



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO.11 OF 2015

HUSSEIN ROBA BORU.....PETITIONER

VERSUS

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

HIS EXCELLENCY, THE GOVERNOR, ISIOLO COUNTY....2ND RESPONDENT

THE COUNTY ASSEMBLY OF ISIOLO COUNTY.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 18th December, 2015)

JUDGMENT

The petitioner filed the petition on 09.07.2015 through Mithega & Kariuki Advocates. The petitioner invoked Articles 1 (1), (2), (3, b) and (4, b), 2, 3, 10, 19, 20, 21, 22, 23, 73, 159, 174, 175, 232, 235, 251, 258 and 259 of the Constitution of Kenya, 2010. The petitioner alleged contravention of fundamental rights and freedoms under Article 27, 28, 41, 47, and 50(1) of the Constitution of Kenya, 2010. The petitioner also stated that the petition was in the matter of the purported suspension of the petitioner from the office of the chairman of Isiolo County Public Service Board.

The petitioner prayed for orders:

- a) That a declaration be issued to declare that the purported suspension of the petitioner from the office of the chairman of Isiolo County Public Service Board vide the 2nd respondent's letter dated 3rd July 2015 is unlawful and illegal on account of violation of section 58(5) of the County Governments Act No. 17 of 2012 as read with Article 47 and 251(1) of the Constitution of Kenya, 2010.
- b) That a declaration be issued to declare that the purported grounds or reasons specified in the 2nd respondent's letter of suspension dated 3rd July 2015 are ultra vires section 58(5) of the County Governments Act No. 17 of 2012 and do not constitute any reasonable grounds for suspension of the petitioner as chairman of the Isiolo County Public Service Board as anticipated under Article 251 (1) of the Constitution of Kenya, 2010.
- c) That a declaration be issued to declare that under section 58(5) of the County Governments Act No. 17 of 2012 as read with section 251 of the Constitution of Kenya, 2010 the petitioner remains

the legitimate and lawful holder of the position and office of the chairman of the Isiolo County Public Service Board.

d) That a declaration be issued to declare that the decisions, actions, omissions, or commissions of the 1st, 2nd and 3rd respondents in respect of the suspension of the petitioner as the chairman of Isiolo County Public Service Board have violated the petitioner's rights and fundamental freedoms secured and guaranteed under Articles 27, 28, 41, 47, and 50 of the Constitution of Kenya, 2010.

e) That the honourable court be pleased to find, uphold and declare that the decisions, actions, omissions or commissions of the 2nd respondent in respect of the suspension of the petitioner from office of the chairman of the Isiolo County Public Service Board constitute conduct and behavior that violates Articles 10, 73, and 75 of the Constitution of Kenya, 2010.

f) That the honourable court be pleased to issue a permanent order of injunction and a prohibitory order respectively against the 2nd respondent and the 1st, 2nd and 3rd respondents, by themselves or their agents, officers, servants or employees or whomsoever or howsoever from interfering with the petitioner in his undertaking, performance or discharging of his duties and functions as the chairman of Isiolo County Public Service Board.

g) That an order of certiorari be issued to bring into this court, for purposes of being quashed, the purported letter of suspension of the petitioner from his position of chairman of the Isiolo County Public Service Board which letter was issued by the 2nd respondent and dated 03.07.2015.

h) That the costs of these proceedings be provided for.

i) That the honourable court be pleased to make any further order or grant any further relief it may deem fit and just to grant.

The petitioner, together with the petition, filed his verifying affidavit sworn on 09.07.2015 and the supporting affidavit also sworn on 9.07.2015 with attached exhibits. The petitioner filed on 17.11.2015 the submissions on the petition.

To oppose the petition, the respondents filed on 16.10.2015 the replying affidavit of Lilian Kiruja, the legal adviser to the 1st and 2nd respondents. The affidavit was sworn on 16.10.2015 and was filed through the respondents' advocates on record, Kithi & Company Advocates. The petitioner filed on 02.11.2015 the supplementary affidavit in support of the petition.

Despite an opportunity to file submissions on the petition, the respondents failed to do so. Despite service to attend court for directions on hearing and determination of the petition, the respondent's advocates failed to attend court and upon submission by counsel for the petitioner, the court directed that the judgment would be delivered on the basis of the pleadings, affidavits and submissions on record and as filed for the parties.

The facts of this case are as follows.

The petitioner was appointed to the position of the chairman of the Isiolo County Public Service Board by the 2nd respondent and with approval of the 3rd respondent sometimes in June 2013. The petitioner took the oath of office and assumed duties of the office as appointed. The petitioner states that on 3.07.2015 the 2nd respondent accompanied by a contingent of security personnel stormed his office and physically and forcefully evicted him from the office and handed to him a letter of suspension from the office of the chairman as earlier appointed to hold. The suspension letter dated 3.07.2015 stated that grievous allegations had been made against the petitioner's office and which called for thorough investigations. The letter stated that the allegations were to the effect as follows:

1) The county health services office requested the Board for recruitment of 40 health staff as

factored in the 2014/15 financial year and the Board issued appointment letters to 258 persons to fill the 40 positions as was declared by the user department. That meant a bloated service with unmet salary demands that would foster unrests.

- 2) The positions were never advertised and the interviews were never conducted.
- 3) The qualifications of those appointed were not verified and most of those appointed lacked the qualifications.
- 4) The appointments were on confirmed permanent and pensionable basis without probationary service as expected under the Employment Act, 2007 and that was an action meant to undermine the office of the 2nd respondent and the administration of the 1st respondent.
- 5) Letters of appointment to the 258 persons provided for extraneous allowances at Kshs.25,000.00 per month for all positions instead of the Kshs.15,000.00 per month as per circular by defunct Ministry of State for Public Service, 2012 for employees of the same job group.
- 6) Letters of appointment were issued on 13.03.2015 but the petitioner caused them to be backdated to 1.01.2015 with consequence that payment of those appointed would commence on 1.01.2015 and for a term not worked.
- 7) Appointment letters were issued by the petitioner's office whereas they ought to have been issued by the user department.
- 8) That in view of those actions the county government would lose millions of shillings paying the extra 218 employees that were appointed.
- 9) The petitioner had made the appointments and recruitments without following the due process established in the Constitution and law and best practices including conducting interviews but purely through unorthodox unconventional and corrupt means to influence the political landscape of the statutory institutions of the county of Isiolo and to reward the petitioner's cronies without regard to the rule of law and effectively bloating the Isiolo county wage bill.
- 10) The board was tasked to recruit 200 ECDE teachers that were competent and qualified under the petitioner's leadership, 356 ECDE teachers were instead recruited. The qualifications of the persons that were appointed were not verified and most of them were not qualified. The petitioner caused appointment letters to be issued from his office instead of being issued by the user department.

The suspension letter then concluded as follows:

“In view of your alleged acts, the County Government stands to lose over millions of shillings every month in paying the extra 156 ECDE teachers whose services are not required. These allegations against yourself constitute serious violations of the provisions of the Constitution especially Article 73 of the Constitution on guiding principles of leadership and integrity. The same if proved are also in contravention of Chapter six of the Constitution of Kenya, 2010.

In exercise of the powers of the Office of the Governor; section 30(3) (f) of the County Government Act which bestows upon the holder of the Office of the Governor the duty to account for the management and use of county resources and section 31(d) of the County Government Act which empowers the Governor such powers as may be necessary for the execution of duties of the Office of the Governor and in exercise of the provisions of the Constitution especially Article 251 of the Constitution and section 58 of the County Government Act, 2012 and all other enabling laws, you are hereby suspended from the Office of Chairman of the County Public Service Board for a period of three (3) months effective 3rd July, 2015 pending investigations on these serious allegations of violation of the Constitution,

the County Government Act and other provisions of law.

You shall be entitled to your remuneration and other benefits while on suspension as per the provisions of the law in regard to officers on suspension. After investigations are concluded, you shall be informed of the outcome of the same and any further actions to be carried out.

Signed

H.E. (Hon) Godana Doyo

GOVERNOR”

The petitioner stated that on 3.07.2015 the 2nd respondent personally directed, conducted and supervised the ransacking of the petitioner's office and seized and carried away all the petitioner's personal files and documents as well as personal laptop from the office. The petitioner reported the invasion at the Isiolo Police Station under OB. No. 64/03/7/2015. In the process the petitioner stated that he was subjected to public humiliation, indignity and which amounted to breach of his rights and fundamental freedoms as secured in the Constitution.

The petitioner's further case was that at the time he received the suspension letter, there had been no approval by the 3rd respondent and no petition had been presented to the 3rd respondent against the petitioner. The procedure prescribed in section 58(5) for removal of the petitioner from office was, for the petitioner, never invoked at all material times.

The petitioner stated that the allegations as contained in the suspension letter were not truthful and were made in bad faith as they could not constitute valid reasons for his removal from office. The hiring of the health workers had been done after Board's deliberation under minute No. MIN/ISL/CPSB/FEB/01/4/2015 of 27.02.2015 and they were hired after a request by the user department. The 258 health workers were absorbed into county service; they had already been at work as volunteers. Since their hiring they had not been paid any salaries and allowances. The 350 ECDE teachers hired were the exact number requested for by the user department. The 2nd respondent had on some occasions usurped the powers of the Board to recruit and appoint like in the case of the appointment of governor's private secretary on 1.10.2014, appointment of external liaison officer on 1.10.2014, and appointment of the director of communications on 3.12.2014 which appointments were all under the hand of the 2nd respondent without involving the Board. The petitioner stated that such were the things he objected to and the suspension letter was out to settle personal scores because he resisted the 2nd respondent's interference with the independence of the Board. The petitioner filed letters showing that the 2nd respondent's office handpicked persons for employment and required the Board to ratify the same in total disregard of the functions of the Board. The petitioner's further case was that his relationship with the 2nd respondent worsened when the 2nd respondent discovered that the petitioner had blown the whistle on various irregularities and manipulation of the County Government Payroll which had led to on-going investigations by the Ethics and Anti-Corruption Commission. Thus the petitioner urged that the prayers made in the petition be allowed.

The replying affidavit has replied to the petitioner's facts of the case as follows:

- a) By letter of 13.10.2014, the chief officer health services requested the Board to recruit 40 health staff for 2014/2015 financial year but the board recruited 258 persons. The court observes that the letter of 13.10.2014 is not attached on the affidavit. The respondents then stated that no advertisements were held and no interviews were conducted. All allegations as per the suspension letter are then narrated in the replying affidavit.
- b) The allegations about irregular recruitment of the 356 ECDE teachers as set out in the suspension letter are repeated in the replying affidavit.

c) The actions of the 2nd respondent to suspend the petitioner were lawful and the petitioner could not be shielded by provisions of section 58(5) of the County Governments Act because the 2nd respondent was entitled to act as he did under section 30(3) (f) and 31 (d) of the Act.

d) The Board had written the letter of 5.08.2015 showing that the petitioner had poor relationship with board members and secretariat, as he was arrogant and irritable and difficult to work with him.

The petitioner in the supplementary supporting affidavit he has stated as follows:

a) The absorption of 258 health workers was in line with the request by the county chief executive for health services as per letter of 15.12.2014 and the request to absorb the workers did not entail advertisement. The anomaly in payment of extraneous allowance of 25, 000.00 was immediately rectified and none of the employees was actually paid that money.

b) That for ECDE teachers the initial request by user department was for 200 then increased to 350 who were recruited by the Board and not 356 as alleged in the suspension letter.

The 1st issue for determination is whether the 2nd respondent had the authority to suspend the petitioner. In Mundia Njeru Gateria – Versus- Embu County Government and 3 Others [2015]eKLR this court stated thus,

“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 2nd 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 2nd respondent to act as he proceeded in the case.”

The court upholds that opinion and to answer the 1st issue for determination the court returns that the 2nd respondent had no authority to suspend the petitioner in the manner it happened. The court repeats as it has held before that the pleasure doctrine does not exist in the new constitutional order under the Constitution of Kenya, 2010. The court holds that no public officer or state officer is a master of the other public or state officer. The relationships can be complex and long both vertically and horizontally but under the constitutional doctrine that the sovereign power of the state is vested in the people, all state and public officers in Kenya are servants of the people and not of each other as state or public officers. The pleasure doctrine has been replaced with the doctrine of due process. Public and state officers hold office within the framework provided in the Constitution and relevant statutes and such progressive human resource practices, policies and conventions that are constitutional and acceptable in civilized democracies. The court finds that the 2nd respondent was bound by the law and he enjoyed no master or inherent powers outside of the provisions of law to purport to suspend the petitioner.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The petitioner prayed for a declaration to be issued to declare that the purported suspension of the petitioner from the office of the chairman of Isiolo County Public Service Board vide the 2nd respondent’s letter dated 3rd July 2015 is unlawful and illegal on account of violation of section 58(5) of the County Governments Act No. 17 of 2012 as read with Article 47 and 251(1) of the Constitution of Kenya, 2010. The court has found that the 2nd respondent lacked the authority to suspend the petitioner and the prayer will succeed.
- b) The petitioner prayed for a declaration to be issued to declare that the purported grounds or reasons specified in the 2nd respondent’s letter of suspension dated 3rd July 2015 are *ultra vires* section 58(5) of the County Governments Act No. 17 of 2012 and do not constitute any reasonable grounds for suspension of the petitioner as chairman of the Isiolo County Public Service Board as anticipated under Article 251 (1) of the Constitution of Kenya, 2010. The court has found that the suspension was illegal. The court further finds that the parties did not establish provisions of law under which the petitioner could have been suspended. The prayer will therefore succeed. The court considers that the 2nd respondent lacked the legal authority to make a finding that the allegations as advanced amounted to grounds for suspension as the law did not envisage such considerations for suspension of the petitioner by the 2nd respondent. The merits of such an inquiry would vest in the county assembly, the 3rd respondent, and not the purpose of imposing a suspension, but imposing a removal from office.
- c) The petitioner prayed for a declaration to be issued to declare that under section 58(5) of the

County Governments Act No. 17 of 2012 as read with section 251 of the Constitution of Kenya, 2010 the petitioner remains the legitimate and lawful holder of the position and office of the chairman of the Isiolo County Public Service Board. As the suspension was unlawful and the petitioner has not been removed from office, the court finds that he is entitled to continue in office as duly appointed.

d) The petitioner prayed for a declaration to be issued to declare that the decisions, actions, omissions, or commissions of the 1st, 2nd and 3rd respondents in respect of the suspension of the petitioner as the chairman of Isiolo County Public Service Board have violated the petitioner's rights and fundamental freedoms secured and guaranteed under Articles 27, 28, 41, 47, and 50 of the Constitution of Kenya, 2010. The court has considered the material on record. The petitioner's right to protection and equal benefit from the law was contravened as the legal provisions for his removal from office were not upheld by the 2nd respondent. The events of the eviction from office as stated by the petitioner have not been denied and the same amounted to contravention of the petitioner's human dignity as protected in Article 28 of the Constitution. The court further finds that the procedure to suspend the petitioner undermined the petitioner's right to fair administrative action as was provided for in section 58(5) of the County Governments Act No. 17 of 2012 as read with section 251 of the Constitution of Kenya, 2010. The actions were inconsistent with the petitioner's right to fair labour practices in Article 41(1) of the Constitution. It was not shown how Article 50 of the Constitution was contravened. The prayer will succeed but with exception to the said Article 50. As no actions or omissions were leveled by the petitioner against the 3rd respondent about the offending suspension, the prayer will fail as against the 3rd respondent.

e) The petitioner prayed that the honourable court be pleased to find, uphold and declare that the decisions, actions, omissions or commissions of the 2nd respondent in respect of the suspension of the petitioner from office of the chairman of the Isiolo County Public Service Board constitute conduct and behavior that violates Articles 10, 73, and 75 of the Constitution of Kenya, 2010. The petitioner did not urge this prayer in the submissions and the same is deemed as abandoned. While making that finding, the material on record suggests that the 2nd respondent at all material times appeared to act in furtherance of what he believed to be within his authority but which the court has found was outside the 2nd respondent's powers, functions and authority. In absence of manifest bad faith or disregard of clear advice, the court finds that the prayer will fail.

f) The petitioner prayed that the honourable court be pleased to issue a permanent order of injunction and a prohibitory order respectively against the 2nd respondent and the 1st, 2nd and 3rd respondents, by themselves or their agents, officers, servants or employees or whomsoever or howsoever from interfering with the petitioner in his undertaking, performance or discharging of his duties and functions as the chairman of Isiolo County Public Service Board. In the opinion of the court the prayer will succeed as it declares a legal position save that only unlawful interference would suffice in terms of the prayer.

g) The petitioner prayed that an order of certiorari be issued to bring into this court, for purposes of being quashed, the purported letter of suspension of the petitioner from his position of chairman of the Isiolo County Public Service Board which letter was issued by the 2nd respondent and dated 03.07.2015. The court finds that the letter has been shown to have issued without authority as it was offensive, ultra vires the 2nd respondent's constitutional and statutory authority, and the petitioner is entitled as prayed for.

As no specific overt and offensive thing was established against the 3rd respondent, the court finds that the 1st and 2nd respondents will pay the petitioner's costs of the suit.

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

a) The declaration that the purported suspension of the petitioner from the office of the chairman of

Isiolo County Public Service Board vide the 2nd respondent's letter dated 3rd July 2015 was unlawful and illegal on account of violation of section 58(5) of the County Governments Act No. 17 of 2012 as read with Article 47 and 251(1) of the Constitution of Kenya, 2010.

b) The declaration that the purported grounds or reasons specified in the 2nd respondent's letter of suspension dated 3rd July 2015 are *ultra vires* section 58(5) of the County Governments Act No. 17 of 2012 and did not constitute any reasonable grounds for suspension of the petitioner as chairman of the Isiolo County Public Service Board as anticipated under Article 251 (1) of the Constitution of Kenya, 2010.

c) The declaration that in view of section 58(5) of the County Governments Act No. 17 of 2012 as read with section 251 of the Constitution of Kenya, 2010 the petitioner remains the legitimate and lawful holder of the position and office of the chairman of the Isiolo County Public Service Board and for that purpose to resume duty with immediate effect.

d) The declaration that the decisions, actions, omissions, or commissions of the 1st, and 2nd respondents in respect of the suspension of the petitioner as the chairman of Isiolo County Public Service Board violated the petitioner's rights and fundamental freedoms secured and guaranteed under Articles 27(1), 28, 41, and 47, of the Constitution of Kenya, 2010.

e) The permanent injunction is hereby issued respectively against the the 1st, 2nd and 3rd respondents, by themselves or their agents, officers, servants or employees or whomsoever or howsoever from unlawfully interfering with the petitioner in his undertaking, performance or discharging of his duties and functions as the chairman of Isiolo County Public Service Board.

f) The order of certiorari is hereby issued to bring into this court, for purposes of being quashed, the purported letter of suspension of the petitioner from his position of chairman of the Isiolo County Public Service Board which letter was issued by the 2nd respondent and dated 03.07.2015.

g) The 1st and 2nd respondents to pay the petitioner's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 18th December, 2015.

BYRAM ONGAYA

JUDGE