment with the 2nd respondent

9. In reply, the 1st Respondent filed a **Replying Affidavit on 11th December 2014** sworn by Hon. Alex Ole Magelo and avers that as the 1st Respondent and chairman of the 2nd Respondent he has read the application and suit by the claimant, which are premised on a letter dated 20th November 2014 where the Claimant was suspended. This followed a meeting held with the County Assembly's banker, the Family Bank during which it was revealed that the accounts of the 3rd Respondent had anomalies. The suspension was therefore meant to facilitate investigations against the claimant.

10. Mr Magelo also avers that the suspension of the Claimant has since been lifted vide letter dated 24th November 2014 on the date the Claimant filed this suit. As a result of the lifting of the suspension, the suit is spent and there is no basis for the Court to issue the final orders sought in the claim. That while

singing the letter dated 20th November 2014, he was acting as the chairman of the 2nd Respondent and not as the speaker of the 1st respondent. This was not to act unconstitutionally.

11. With the lifting of the suspension against the claimant, the only prayer pending is that there should be a prohibition against the Respondents from suspending, interdicting, terminating or interfering with the contract of employment of the Claimant but to grant such orders would be contrary to the provision of section 12(7) of the County Governments Act where the 2nd Respondent is responsible for supervising its officers. This would stifle the statutory powers of the 2nd respondent. The facts of the case have since changed with the lifting of the suspension and to issue the final orders sought would be a blanket orders which in the interests of justice should not issue.

12. **Elias Otieno Okumu** also filed **his Replying Affidavit on 8th December 2014** as the Majority Leader of the 2nd Respondent and also Vice-Chairperson of the 2nd respondent. Such records and appearance have since been expunged from the record vide Court ruling on 11th May 2015.

Submissions

13. The parties agreed to file their written submissions hereto and to highlight the same in summary. The Claimant filed his written submissions on 24th June 2015 and lists of authorities thereto and also a reply to the respondent's submissions filed on 27th July 2015. The Respondents filed their written submissions on 2nd July 2015.

14. The Claimant submitted he is seeking for a conservatory order to issue against the decision of the 1st Respondent on 20th November 2014 suspending him pending the hearing of the suit and further b issued with a restraining order against the Respondents from interdicting, terminating or otherwise interfering with his contract of employment pending hearing and determination of his suit. As the Clerk of the Nairobi City County Assembly where he was deployed by the TA to establish the requisite administrative structures among other duties he was thus appointed and confirmed for the position by the 2nd respondent. His position is thus established under section 13(1) of the County Government Act. The suspension letter issued by the 1st Respondent was therefore *ultra vires* and despite its revocation, the same was contrary to the provisions of article 47 of the constitution. There was a violation of the right to a fair administrative action as the Claimant was not granted due process. The revocation of the suspension was after the suit herein had been filed in Court and there is good basis to restrain the Respondents as there is threat of the repeat of such arbitrary, *mala fides* action pending hearing and determination of the suit herein. Article 236 of the Constitution protects the claimant's employment as he should not be dismissed or negative action taken against him without due process. Section 76 of the County Government Act also requires the Respondents to observe the principles of natural justice in exercising any disciplinary powers.

15. The Claimant also submitted that he is apprehensive that similar adverse action will be taken against him before this suit is determined if no conservatory orders ate granted against the respondents. That on 26th November 2014 the 1st Respondent issued communication that he was not a staff of the County assembly; and there is a petition for this purpose in circulation dated 11th November 2014. In issuing the suspension and later revoking it, the 1st Respondent does not give any reasons and contrary to the principles laid out in the case of **Richard Bwogo Birir versus Narok County Government and 2 others [2014] eKLR** on the need for due process before any public officer or employee is removed from office. In **John Mining Temoi & Another versus The Governor of Bungoma County & 3 others** the Court held that where a party acts in breach of the Constitution or outside their areas of operation, the Court will not hesitate to intervene and reverse those actions. The Court further held that the County Public Service Board is a body corporate and its chair acts in an official capacity and not in his personal capacity. The chairman of the County Public Service Board and the County Public Service Board are different legal entities.

16. In response to the respondent's submissions, the Claimant states that the provisions of section 13 of

the County Government Act are to the extent that the appointment of the County Assembly Clerk is by the County Assembly Service Board and section 12 of the Act vests the authority to appoint and supervise the Clerk upon the same board and not upon a Speaker. In this case the 1st Respondent cannot act alone in supervising the Claimant as only the 2nd Respondent holds such mandate as an entity.

17. The Claimant further responds that pursuant to the provisions of article 47 of the constitution, there is a right to fair administrative action and in this case conservatory orders are justified as there is eminent danger of him suffering a violation of his rights and it is imperative that such orders be granted as to facilitate ordered functioning within public agencies and to uphold adjudicatory authority of the courts and in the public interest as held in **Richard Bwogo Birir versus Narok County Government & 2 Others [2014] eKLR**. The Court must stop a body from acting in excess of its powers or in contravention of the laws as held in **Kenya National Examination Council versus Republic exparte Geoffrey Gathenji Njoroge & Others [1997] KLR**.

18. The Claimant relied on the following cases **Martin Nyaga Wambora & 3 Others versus Speaker of the Senate & 6 Others; Republic versus the Transitional Authority & Another; Ann Kinyua versus Nyayo Tea Zone Development Corporation; Lucy Nyokabi Nyambura & 12 Others versus Attorney general & 2 Others [2014] eKLR; Silas Kipruto & Another versus County Government of Baringo & Another [2014] eKLR** and **Richard Bwogo Birir versus Narok County Government & 2 Others [2014] eKLR**.

19. The Respondents on their part submitted that when applying for conservatory orders one must demonstrate that he has a *prima facie* case with a likelihood of success and that there is danger to suffer injury if this is not granted. There must be an eminent threat of violation of constitutional rights. In this case there is no violation of any constitutional right and the 2nd Respondent still retains the power to supervise the Claimant as under the Constitution and the County Government Act. The Court should deal with real and not hypothetical or perceived disputes so as to get a relief.

20. The Respondent also submit that to for the Court to issue the prohibitions sought by the Claimant it would be unconstitutional and unlawful. Section 12(7) of the County Government Act sets the mandate of the 2nd Respondent and further section 13(1) outlines the appointing authority of the Clerk upon the 2nd Respondent with the approval of the 3rd respondent. To thus issue prohibitory orders would be to stifle the statutory powers and mandate of the 2nd Respondent in supervising the Claimant as the clerk of the County assembly. A prohibition order cannot be made in a blanket manner.

21. That conservatory orders are only granted upon a demonstration by a party that they have a *prima facie* case with a likelihood of success and that the applicant would suffer real danger if such orders are not granted as held in **Centre for human Rights Education & Awareness & 7 others versus Attorney General, Petition No. 16 of 2011**. That the Claimant herein should demonstrate that there is imminent threat to his constitutional rights which he has failed to do. Article 165(6) of the Constitution which give the Court power with regard to the removal of clerk from office must be read with the powers of the Respondents in supervising such an officer as under the County Government Act.

22. The Respondents also submitted that the Claimant moved to Court before exhausting the internal procedures as required under article 159(2) of the Constitution that require alternative disputes resolution mechanism. He Claimant was appointed under the provisions of section 13 of the County Government Act and under the law he was expected to lodge his complaint with the public Service commission as under section 77 of the Act. In this regard alternative disputes resolution mechanisms should be complimentary to the judicial process and by virtue of article 159(2)(c) of the constitution, the Court is obligated to promote these other mechanisms as they are not inconsistent with article 22 and 23 of the constitution.

23. The Claimant has therefore failed to show that there exists any cause of action to warrant the orders sought and even where such a case did exists, recourse should have been to the appeals provisions under section 77 of the County Government Act. The application should be dismissed with costs.

24. The Respondents have relied on the following cases – **Dickson Mukweluine versus Attorney General & 4 Others, HCCC Petition No. 390 of 2012; Narok County Council versus Trans Mara County Council & Another, Civil Appeal No.25 of 2000 and Okiya Omtatah Okoiti & Another versus Attorney General & 6 others [2014] eklr.**

Determination

The issues for determination herein can be summarised as;

Whether conservatory orders sought should issue

Whether the Claimant should have addressed the matter herein as under section 77 of the County Government Act; and

Whether the Claimant has laid out a good case for the grant of any of the orders sought.

25. The above issues outlined are intertwined and shall be addressed simultaneously save that there is need to set out here that Though Hon Hon. Alex Ole Magelo as the 1st Respondent is the Speaker of the Nairobi City County Assembly and as a result the Chairperson of the 2nd Respondent as per section 12(3) of the County Governments Act, my reading of the functions of the 1st Respondent and the functions undertaken by the 2nd Respondent are fundamentally different in law. Whereas the 1st Respondent as the Speaker can give directions to the County Assembly in its sessions, any such decision made by the Assembly must be communicated to any subject recipient of the same in that capacity. The same position does not suffice with regard to matters undertaken for and on behalf of the 2nd Respondent as any decisions made by the 2nd respondent, even where the person of the Speaker such as the 1st Respondent is the Chairperson, any communication of a decision must be made for and on behalf of the 2nd respondent. To communicate a decision of the 2nd Respondent in the capacity of the 1st Respondent is an anomaly. Hence, the letter sent to the Claimant dated 20th November 2014 by the 1st Respondent in his capacity as from *office of the Speaker* and signed for *speaker-chairman of Nairobi City County Assembly* is gross error of judgement and decision making. Such function for *speaker* for the 1st Respondent and *chairperson* for the 2nd Respondent should be clearly separated. The powers bestowed upon the 1st Respondent are separate and distinct from the persons bestowed upon the 2nd Respondent and the chairperson thereto. Each function and the consequent decisions made, separate the powers of the two and to purport to have the same act as synonymous is a serious anomaly in law. This was the gist of the decision made in **John Mining Temoi & Another versus The Governor of Bungoma County & 3 others** where the Court held that;

... It is not in dispute that the County Assembly as a distinct institution in the County Government, capable of suing and being sued was a proper party in these proceedings. However, in a case such as this one, the Speaker must also be enjoined together with the County Assembly. ...

26. The above decision was made in regard to the clear separation of powers between the roles of the Speaker of the County Assembly as against the role of the County Assembly Service Board.

27. In submissions, the Respondents admit that the claimant's appointing authority is vested upon the 2nd Respondent with approval of the 3rd respondent. With such admission then, the 1st Respondent has no mandate other than as the chairperson of the 2nd Respondent to *sue motto*, singly, or in any manner while acting in the capacity of the 1st Respondent purport to supervise the Claimant in his capacity as the Clerk of the County Assembly. To do so is *ultra vires* the powers vested upon the 1st respondent.

28. On whether the orders sought should issue, article 23 of the Constitution and section 12(3) of the Employment and Labour Relations Court Act read together make provisions for the grant of conservatory orders by this court. the admission by the Respondents that the Claimant was issued with letters dated

20th and 24th November 2014, for dismissal and revocation of the same respectively, and the submission by the Claimant that subsequent, there has been effort to challenge his employment since, I find thus there exists good grounds for the Claimant to be apprehensive over threats to his employment hence the orders sought to secure and preserve such employment to avoid the same being terminated without due process. In such an instance, the powers vested upon this Court require such threat be addressed with the grant of the orders sought. This is premised on principles set out in the case of **Richard Bwogo Birir versus Narok County Government and 2 others**, where the Court held that;

The Court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the Court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service. Due process of law or simply, "due process" entails according the concerned person proceedings in which rules and principles for the protection and enforcement of private rights are upheld by the decision maker or relevant authority. At the core of due process is according the concerned person a reasonable notice with sufficient particulars to prepare for a fair hearing ...

29. This position does not just suffice within the Kenyan Court as it has been widely accepted and applied in other jurisdiction with similar labour and employment courts. In the Constitutional Court of South Africa in the case of **Masetlha versus President of South Africa [2007] ZACC 20**, at paragraph 184 the Court held;

Acting fairly provides the decision-maker with the opportunity to hear the side of the individual to be affected by the decision. It enables the decision-maker to make a decision after considering all relevant facts and circumstances. This minimises arbitrariness. There is indeed an inter-relationship between failure to act fairly and arbitrariness. In this sense, the requirement of the rule of law that the exercise of public power should not be arbitrary, has both a procedural and substantive component. Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason for the action taken. The procedural component is concerned with the manner in which the decision was taken. It imposes an obligation on the decision-maker to act fairly. To hold otherwise would result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review. A reasonable balance must, however, be maintained between the need to protect the individual from decisions unfairly arrived at by officials exercising public power and the contrary desirability of avoiding undue judicial interference in their administration. [Emphasis added].

30. For the position held by the claimant, the rights due to him in employment, to remove him without due process is an act of arbitrariness and contrary to the rule of law as public power should not be arbitrary. The obligation upon the Respondent is that before taking the decision to dismiss the claimant, due process was required and this is not cured by simply revoking the dismissal letter. Such an act of arbitrariness is clearly demonstrated by the 1st respondent, where without the requisite authority to interfere with the employment of the Claimant did issue the letter dated 20th November 2014. Such actions require to be stopped as to leave such in abeyance one more day is to create room for more and future abuse.

31. Rule of law creates the requirement that laws as enacted by Parliament be faithfully executed by officials; that orders of Court should be obeyed; *that no person should be condemned unheard*; and that power should not be arbitrarily exercised. In employment and labour relations cases the overriding consideration will always be what does fairness demand in the circumstances of a particular case as held by this Court in the case of **Elizabeth Washeke & 62 Others versus Airtel Networks Limited, Cause No.1972 of 2013**.

32. With regard to the application of the provisions of section 77 of the County Government Act, the

decision challenged by the Claimant herein is the one issued by the 1st Respondent as the Speaker of the Nairobi City County Assembly and not any decision made by the 2nd Respondent or any *County Public Service Board*.^[1] even where the Claimant has failed to file an appeal against any decision of the 2nd respondent, which is not the case here, the provisions of section 77 of the County Government Act do not oust the jurisdiction of this Court to address employment and labour relations claims which are part of the Bill or Rights under article 41 of the constitution. A party whose constitutional rights to employment and fair labour practices have been violated has recourse to this Court as the Court with the original jurisdiction to address such claims. In any case the Claimant is an employee of the 2nd respondent, the Nairobi City County Assembly and not an employee of the County Public Service Board under which the provisions of section 77 of the County Government Act would apply.

33. Even where the provisions of section 77 of the County Government Act were to apply to any other employee, my reading of section 77 of the County Government Act is that a party *may* lodge an appeal to the Public Service Commission against any decision of the County Public Service Board thus;

*77. (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County public officer **may appeal to the Public Service Commission** (in this Part referred to as the "Commission") against the decision.*

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of—

...

(c) Disciplinary control;

34. Such provisions are not mandatory and even where they are to be taken as a best practice to do, such do not oust the jurisdiction of the Court to address urgent and critical violations of rights at the workplace for an employee such as the claimant. Where the Claimant required to urgently move and preserve his employment rights, recourse was to this court.

35. With the above analysis, I wish to conclude by drawing the respondents' attention to the provisions of section 46(h) of the Employment Act, 2007;

The Court draws the respondent's attention to the provisions of section 46(h) of the Employment Act, 2007;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty

—

...

(h) An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation

Conclusion

In the penultimate, based on the matters outlined above, in the interests of justice and good order accordingly, the Court makes the following orders:

- 1. The Respondents are hereby restrained from suspending, interdicting, terminating or otherwise interfering with the contract of employment of the Claimant with regard to matters outlined in the letter issued to the Claimant and dated 20th November 2014 unless**

- otherwise lawfully disciplined on account of substantially different and proven misconduct.
2. With the issuance of the orders as above (a) the subject of the suit is hereby settled;
 3. Costs herein awarded to the claimant.

Delivered, dated and signed in open Court at Nairobi this 21st Day of September 2015.

M. Mbaru

JUDGE

In the presence of:

Court Assistant.....

.....

.....

[1] Where this submissions was made in error is not clarified by the Respondent as the County Public Service Board is not a party herein sued as a Respondent herein or stated to have been an employer of the Claimant to warrant such reference.