



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**PETITION NO.5 OF 2015**

**MUNDIA NJERU GATERIA.....PETITIONER**

**VERSUS**

**EMBU COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**HON. MARTIN NYAGAH WAMBORA.....2<sup>ND</sup> RESPONDENT**

**SECILY WANJA NAMU.....3<sup>RD</sup> RESPONDENT**

**RUTH NJOKI MOSES.....4<sup>TH</sup> RESPONDENT**

**AND**

**COUNTY ASSEMBLY OF EMBU.....1<sup>ST</sup> INTERESTED PARTY**

**THE TRANSITION AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY**

**(Before Hon. Justice Byram Ongaya on Friday 20<sup>th</sup> November, 2015)**

**JUDGMENT**

The petitioner filed the petition on 05.05.2015 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. The petitioner further invoked the County Governments Act, 2012 and brought the petition citing his purported interdiction as the chairman of the Embu County Public Service Board. The petitioner prayed for redress as follows:

- a. That a declaration be issued to declare that the respondents have no power to subject the petitioner to disciplinary action or to interdict him from the office of chairman Embu County Public Service Board.
- b. That a declaration be issued to declare that the notice to show cause contained in the letter dated 11.03.2015 contravenes Article 251 of the Constitution and section 58(5) of the Constitution.
- c. That a declaration be issued to declare that the decision of the second respondent to interdict the petitioner from the office of chairman, Embu County Public Service Board violates Articles 251 of the Constitution and section 58(5) of the County Governments Act, 2012.
- d. That an order of certiorari be issued to bring into this honourable court and quash the decision of the second respondent to interdict the petitioner contained in the letter dated 18.03.2015.
- e. That a declaration be issued to declare that all the decisions, actions and proceedings of the Embu

- County Public Service Board made, taken or undertaken during the purported interdiction of the petitioner and the secretary of the Embu Public Service Board are null and void *ab initio*.
- f. That a declaration be issued to declare that the purported interdiction of the petitioner as chairman Embu County Public Service Board constitutes gross violation of Articles 10, 75, and 251(1) of the Constitution read with sections 30, 31 and 58(5) of the County Government Act, 2012.
  - g. That a declaration be issued that the purported interdiction of the petitioner by the second respondent constituted a violation of the petitioner's rights under Articles 27, 28, 41, 47 and 50 of the Constitution.
  - h. That compensation for the violation of the petitioner's rights and fundamental freedoms under Articles 27, 28, 41, 47 and 50 of the Constitution.
  - i. Costs of the petition are borne by the respondents.

The petition was supported with the petitioner's affidavit filed together with the petition.

The respondents opposed the petition by filing the replying affidavit of the Embu county secretary one Raymond Kinyua on 05.06.2015 through Ndegwa & Ndegwa Advocates. The petitioner filed his supplementary affidavit on 16.07.2015 in accordance with the leave granted by the court.

The petitioner filed the submissions on 16.07.2015 and the respondent filed the submissions on 06.08.2015. The petitioner's and respondents' respective advocates made elaborate and further oral submissions on 5.11.2015.

Despite service the interested parties did not enter appearance, did not file any papers and did not attend the hearing.

The petitioner was appointed to hold the office of the chairperson of the Embu County Public Service Board. He was nominated and appointed by the Embu County governor with the approval of the Embu County Assembly as provided for in section 58(1) (a) of the County Governments Act, 2012.

The 2<sup>nd</sup> respondent addressed to the petitioner the letter dated 11.03.2015 Ref. EBU/CG/CPSB/1/34 titled **"Complaints against Inept Performance of the Office of Chairman, Embu County Public Service Board."** The letter stated that there were numerous written and verbal complaints against the petitioner from the majority of the members of the Embu County Public Service Board, officials of Embu County Executive, many members of the County Assembly of Embu and members of the public residing in Embu County. The letter further stated that the 2<sup>nd</sup> respondent had inevitably decided to put the petitioner on notice to show-cause why disciplinary action should not be taken against the petitioner in 7 days. The letter set out the allegations against the petitioner as follows:

- a. Gross violation of the Constitution of Kenya, 2010, Articles 179(1), 179 (2) and 176(4). The court has perused the Constitution. Article 176(4) does not exist. Article 179(1) provides that the executive authority of the county is vested in, and exercised by a county executive committee. Article 179(2) provides that the county executive committee consists of the county governor and the deputy county governor, and, members appointed by the county governor, with approval of the assembly, from among persons who are not members of the assembly. Under that allegation, the letter stated that the petitioner had failed to convene the County Public Service Board meeting for the past 20 months or thereabouts and the petitioner had disregarded the requests of the Embu County Executive Committee for tabling the organization structures of the Board for its consideration and endorsement. It was stated that that the petitioner violated Article 179(4) of the Constitution which recognizes the county governor as the chief executive officer of the county and Article 179(1) which vests the executive authority of the county in the county executive committee. It was further stated that the petitioner had contravened Article 176(2) of the Constitution which states that every county government shall decentralize its functions and provision of services to the extent that it is efficient and practical to do so.
- b. Gross violation of Article 179(1) by undermining the Embu Executive Committee in which the executive authority of the county is vested and exercised and this is actualized in the County Government Act under section 46. It was alleged that the petitioner had been obsessed with

- independence of the County Public Service Board which was not anchored in the Constitution and that the petitioner was to stop putting himself above the 2<sup>nd</sup> respondent as the county chief executive officer and above the county executive committee.
- c. Gross violation of Article 179(4) by undermining the 2<sup>nd</sup> respondent as the chief executive of the county government of Embu.
  - d. Gross abuse of office in violation of the County Government Act, 2012. It was stated that under section 32(4) of the Act, the deputy governor when acting in office of governor as contemplated in Article 179(5) of the Constitution could not exercise the powers of the governor to nominate, appoint or dismiss but the petitioner and the Board secretary in disobedience of the directive by the High Court in petition 3 of 2014 had irregularly terminated the services of 60 Embu County employees without following the principles of natural justice as required under section 76(1) of the Act that requires the Board to uphold natural justice.
  - e. Gross violation of section 30(a) and (e) of the Act by sabotaging the ability of the 2<sup>nd</sup> respondent to execute functions and responsibilities of a county governor.
  - f. Sheer incompetence and violation of the County Government Act, 2012 by violating section 59 (1) which states that the Board acts on behalf of the county government. It was alleged that the petitioner and the Board secretary had failed to convene meetings of the Board and to facilitate the performance of the Board's functions under section 59 (1) (a) (b) (h) and (i) by failing to finalize recruitment process for county directors, ward administrators, information or public relations or protocol officials and county attorney in spite of persistent requests by county government executive and by all the 4 members of the Board; failing to confirm appointments of sub-county administrators and revenue officers despite their over one year service and recommendation for confirmation by their supervisors; failure to advise the county government on human resource management and instead spending most time in seminars together with the Board secretary; and failing to advise the county government on the implementation and monitoring of the national performance management system in counties.
  - g. The letter stated that the additional complaints by the 4 members of the Board were failure to call regular board meetings even when the members demanded for the meetings; petitioner's insubordination of the Board members; absenteeism whenever the board members asked the petitioner to call a meeting; and perennial absenteeism from work

The letter concluded thus, **“In view of the foregoing stated gross violations by you against specified provisions of the Constitution of Kenya and the County Government Act and your sheer and deliberate sabotage of the Mission and Objectives of the Embu County Government Executive, which greatly compromise the performance of the Executive and development of Embu County this is to demand that with IMMEDIATE effect you address the same in line with Section 59 of the County Government Act and Articles 10 and 232 of the Constitution of Kenya or show cause why appropriate disciplinary action should not be taken against you after seven (7) days hereof.**

Yours sincerely

Signed

**Hon. Martin N. Wambora**

**Governor**

**Embu County”**

The letter was copied to Kinuthia WaMwangi, Chairman of the Transitional Authority, and, Alice A. Otwala, the Secretary and Chief Executive Officer, Public Service Commission of Kenya.

The petitioner replied by his letter dated 18.03.2015 Ref. No. EC/PSB.DISCP.24/VOL.I/38. In the reply the petitioner asked to be furnished with the copies of the written complaints, details of the verbal complaints including the maker, when, and the person they were made to, and the nature and legal basis of the disciplinary action the petitioner would face on account of such complaints. The petitioner disputed

the allegations as leveled against him and stated in the replying letter as follows:

- a. Articles 179(1), (2) and 176(2) did not provide that the County Public Service Board had to do anything towards their enforcement. Thus there was no violation as alleged.
- b. He had convened meetings in the past 20 months and the records were available and the meetings had been halted by the 4 members of the Board who by insubordination insisted to discuss the petitioner's conduct and had petitioned the county assembly of Embu to remove the petitioner from the office of the chairperson of the board.
- c. He had attended relevant meetings and the preparation of the Board's structure had been concluded on 3.03.2015.
- d. Under Article 178(2) the obligation to decentralize county services vested with the county assembly and the county executive and not the board.
- e. There were no furnished details to show that the petitioner had violated Article 179(1) by allegedly putting himself above the Embu county executive committee and the 2<sup>nd</sup> respondent, the governor.
- f. There were no details furnished to show that the petitioner had violated Article 179(4) by undermining the 2<sup>nd</sup> respondent as the chief executive of the county government of Embu.
- g. The issue of the 60 county employees that were terminated was pending before the court and it was *sub judice* to address it.
- h. If the petitioner had disobeyed any court order then he was ready to answer the contempt proceedings if the same was served upon him.
- i. There were no details to show that the petitioner had sabotaged the 2<sup>nd</sup> respondent as was alleged.
- j. The functions of the Board in section 59 of the County Government Act, 2012 were vested in the Board and not any member or chairperson of the Board and he had no shortcomings as alleged.
- k. There were no details of the seminars or workshops he had attended as alleged.
- l. The 4 Board members had refused to attend Board meetings since late 2014 and particulars were available with the Board secretary.
- m. The 4 Board members had engaged in insubordination against the petitioner and not the other way round as was alleged. Thus on 23.04.2014 they denied the petitioner the pool transport to the County Public Service Boards' convention and the petitioner had to use private transport; on 30.10.2014 they purported to hold a Board meeting in absence of the petitioner and contrary to section 7(1) of the Board's Charter; one Mugambi had threatened the petitioner on cell phone message not to attend an official meeting at Mombasa using Board's funds and the petitioner was forced to use private funds to attend the meeting; the 4 members refused in July to December to draft terms of the Board committees that they chaired as assigned by the petitioner and to date they had not delivered on that assignment; in August 2013 the 4 members had insisted on short listing one Margaret Lorna for the position of Board secretary whereas the said Lorna did not hold the prescribed qualifications.
- n. In conclusion the petitioner requested for better particulars of the allegations and drew the 2<sup>nd</sup> respondent to the orders in the judgment in **Mundia Njeru Geteria- Versus- Embu County Government & 3 Others , Industrial Court Petition No. 116 of 2013** where the court issued an injunction restraining the respondents from removing the petitioner from office by any other manner whatsoever or grounds that contravened Article 251 of the Constitution. It was the petitioner's case that the notice to show cause was in contravention of Article 251, the provisions of the County Governments Act, 2012, and the provisions of the Embu County Assembly's standing orders. The petitioner gave notice of instituting legal action if the particulars of the allegations were not furnished in 7 days of his replying letter.

By the letter dated 18.03.2015 Ref, No. EMB/CG/CPSB/1/37 the 2<sup>nd</sup> respondent interdicted the petitioner from office for allegedly failing to rectify his omissions and commissions as outlined in the earlier letter of 11.03.2015 and within 7 days of that earlier letter. The interdiction letter stated that the 2<sup>nd</sup> respondent had decided to interdict the petitioner with immediate effect to give an ad hoc investigating committee opportunity to investigate the complaints against the petitioner and subsequent recommendations for further action. The letter further stated that during the interdiction, one Secily Wanja Namu would perform the role of chairperson of the Embu County Public Service Board and in an acting capacity.

Faced with the interdiction and having been precluded from performing the functions of his office as the chairman of the Embu County Public Service Board, the petitioner decided to file the present case.

The court has carefully examined the material on record towards unearthing the circumstances leading to the filing of the petition. In the supporting affidavit, the petitioner at paragraph 6 states that he earnestly believes that the 2<sup>nd</sup> respondent purported to suspend him on account of the petitioner's refusal and unwillingness to compromise the independence of the Embu County Public Service Board and to aid and abet the 2<sup>nd</sup> respondent's illegal schemes to circumvent the law and procedures in appointment and dismissal of county government workers. In that paragraph the petitioner states that in fact, the main bone of contention that triggered the government's illegal decision to illegally suspend the petitioner and the Board secretary one Johnson Nyaga related to the termination of 60 Embu County employees by the second respondent in March 2014 during the 2<sup>nd</sup> respondent's first impeachment by the Senate. The termination of the 60 employees who had been irregularly and un-procedurally employed was actually approved by the County Assembly, the 1<sup>st</sup> interested party in the present petition. The petitioner then continues to state as follows in the supporting affidavit, thus,

**“7. That upon the termination of the 60 employees some of them filed a case namely Petition No.14 of 2014 – Elias Mugendi & 41 Others –Vs- County Government of Embu & 2 Others. All the parties were initially represented by the Hon. Attorney General. However on 26.05.2014 the County Government contested the instructions of the Attorney General. Consequently by a letter dated 12.06.2014 the Hon. Attorney General sought clarification on the matter of representation but he reiterated that his office would continue to represent the Embu CPSB- in that matter. Annexed hereto marked “MNG5” is a true copy of the said letter dated 12.06.2014.**

**8. That subsequently the law firm of R.M.Mugo & Company Advocates came on record for the Embu County Government and County Secretary and its major interest was to compromise the case in favour of the petitioners. However, when the Embu CPSB expressed unwillingness to compromise the said case, the said law firm started to claim it also acted for Embu CPSB on account of purported instructions by some members of the said Board. This matter of representation is yet to be fully resolved.**

**9. That the foregoing notwithstanding, by a letter dated 28.01.2015 addressed to Ms. R.M.Mugo & Company Advocates, the petitioners' lawyers in Petition No. 14 of 2014 Ms. Robson Harris & Company Advocates proposed terms for settlement of the said industrial dispute. Annexed hereto marked “MNG6” is a true copy of the said letter dated 28.01.2015.**

**10. That by a letter dated 4.02.2015 Ms. R.M.Mugo & Co. Advocates agreed to proposed settlement in the following terms:**

- a. That your clients will be confirmed to their various positions, as permanent and pensionable employees.
- b. That your client will be paid all their salaries as due to them from February, 2014 to date.
- c. That your legal fees of Kshs. 2,000,000/- plus VAT shall be deducted upfront and directly from payment in (b) hereinabove and remitted to your account.
- d. That you will proceed to execute, file, and record in court the consent to mark the matter as fully settled in all aspects.

**It is in my earnest belief that the consent aforementioned was not in the best interests of the County Government of Embu and payment of salaries from February, 2014 to date is illegal, inter-alia, on the grounds that the Petitioners rendered no services to the people of Embu upon being lawfully terminated. Annexed hereto marked “MNG7” is a true copy of the said letter dated 4.02.2015**

**11. That pursuant to the foregoing by a consent letter dated 17.02.2015 Ms. Robson Harris & Co. Advocates and Ms. R.M.Mugo & Co. Advocates requested the deputy registrar of this honourable court to record the said consent. A true copy of the consent letter dated 17.02.2015 is annexed hereto and marked “MNG8”.**

**12. That by the letter dated 18.02.2015 addressed to the Embu Acting County Secretary, Ms. R.M. Mugo & Co. Advocates requested facilitation of approval and adoption of the settlement aforementioned by the Embu CPSB to enable the filing of the same in the Industrial Court. Annexed hereto marked "MNG9" is a true copy of the said letter dated 18.02.2015.**

**13. That in furtherance of the foregoing, by a letter dated 19.02.2015 the Acting County Secretary formally requested the Embu CPSB to approve and adopt the settlement aforementioned "in order to save us from a protracted legal battle that we are bound to lose in end". Annexed hereto marked "MNG10" is a true copy of the said letter dated 19.02.2015.**

**14. That in my considered opinion the request to approve the settlement could not be lawfully acceded to because the Board's position all along has been that the decision of termination was made lawfully and procedurally and that position was easy to defend in court. However some Board members supported the request notwithstanding its patent illegality. In the premises the split between members of the Board in this matter explains the false accusations against the Board Secretary and myself by some members of the Board who support any request or proposal by the Governor.**

**15. That in view of the foregoing I believe that the Governor made illegal decision to suspend the Board Secretary and I in order to secure a Board that would rubber-stamp his decisions and particularly to approve and adopt the settlement. In fact one of the allegations made against me is that I dismissed the concerned employees in disregard of law and procedure.**

**16. That I believe the Governor has no power to suspend me from office and he is simply abusing his powers in furtherance of his scheme to reverse the lawful decision of the County Government of Embu and the CPSB to terminate the services of workers who had been engaged illegally."**

In the supplementary affidavit filed on 16.07.2015 at paragraph 8 the petitioner states that until the 2<sup>nd</sup> respondent started meddling in the affairs of the Embu Public Service Board, the Board had been having cordial working relationships and the animosity, if any, arose after the petitioner refused to rubberstamp the consent in the supporting affidavit marked "MNG-8" which was a scheme that would defraud the Embu County huge sums of money. In that paragraph, the petitioner states that to demonstrate that fact, a day after his alleged interdiction, the Embu CPSB met, though illegally constituted, and ratified the consent.

The respondents at paragraph 25 of the replying affidavit have stated that as regards the 2<sup>nd</sup> respondent's decision to interdict the petitioner being based on the case in court, it is untrue and diversionary as the allegations raised against the petitioner are serious and substantial which cannot be excused and the actions by the 2<sup>nd</sup> respondent are justified as they defend the Constitution. At paragraph 26 of the replying affidavit it is stated that the petitioner in reply to the show cause notice did not raise the issue of the court case and therefore the petitioner has averred it as a mere afterthought. At paragraph 22 the replying affidavit states that the determination of the legality of termination of the 60 employees is subject to the pending petition 14 of 2014 at Nyeri and at paragraph 23, that the petitioner's averments about R.M. Mugo & Co. Advocates relate to execution of professional duty by advocates on record and therefore are irrelevant to the matters in dispute.

The foregoing are the circumstances of the petition as far as the court could gather from the material on record. The court has considered the pleadings, the exhibits, the submissions and all the circumstances of the present dispute and proceeds to determine the issues in dispute as follows:

The **1<sup>st</sup> issue** for determination is whether the petitioner's interdiction by the governor of the county of Embu, the 2<sup>nd</sup> respondent, was lawful. It was submitted for the respondents that in view of the allegations leveled against the petitioner, the petitioner violated the provisions of Articles 10, 73, and 232 of the Constitution including but not limited to good governance, integrity, transparency and accountability and the violation of the Integrity Act. The respondents' submissions essentially focused on attempting to

justify that the petitioner, as alleged in the show cause notice and the interdiction letter, had engaged in gross misconduct that justified the interdiction. The court has perused the respondents' oral and written submissions and nowhere do they point out the source of the 2<sup>nd</sup> respondent's authority to interdict the petitioner save the submission that the 2<sup>nd</sup> respondent is the chief executive of the county government.

Section 58(1)(a) of the County Government Act, 2012 provides that the chairperson of the County Public Service Board is nominated and appointed by the county governor with the approval of the county assembly. Section 58(5) of the Act provides that the members of the Board may only be removed from office on grounds set out for the removal of members of a constitutional commission under Article 251(1) of the Constitution; and by a vote of not less than seventy five percent of all the members of the county assembly. The grounds for removal under the said Article 251(1) include serious violation of the Constitution or any other written law, including a contravention of Chapter Six; gross misconduct, whether in the performance of the member's or office holder's functions or otherwise; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy.

The court has considered the grounds and the procedure for removal of the members of the Board who, include the chairperson of the Board.

The person desirous that the chairperson is removed from office must satisfy the substance and the procedure by first, alleging the details of the grounds that satisfy any of those enumerated in the Constitution and secondly, submitting the appropriate petition to the county assembly for the assembly's consideration and resolution. There is no exception of application of the procedure where the removal is to be as desired by the county governor.

Article 179(1) of the Constitution is clear that the executive authority of the county is vested in, and is exercised by, a county executive committee; Article 179(5) provides that the county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively; and Article 183 (1) provides that a county executive committee shall implement county legislation; implement, within the county, national legislation to the extent that the legislation so requires; manage and coordinate the functions of the county administration and its departments; and perform any other functions conferred on it by this Constitution or national legislation. The court has considered those provisions and holds that the executive powers in a county government is vested in the county executive committee and with the governor as the chief executive to whom the executive committee members are accountable to as provided in Article 179(6). The court further holds that under Article 183, the function of the county executive committee is chained to implementing county and national legislation so that the committee or its members, including the governor and deputy governor as per Article 179(2), must show that the executive actions or omissions are founded upon some legislative provision. It is therefore the holding of the court that the governor, the deputy governor, the members of the county executive committee and indeed the county executive committee do not enjoy inherent executive powers outside of legislative provisions as may be provided in national or county legislation. To safeguard interests of the executive arm of the county governments, where it is desired to do that which is not provided in the legislation, Article 183 (2) of the Constitution provides that a county executive committee may propose legislation for consideration by the county assembly. It is the opinion of the court that until such legislation is prepared and enacted, the governor, the deputy governor and the members of the county executive committee by themselves or as a committee may not implement that which is not provided for in legislation; they do not enjoy inherent executive powers by which they can purport, by way of filling real or perceived gaps in the legislation, to act outside the law or where the law is silent or so to say, absent.

In the present case, the court finds that the 2<sup>nd</sup> respondent did not enjoy inherent disciplinary powers to impose the disciplinary sanction of interdiction against the petitioner as there was no constitutional or legislative authority or power for the 2<sup>nd</sup> respondent to act as he proceeded in the case.

While making that finding the court upholds its opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** thus, “**To answer the 1<sup>st</sup> 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 2<sup>nd</sup> 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."

And again the court upholds the opinion in **Birir's case** on the demise of the pleasure doctrine and the doctrine of the servants of the crown, thus,

"...In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution."

Thus, the court finds that in the present case, the 2<sup>nd</sup> respondent erroneously acted in the misconceived believe that the petitioner was his servant. The court finds that the petitioner was not the 2<sup>nd</sup> respondent's servant but like the 2<sup>nd</sup> respondent, he was a servant of the people and the 2<sup>nd</sup> respondent was not the master of the petitioner. The court holds that in such circumstances, the 2<sup>nd</sup> respondent did not enjoy the inherent disciplinary powers of a master over a servant as such relationship did not exist at all. The petitioner's service as a public officer was governed and based upon the provisions of the Constitution, legislation and governmental policies. It was a service free from the individual will or discretion of the petitioner or the 2<sup>nd</sup> respondent. And even if the discretion existed, but which the court finds did not in view of the statutory provisions on the removal of the petitioner from the office of the chairperson of the County Public Service Board, the court holds that the 2<sup>nd</sup> respondent acted unreasonably per Lord Green in Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683 thus, "It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said,

**and often is said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”**

The court finds that the 2<sup>nd</sup> respondent failed to consider the clear statutory provisions that applied to the petitioner’s removal or disciplinary control and the court returns that the 2<sup>nd</sup> respondent’s show-cause letter and then interdiction decision was unreasonable as was unlawful.

To answer the 1<sup>st</sup> issue for determination, the court returns that the petitioner’s interdiction by the governor of the county of Embu, the 2<sup>nd</sup> respondent, was unlawful as it was not founded upon a constitutional or statutory provision that vested upon the 2<sup>nd</sup> respondent disciplinary power to interdict the petitioner or to require the petitioner to show-cause as was done by the 2<sup>nd</sup> respondent.

The **2<sup>nd</sup> issue** for determination is whether consequential to the interdiction of the petitioner, the 2<sup>nd</sup> respondent could lawfully appoint the 3<sup>rd</sup> respondent to act as the chairperson of the Embu County Public Service Board. The County Government Act, 2012 does not empower the 2<sup>nd</sup> respondent to appoint an acting member of the Board. As the 2<sup>nd</sup> respondent did not enjoy constitutional or statutory power to make such acting appointment, the court returns that the appointment was null and voided as it was founded upon the exercise of fictitious authority. The court has considered the provisions of section 64(2) of the County Government Act, 2012 that acting appointments shall be made only by the lawful appointing authority and for a specified period. Further, the court has considered the provisions of section 64 (1) of the Act that a person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding that office. The court finds that in view of those provisions, the acting appointment was defective because it was indefinite and for want of approval by the county assembly as provided for in section 58(1) of the Act.

The **3<sup>rd</sup> issue** for determination is whether the petitioner’s fundamental rights and freedoms and other constitutional protections were violated by the 2<sup>nd</sup> respondent. At paragraph 15 of the petition the petitioner has stated that the purported interdiction of the petitioner is a flagrant violation of his fundamental rights and freedoms enshrined in Articles 27, 28, 41, 47 and 50 of the Constitution. On this issue the findings of the court are as follows:

- a. Article 27 (1) of the Constitution entitled the petitioner to equal protection and equal benefit of the law. It has been established that the petitioner’s interdiction was not founded upon a constitutional or statutory provision as it was unlawful. The interdiction denied the petitioner the enjoyment of the clear statutory provisions that governed any desired removal from office. The court returns that the petitioner’s right was contravened as alleged.
- b. Article 28 entitled the petitioner to inherent dignity and the right to have that dignity respected and protected. The court has considered the interdiction letter. The court finds that by exercising imaginary authority and pretending to effectively remove the petitioner from office by way of interdiction, the 2<sup>nd</sup> respondent subjected the petitioner to unjustified harassment, intimidation and mental torture that fell short of the petitioner’s dignity as a person and the chairperson of the Board. The 2<sup>nd</sup> respondent made unreasonable allegations such as that the petitioner had engaged in insubordination of the 4 members of the Board who in fact were subordinate to the petitioner by reason of the offices they held as Board members. In the opinion of the court, such was a move carefully designed to make the petitioner feel smaller than his juniors, the members of the Board he chaired and therefore was the leader. The court finds that such was a calculation to lower the human esteem and seniority of the petitioner as the chairperson of the Board and thereby seriously offending the human dignity of the petitioner.
- c. The law clearly prescribes the grounds and procedure for removal from office of the petitioner entailing the deliberation by and resolution of the county assembly. It was unfair administrative

- action in contravention of Article 47 for the 2<sup>nd</sup> respondent to have behaved in a manner to suggest that he held disciplinary powers over the petitioner but which was not true under the relevant statutory provisions.
- d. The petitioner has shown that the interdiction and related processes of requiring him to make a reply to the 2<sup>nd</sup> respondent defiled the protection to independent and impartial determination of the dispute. The 2<sup>nd</sup> respondent was clearly a member of the county executive committee that was alleged to have leveled serious allegations against the petitioner. At the same time, it was the 2<sup>nd</sup> respondent who had acted as though he was an independent arbiter charged with appointing an ad hoc investigating committee which lacked legal basis. The court returns that the petitioner's fundamental rights and freedoms were violated as protected under Article 50(1) of the Constitution. While making that finding, the court considers that under the relevant statutory provisions for removal of the petitioner as the Board chairperson, the Embu county assembly was the prescribed independent and impartial institution or body for affording the petitioner a fair and public hearing as was envisaged in Article 50(1) but which the 2<sup>nd</sup> respondent decided to go against.
  - e. That the petitioner was subjected to illegal disciplinary process that had no basis in law shows that the 2<sup>nd</sup> respondent violated the petitioner's right to fair labour practices as conferred in Article 41(1) of the Constitution.
  - f. Needless to state, the court returns that the interdiction was in violation of the values and principles of governance in Article 10 and the integrity provisions in Article 75 of the Constitution. In particular the court finds that it offended the principles of good governance, rule of law, human rights, human dignity, and integrity for the 2<sup>nd</sup> respondent to commit the violations of the law as found in this judgment.

The 4<sup>th</sup> issue for determination is whether the decisions by the Embu Public Service Board made effective and after the date the petitioner was interdicted were null and void. The court has found that the 2<sup>nd</sup> respondent lacked constitutional or statutory authority to appoint the 3<sup>rd</sup> respondent as the acting chairperson and that appointment has been found to have been illegal. The court finds that effective the date of the petitioner's interdiction the Embu Public Service Board was defectively constituted as it could not lawfully exercise any of the powers and functions vested in the Board. Section 58 of the County Government Act, 2012 clearly spells out the Board's membership as the chairperson, not less than three and not more than five other members and a certified public secretary of good standing all nominated and appointed by the county governor with the approval of the county assembly. Under section 58(2) the appointments are through a competitive process. The actions of the 2<sup>nd</sup> respondent to illegally interdict the petitioner and to unlawfully appoint an acting chairperson rendered the Board improperly constituted. Accordingly, all decisions made by the board and all consequential actions and omissions, as prayed for, are null and void *ab initio*.

The 5<sup>th</sup> issue for determination is whether the petitioner is entitled to compensation for the violation of the petitioner's rights and fundamental freedoms. The court has found that the petitioner's rights were violated. First is the violation of the petitioner's right to fair labour practices. The court finds that flowing from that violation, the petitioner was subjected to unfair loss of the otherwise due income and the right to work as was duly appointed. The letter of appointment shows that the petitioner earned Kshs. 225, 000.00 per month and was interdicted effective 18.03.2015. The court finds that the petitioner is entitled to all withheld pay for 9 months making **Kshs.2, 025,000.00** to be paid by the 1<sup>st</sup> respondent. While making that finding the court uphold its opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited, [2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11, where the court stated thus **"In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or**

the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, '(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;'. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged."

In making upholding that opinion, the court further recognizes that the sections referred to in the quoted opinion are in the Employment Act, 2012 and there is no reason why they would not apply to state or public officers unless it is established that better terms of service were in place for that purpose. The court further upholds its opinion in the ruling of 06.03.2015 in Margaret Lorna-Versus- Embu County Government [2015]eKLR thus, "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."

Taking the quoted opinions into account, the court considers that the petitioner is entitled to the withheld pay throughout the period of the interdiction and within the right to fair labour practices under Article 41(1) and the general principles of fair terms of employment.

The court has considered the manner in which the 2<sup>nd</sup> respondent acted in this case outside the law and was keen to injure and deliberately continue the cited violation of the petitioner's rights despite clear advice the Transitional Authority had given to him. On 30.04.2015 the Transitional Authority wrote as per exhibit MNG11 in reply to the 2<sup>nd</sup> respondent's letter of 11.03.2015 regarding an advisory on the office of the chairman and the secretary of the Embu County Public Service Board. The Transitional Authority, inter alia, advised as follows:

- a. Section 57 of the County Governments Act, 2007 created the County Public Service Board as a body corporate with perpetual succession and subsequent provisions there under lay emphasis on the autonomy of the Board and that autonomy should not be infringed upon as it appeared to have happened.
- b. Any person who desired the removal of the chairperson from office had to present a petition to the county assembly in line with the provisions of section 57 of the County Governments Act, 2007 as read with the provisions of Articles 236 and 251(1) of the Constitution. Further, it was advised that the purported interdiction was ill advised and should be reversed.

- c. The Board was entitled to reverse appointments of county staff which in the Board's opinion was done irregularly as per section 75 of the County Governments Act, 2012.

The material before the court show that the 2<sup>nd</sup> respondent failed to act as per the advice and instead allowed the petitioner's lamentations about the violations of his rights to persist. The court finds that in the circumstances of the case the petitioner is entitled to compensation by the 2<sup>nd</sup> respondent for the violation and continued violation of the rights beyond the clear advice that the 2<sup>nd</sup> respondent was given by the Transitional Authority. As submitted for the petitioner, the 2<sup>nd</sup> respondent continued to violate the petitioner's rights after receiving the advice and the court finds that taking all the circumstances into account, the 2<sup>nd</sup> respondent's violation of the petitioner's rights was not in pursuit of justified or genuine governmental purpose. It is the opinion of the court that it would be unjustified to burden the tax payer to meet the compensation for violation of the rights in this case whereby the 2<sup>nd</sup> respondent engaged in the illegalities and his actions were clearly in violation of the law and were advanced in clear disregard of the advice given by the relevant government agency. The 2<sup>nd</sup> respondent and not the tax payer is therefore found liable for the paying the compensation for the violation of the fundamental rights and freedoms.

There is no doubt that the petitioner was wronged. The court has considered the aggravating factors that the 2<sup>nd</sup> respondent disregarded the clear opinion of the court in the earlier decided case of **Mundia Njeru Geteria- Versus- Embu County Government & 3 Others , Industrial Court Petition No. 116 of 2013** in which this court (Abuodha J) gave clear guidance and orders on the manner of handling the petitioner's removal. The court has also considered that the 2<sup>nd</sup> respondent failed to heed the clear advice by the Transitional Authority in that regard. It was submitted for the petitioner that in view of the abuse of the law, disobedience of the court's opinion and orders in the earlier decided case and the seriousness of the wrongs committed, the claimant had been dehumanized and an award of Kshs. 10,000,000.00 would meet the ends of justice. It was further submitted that the remedy of compensation recognizes that the petitioner was indeed wronged and the fact that the court order and guidance in the previous case between the parties had been disobeyed was a circumstance that aggravated the violation of the petitioner's rights. Further, it was submitted that the 2<sup>nd</sup> respondent's actions were not in furtherance of the government's interest and so the government would not be liable for the violations.

In **Arnacherry Limited –Versus- Attorney General [2014]eKLR** the High Court ( Lenaola J) awarded Kshs. 3,000,000.00 where there had been violation of Article 40 on the right to protection of property and the petitioner having been fully compensated the value of the land at Kshs. 850,000.00 and the destroyed assets at Kshs. 30,000,000.00. In **Mak'Onyango-Versus- Attorney General and Another [2013]1EA at 353** the High Court (Rawal J) awarded Kshs. 20,000,000.00 for violation of rights for unlawful and malicious arrest, search and detention during the aftermath of the attempted *coup d'état* on 01.08.1982 and the same having amounted to torture, cruelty, inhuman and degrading treatment.

The court has awarded the petitioner the full withheld salaries. Taking into account the cited cases and the awarded salaries the court finds that Kshs.10, 000,000.00 as submitted for the petitioner would be on the higher scale. The respondents on their part did not offer any submissions to guide the court on the quantum of the compensation. The court has already pointed out the aggravating circumstances as submitted for the petitioner and finds that **Kshs. 5,000,000.00** for violation of the fundamental rights and freedoms will meet the ends of justice in this case.

Finally, the court has revisited the petitioner's written and oral submissions. There are no specific submissions urging for grant of a declaration that the 2<sup>nd</sup> respondent's action of interdicting the petitioner was gross violation of Article 75 of the Constitution as was partly prayed for in prayer (f) in the petition. The court considers that the petitioner abandoned that part of the prayer or that the petitioner has by way of submissions failed to justify that part of the prayer. Thus, while allowing that prayer (f), the part the court has found unjustified or abandoned will be excluded as declined by the court.

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

- a. The declaration that the respondents had and have no power to subject the petitioner to disciplinary action or to interdict him from the office of chairman, Embu County Public Service Board.
- b. The declaration that the notice to show-cause conveyed in the letter dated 11.03.2015 contravened Article 251 of the Constitution and section 58(5) of the Constitution.
- c. The declaration that the decision of the 2<sup>nd</sup> respondent to interdict the petitioner from the office of chairman, Embu County Public Service Board violated Articles 251 of the Constitution and section 58(5) of the County Governments Act, 2012.
- d. The order that the prerogative order of certiorari hereby issues to bring into this honourable court and hereby quashes the decision of the second respondent to interdict the petitioner contained in the letter dated 18.03.2015 and the notice to show cause dated 11.03.2015.
- e. The declaration that all the decisions, actions and proceedings of the Embu County Public Service Board made, taken or undertaken during the purported interdiction of the petitioner as chairman of the Embu Public Service Board are null and void *ab initio*.
- f. The declaration that the purported interdiction of the petitioner as chairman Embu County Public Service Board constituted gross violation of Article 10, and 251(1) of the Constitution read with sections 57 and 58(5) of the County Government Act, 2012.
- g. The declaration that the purported interdiction of the petitioner by the second respondent constituted a violation of the petitioner's rights under Articles 27(1), 28, 41(1), 47 and 50 (1) of the Constitution.
- h. That the 1<sup>st</sup> respondent to pay the petitioner a sum of **Kshs.2, 025,000.00** by 01.12.2015 and in default interest at court rates to be payable thereon from the date of this judgment till full payment.
- i. That the 2<sup>nd</sup> respondent to pay the petitioner a sum of **Kshs.5, 000,000.00** by 01.01.2016, for the violation of the petitioner's fundamental rights and freedoms, and in default interest at court rates to be payable thereon from the date of this judgment till full payment.
- j. For avoidance of doubt the petitioner shall assume his duties as the chairperson of the Embu County Public Service Board effective today, without intimidation by the respondents, without a break in service as appointed, and with full pay and benefits and shall serve in that office for all the unexpired term unless lawfully removed in accordance with the provisions of section 58(5) of the County Government Act, 2012 as read with Article 251(1) of the Constitution of Kenya, 2010.
- k. The respondents shall bear the petitioner's costs of the petition.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 20<sup>th</sup> November, 2015**.

**BYRAM ONGAYA**

**JUDGE**