



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.7 OF 2015

MONICA CYOMBUA GITARI.....1ST PETITIONER

JOSEPH MURIUKI KITHUMBU.....2ND PETITIONER

VERSUS

EMBU COUNTY GOVERNMENT.....1ST RESPONDENT

HON. MARTIN NYAGAH WAMBORA.....2ND RESPONDENT

AND

EMBU COUNTY PUBLIC SERVICE BOARD.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 20th November, 2015)

JUDGMENT

The petitioners filed the petition on 27.05.2015 through Kinoti & Kibe Company Advocates. The petitioners alleged the contravention of their respective fundamental rights and freedoms under Articles 27, 28, 41, 47, and 50 of the Constitution. The petitioners further cited the County Government Act, No.17 of 2012. The petitioners prayed for judgment against the respondents for:

- a. A declaration that the 2nd respondent has no power to subject the petitioners to disciplinary action or compel them to proceed on compulsory annual leave to pave way for investigations into the allegations contained in two letters dated 19.05.2015.
- b. A declaration that the notices to show-cause contained in the letters dated 19.05.2015 contravenes section 40 and 55 of the County Governments Act, 2012.
- c. A declaration that the decisions of the 2nd respondent contained in the letters dated 19.05.2015 violates Articles 10(1), 174 and 235 of the Constitution.
- d. An order of certiorari be issued to bring into the honourable court for quashing the decision of the 2nd respondent to interdict the petitioners contained in the two letters both dated 19.05.2015.
- e. A declaration that the purported interdiction and compulsion of the petitioners to proceed on annual leave by the 2nd respondent constitute violation of the petitioners' rights under Articles 27, 28, 41, 47 and 50 of the Constitution.
- f. That compensation for the violation of the petitioners' respective rights and fundamental freedoms under Articles 27, 28, 41, and 50 of the Constitution.

g. Costs of the petition be borne by the respondents.

The respondents opposed the petition by filing on 06.08.2015 the replying affidavit of Raymond Kinyua, the 1st respondent's county secretary.

At all material times the 1st petitioner is the duly appointed and serving chief officer for the department of gender, empowerment, culture, children and social services and the 2nd petitioner is the county executive member for education, the county of Embu.

The petitioners' case is that the county of Embu has 3 main communities namely the Embu, Mbeere, and the Akamba. The 2nd respondent hails from the populous Embu community while the petitioners are members of the Mbeere community. The petitioners' further case is that the 2nd respondent has been subjected to double impeachment proceedings and the 2nd respondent is currently serving as governor for the county of Embu on account of orders of stay of the impeachment as given by the Court of Appeal. It is the petitioners' case that the present cause of action has evolved from the 2nd respondent's hostile attitude towards senior county public officials who hail from the Mbeere community and who include the petitioners. It is the petitioners' position that the 2nd respondent holds the Mbeere community responsible for his political woes and performance shortcomings that led to the said double impeachment by the Senate of Kenya.

On 19.05.2015 the 1st petitioner received the 2nd respondent's letter to show-cause in respect of complaints against the 1st petitioner including alleged disrespect to members of the public; repeated use of the Embu county government motor vehicle; irregular financial transaction; irregular procurement; and participating in gainful employment and yet the 1st petitioner was a full time state officer thus contrary to Article 77(1) of the Constitution. The letter required the 1st petitioner to show-cause within 7 days from the date of the letter and to step aside by taking her full annual leave to facilitate investigations and subsequent necessary action by the Embu County Public Service Board. The 1st petitioner replied by her letter dated 22.05.2015 that it was clear investigations had not taken place yet she had been subjected to stepping aside. She stated that she had not been provided with details of the reports and thus the allegations were not true as they were false. She demanded the lifting of the show-cause letter and the decision to step aside as conveyed. The 1st petitioner's further reply dated 25.05.2015 responding to the specific lines of allegations as leveled and requested for details of particulars of the allegations as leveled in the earlier letter.

The 2nd petitioner received the letter dated 19.05.2015 by the 2nd respondent about alleged complaints against the 2nd petitioner in respect of the petitioner's omissions and commissions in the course of the petitioner's official duties as county executive committee member including prolonged absenteeism from office; frequent absenteeism from duty leading to leadership vacuum in the education department; and failure to harmonize the critical bursary fund process. The letter required the petitioner to explain in 7 days why disciplinary action should not be taken against the 2nd petitioner. To facilitate investigations by the Public Service Board at Embu, the letter required the 2nd petitioner to step aside by taking his annual leave and handing over his duties as the county executive committee member for education with immediate effect. The 2nd petitioner replied by his letter dated 21.05.2015 that the allegations were false, baseless and malicious and the full particulars of the allegations had not been provided. The 2nd petitioner pointed out that it was premature to require him to step aside because it was clear that no investigations had taken place. A further reply specifically responding to each of the allegations as leveled was issued by the 2nd petitioner on 25.05.2015.

The 2nd respondent did not file an affidavit to dispute or rebut any of the facts as set out in the petition and the petitioners' affidavits in support of the petition. Accordingly, the court finds that there is no reason to doubt the facts as set out for the petitioners. The court has further noted the letter by the acting secretary for the interested party addressed to the court's deputy registrar dated 2.06.2015 and filed on 04.06.2015. That letter states that the interested party wished to disassociate itself as it was not interested

party in the suit as a corporate body. The court infers that by that letter, the only document on record for the interested party, the interested party was not party to the investigations and had nothing to do with the investigations as referred to by the 2nd respondent in the letters the 2nd respondent addressed to the petitioners to show cause. The replying affidavit filed for respondents is rather argumentative and does not squarely respond to the facts as stated for the petitioners. It also mixed the two cases by urging similar grounds whereas the petitioners held two distinct offices governed by the distinct provisions of the County Government Act, 2012.

The petitioners filed and served the final submissions as directed by the court whereas despite repeated opportunity to file the submissions, the respondents failed to file the final written submissions.

The **1st issue** for determination is whether the 2nd respondent lawfully issued the two letters to the respective petitioners to show-cause and to step aside. The 2nd respondent has not established any provision of law that empowered him to ask the petitioners to step aside and to show cause as was done by the 2nd respondent. Section 40 of the County Government Act, 2012 provides for procedure for removal of a county executive committee member as well as section 31 (a) and (b). The sections do not prescribe that the governor may ask the affected member to step aside. Similarly, section 45 (2) of the Act provides that the office of a county chief officer shall be an office in the county public service. Thus the court finds that the 1st petitioner was subject to the disciplinary powers of the County Public Service Board as provided for in section 59(1) (c) of the Act. Thus it was not open for the 2nd respondent to usurp the function of the Board as provided for in the Act by purporting to exercise disciplinary control over the 1st petitioner. The court returns that the 2nd respondent did not have authority to require the petitioners to step aside. While making that finding the court has considered that the scope, meaning and effect of stepping aside has not been provided in the law and it was arbitrary to subject the petitioners to a disciplinary process which was alien to the provisions of the law governing the petitioners' employment. The 2nd respondent, in the opinion of the court did not have the discretion or authority to invent a disciplinary process and impose the stepping aside by subjecting the petitioners to that process. The court upholds the opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** 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. ”

Accordingly, the 2nd respondent could not impose his subjective procedures that were clearly not founded upon the clear statutory provisions. In particular and as submitted for the petitioners, the court finds that the 2nd respondent’s actions clearly went against the objectives of the county public service as stipulated in section 55 of the County Public Service Act, 2012. The section provides for the objectives of the statutory provisions on the county public service aimed at achieving the lawful discharge of the human resource functions in the county governments. The 2nd respondent was required to comply with the statutory provisions.

For the 1st petitioner the court has found that she clearly fell outside the 2nd respondent’s disciplinary control because her office was clearly under the county public service and therefore her disciplinary control was under the County Public Service Board. For the 2nd petitioner section 31(b) of the County Governments Act, 2012 empowered the 2nd respondent to dismiss the 2nd petitioner if required to do so by a resolution of the county assembly as provided under section 40 of the Act. Further, section 30 (a) of the Act empowered the 2nd respondent despite section 40 of the Act, to dismiss the 2nd petitioner at any time if the 2nd respondent considered that it was appropriate or necessary to do so. The court holds that the cited sections, while vesting disciplinary powers in the 2nd respondent over the 2nd petitioner, the disciplinary powers were clearly the powers to dismiss. The powers did not include or entail stepping aside long before the desired dismissal or subjecting the 2nd petitioner to an investigation by the County Public Service Board whose powers did not apply to members of the county executive committee like the 2nd petitioner.

While making that finding, the court further considers that the 2nd respondent by evidence failed to rebut the petitioners’ case that their predicament of the imposed stepping aside was founded upon the 2nd respondent’s hostile attitude towards senior county public officials who hail from the Mbeere community and who included the petitioners, and further that the 2nd respondent held the Mbeere community responsible for his political woes and performance shortcomings that led to the said double impeachment by the Senate of Kenya. In absence of a rebuttal, the court finds that the petitioners’ lamentations were on a balance of probabilities valid and constituted an unreasonable consideration by the 2nd respondent in imposing the stepping aside decision against the petitioners and upon the test of reasonableness in **Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683** per Lord Green 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.”**

Thus, to answer the 1st issue for determination the court returns that the 2nd respondent unlawfully issued the two letters to the respective petitioners to show-cause and to step aside because the 2nd respondent acted outside the clear provisions of the County Governments Act, 2012 and his actions were unreasonable.

The **2nd issue** for determination is whether the petitioners' fundamental rights were contravened as alleged. The court makes findings as follows:

- a. The cited statutory provisions entitled the petitioners to protection and equal protection to the law so that they were entitled to the prescribed disciplinary procedure. The court finds that the 2nd respondent's actions contravened Article 27(1) of the Constitution that entitled the petitioners to equality before the law and the right to equal protection and equal benefit of the law.
- b. Article 47 entitled the petitioners to fair administrative action and the court finds that by asking the petitioners to step aside without legal basis under such invented process and unreasonable decision that was adverse, the petitioners' right under the Article was contravened. It was unfair administrative action for the 2nd respondent to require the 2nd petitioner to be subjected to investigation by the interested party whereas it was clearly outside the interested party's statutory mandate to do so. Similarly, it was unlawful administrative action for the 2nd respondent to institute and make disciplinary decisions against the 1st petitioner whose disciplinary control clearly fell within the interested party's statutory functions.
- c. The petitioners were subjected to a disciplinary process that was alien to the law that governed their employment and that was not agreed upon and the court finds that their right to fair labour practices in Article 41(1) was thereby violated.

The **3rd issue** for determination is whether the petitioners are entitled to the remedies as prayed for. The court makes findings as follows:

- a. Prayer (a) will succeed as already found as established by the petitioners.
- b. Prayer (b) shall succeed as the court has already found as established by the petitioners.
- c. The material on record shows undisputed position that the 2nd petitioner moved against the petitioners on account of unfounded considerations that were inconsistent with the provisions of Articles 10(1), 174 and 235 of the Constitution and prayer (c) will succeed.
- d. The 2nd respondent's stepping aside decision has been found offensive as it was without legal foundation and the court finds that the petitioners are entitled to certiorari as prayed for.
- e. The court has found that the 2nd respondent's stepping aside decision contravened the petitioners' rights under Articles 27 (1), 41(1) and 47 and the petitioners are entitled to a declaration accordingly.
- f. The petitioners did not offer submissions in furtherance of the prayer for compensation. The court has further considered the interim orders on record that pending this judgment the petitioners continued to discharge the duties of the respective offices they held with full benefits and authority and without disruption by the respondents or the respondents' agents or employees. The court considers that the prayer was abandoned by the petitioners as there were no specific submissions and under the interim orders they earned full pay and benefits and their right to work was upheld. The prayer for compensation will therefore not succeed.
- g. As the petitioners have succeeded, the respondents will pay their respective costs of the petition.

In conclusion judgment is entered for the 1st and 2nd petitioners against the respondents for:

- a. The declaration that the 2nd respondent had no power to subject the petitioners to disciplinary action known as stepping aside or compel them to proceed on compulsory annual leave to pave way for investigations into the allegations contained in the two respective letters dated 19.05.2015.
- b. The declaration that the notices to show-cause contained in the letters dated 19.05.2015 contravened sections 40 and 55 of the County Governments Act, 2012.
- c. The declaration that the decisions of the 2nd respondent contained in the letters dated 19.05.2015 respectively addressed to each petitioner violated Articles 10(1), 174 and 235 of the Constitution.
- d. The order of certiorari hereby issues to bring into the honourable court for quashing and the

decisions of the 2nd respondent for stepping aside of the petitioners as contained in the two respective letters both dated 19.05.2015 and as conveyed to each petitioner are hereby quashed by the court.

- e. The declaration that the purported stepping aside and compulsion of the petitioners to proceed on annual leave by the 2nd respondent constituted the violation of the petitioners' rights under Articles 27(1), 41(1) and 47 of the Constitution.
- f. The respondents to pay the petitioners' costs of the petition proceedings.

Signed, dated and delivered in court at Nyeri this Friday, 20th November, 2015.

BYRAM ONGAYA

JUDGE