



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 288/2013 & 11/2013

(Before Hon. Justice Hellen Wasilwa on 11th February, 2014)

NEWTON K. MKABUE 1ST APPLICANT

M MOSI BENSON OTUNDO 2ND APPLICANT

SYLVANCE OBONDO 3RD APPLICANT

-VERSUS-

KAKAMEGA COUNTY GOVERNMENT1ST RESPONDENT

KAKAMEGA COUNTY PUBLIC SERVICE BOARD.... 2ND RESPONDENT

R U L I N G

Two applications were filed in 2 different files, causes No. 288 of 2013 and Misc. Cause No. 11 of 2013. The applications relate to the same respondents herein. For purposes of this ruling the claimants in Cause No. 288/2013 are:- **Newton K. Mkabue** and **Mmosi Benson Otundo** and in Cause No. 11/2013 is **Sylvance Obondo** hereinafter referred to as 1st, 2nd and 3rd applicants respectively.

In Cause No. 288 of 2013, the applicant claimants filed an application dated 15.10.2013 under certificate of urgency. The application was brought through a Notice of Motion and brought under Section 3A and 63(c) and (e) of the Civil Procedure Act, Order 40 rule 2, 3, 4 and Order 51 rule 1, 3 and 4 of the Civil Procedure Rules and any other applicable provisions of the law. The applicant seeks orders that:-

1. **This application be heard on a priority basis and *ex-parte* in the first instance.**
2. **Pending the hearing and determination of this application *inter parties*, there do issue a temporary order of injunction against the respondents, their agents, servants and/or in any way those working under them from terminating and or dismissing the claimants from their employment without following the law and the terms and conditions of the employment.**
3. **Pending the hearing and determination of this claim, a mandatory injunction do issue directed at the Respondents, their agents, servants and/or in any way those working under them from terminating and or dismissing the Claimants from their employment without following the law and the terms and conditions of the employment.**
4. **A mandatory order do issue directing the Respondents, their agents, servants and those working under them for the reinstatement of the Claimants to their employment, position with full salary and benefits pending the hearing and determination of the claim *inter parties*.**
5. **Upon prayer 4 being granted, all the salaries and benefits accruing to the Claimants be paid**

in full.

6. Costs of this application be provided for.

The application was grounded on the annexed affidavit of Newton Mkabue and on the grounds that:-

- (a) The applicants have been serving the defunct Municipal Council of Kakamega as Town Clerk and Administrative Officer respectively.**
- (b) Pursuant to the General Elections, the 1st Respondent redeployed the applicants as per Section 138 of the County Government Act.**
- (c) The applicant was suspended from duty without any justifiable excuse on 11.07.2013.**
- (d) The suspension was done arbitrary and without following the tenets of natural justice and is due to be dismissed at any time from now.**
- (e) The respondents' action violated Constitution of Kenya, Sections 56, 61, 62, 63 and 72, 74, 75 and 76 of the Guide book for Governors.**
- (f) The applicants states that the respondents lack the legal or contractual authority or basis to act as they purported to do and ought to be prevented from such acts.**
- (g) The respondents acted *ultra vires*.**
- (h) The applicants are facing extreme hardship and injustice by the actions of the respondents and unless the respondents are restrained, the claimants' legal and constitutional right shall continue to be infringed upon.**
- (i) This application has been brought in good faith and without any delay.**

It is the applicants contention that the claimants herein were at all material times the Town Clerk and Administration Officer respectively of the defunct Kakamega Municipal Council then an authority established in accordance with the now repealed Local Government Act Cap 265 Laws of Kenya. The claimant applicants further content that after the general election held on 4.3.2013 they were seconded to the new county government that came into operation after the general elections. The 1st claimant was subsequently transferred to serve at the Malava Town Council and the 2nd claimant was retained in Kakamega sub-county offices.

On 15th of July the 2 claimants were served with letters of suspension by the County Government of Kakamega dated 11.7.2013. The said letters demanded that they make a written response on allegations raised therein. They made their responses accordingly which they have annexed to this application.

On 29th August 2013 they received other letters inviting them before the Kakamega County Public Service Board at Bishop Stam Pastoral and Animation Centre on 10.9.2013 to defend themselves and also carry along with them all their documents deemed necessary for their defence. The said letters were also annexed to this application.

On the date set for the meeting, they were told they would appear before the Disciplinary Committee and not the Public Service Board. The applicants further contend that the letters of suspension served on them were irregular and illegal as the steps to be taken before suspension stipulated in Labour Relations Act were not taken before the suspension and they were also not told who their accusers were. That these letters were coercive in nature, inhuman and injurious to their reputation as they were condemned unheard.

The applicants submitted before this court that the County Government Act created 3 arms of government i.e the County Assembly, the County Executive and the County Service Board. The Act

further gives provisions as to how the County Public Service Board was to exist and that it would be composed of the chairman, secretary and 5 others with 1/3 being of either gender. They must also be graduates. This board was expected to be vetted by the County Assembly and be gazetted before taking up their work of forming the employment policy, hiring and disciplining of employees etc. The claimant applicants contend that they were suspended by the 2nd respondent herein the Kakamega County Public Service Board who had not been properly constituted at the time.

It is the applicants contention that under Section 138 of the County Government Act the officers were deemed to have been seconded by the Public Service Commission and so if there is any body that can take disciplinary action, it would only be the Public Service Commission.

The applicants aver that rules of suspension were not followed. They were not accorded any hearing nor given any notice but were just sent home and are only paid house allowance. Their prayers is that the respondents be directed to reinstate their pay pending hearing and determination of this case.

The respondents opposed this application. They filed their replying affidavit sworn by one Christabel Ashiono on 18.11.2013 and a supplementary affidavit sworn on 28.1.2014. They contend that the application has no merit and is frivolous and is a waste of court's time. It is their position that the claimant applicants have not been dismissed from employment but are merely on suspension. Their submission is that the suspension was lawfully and procedurally undertaken with tenets of natural justice. They aver that the claimant applicants were afforded chance of representation as per their annexures NNK 1 and NNK 2. They were also issued with a notice to show cause first and then invited to a hearing and they complied.

The respondents also aver that the board was properly constituted at the time of suspension of the claimants and this is a legal issue. They invited the court to look at the Kenya Law website for evidence of the same. They state that the letter of suspension and one inviting the applicants for hearing was signed by one Isaac Litati who is the CEO/Secretary of the County Public Service Board and delivered to the claimants on July 2013. They aver that since the claimants complied with the invitation to appear for the hearing, they are estopped from raising the issue as to whether the board existed or not.

The applicants insist that the respondents could not take action against them in matters done before elections and especially so given that the 2nd respondent had not been properly constituted.

In Cause No. 11 of 2013 the applicant Sylvance Obondo sued the respondents herein on issues similar to those raised in cause No. 288 of 2013. He filed his notice of motion dated 10.10.2013 on 14.10.2013. The application was brought under same provision of law as those in cause No. 288 of 2013. He is seeking orders as those of the applicants in cause No. 288 of 2013. The application is further based on the annexed affidavit of Sylvance O. Obondo dated 10.10.2014 and the grounds that:-

- (a) The applicant was on the 14th August 2012 transferred to the defunct Municipal Council of Kakamega and by virtue of the general elections held on the 4th March 2013, he worked on secondment as an employee of Public Service Commission.**
- (b) The applicant reported on duty on 17th August 2013 and took duties as the Town Treasurer.**
- (c) Pursuant to the general election, the 1st respondent redeployed the applicant to Lugari Sub-County Government of Kakamega as per Section 138 of the County Government Act.**
- (d) The applicant was suspended from duty without any justifiable excuse on 11.7.2013.**
- (e) The suspension was done arbitrary and without following the tenets of natural justice and is due to be dismissed at any time from now.**
- (f) The respondents' action violated Constitution of Kenya, Section 56, 61, 62, 63 and 72, 74, 75 and 76 of the Guide book for Governors.**

(g) The applicant states that the respondents lack the legal or contractual authority or basis to act as they purported to do and ought to be prevented from such acts.

(h) The respondents acted *ultra vires*.

(i) The applicant is facing extreme hardship and injustice by the actions of the respondents and unless the respondents are restrained, the claimant's legal and constitutional right shall continue to be infringed upon.

(j) This application has been brought in good faith and without any delay.

It is the applicant's contention that he was suspended from work on 11.7.2013 by the respondents and during the suspension, he would be entitled to only house allowance and not leave his work station and report to the County Secretary every Friday. The applicant on his part had been an employee of the PSC and seconded to the Municipal Council of Kakamega prior to the general election of 4.3.2013.

Like the other applicants in cause No. 288 of 2013, he avers that his purported suspension by the respondent was illegal and with no legal basis as the Public Service Board of Kakamega had not been constituted and the 1st respondent should not have enforced any decision by 2nd respondent. He relies on the annexure S.06 a Guideline on Management of Public Offices Seconded to the County Government which lays down how services were to be devolved. He contends that under Article 2.2.1 of the guidelines, he remained seconded to the County Government until such a time that the Public Service Board would take him back or he be employed by the County Government.

The respondents also opposed this application and relied on the affidavit sworn on 28.1.2014 of Christabel Ashiono. Like in the previous application, the respondents position is that the applicant was properly suspended and the board was properly constituted. They submitted that no *prima facie* case had been established to warrant the prayers sought being granted and asked this court to dismiss this application.

Due to the similarity in the applications before court, it was agreed by the parties that the 2 applications be consolidated and be heard as one.

I have heard submissions of both parties and considered their respective applications and pleadings. The issues for determination are as follows:-

- 1. Whether the County Service Board of Kakamega had been constituted at the time the applicants were suspended.**
- 2. Whether the respondents had authority as opposed to the Public Service Commission to suspend the applicants.**
- 3. Whether the respondents followed the laid down procedures before suspending the applicants.**
- 4. Whether the applicants are entitled to the orders sought.**

In considering the 1st issue, this court is guided by the County Government Act 2012. Under Section 58 of the County Government Act, there is established a County Public Service in accordance with Article 235 of the Constitution having it's own Public Service to be known as the County Public Service. Under Section 56(2) of the said Act 2012, the County Public Service shall be headed by a County Secretary appointed under Section 44.

Under Section 44 (2):-

“the County Secretary-

(a) Shall be competitively sourced from amongst persons who are university graduates with at least ten years experience in administration and management.

(b) Shall be nominated from persons competitively sourced under paragraph (a) by the governor and with the approval of the County Assembly, appointed by the governor---

Under Section 58 (1) of the County Government Act:-

“the County Public Service Board shall compose-

(a) a chairperson nominated and appointed by the County Governor with the approval of the - County Assembly.

(b) not less than three but not more than five other members nominated and appointed by the County Governor with the approval of the County Assembly, and

(c) a certified Public Secretary of good professional standing nominated and appointed by the governors, with the approval of the County Assembly and shall be the Secretary to the board”

All the above members shall be appointed through a competitive process.

The applicants have submitted before this court that at the time of their suspension, the Kakamega County Public Service Board had not been constituted. The constitution and/or appointment must therefore be demonstrated by the respondents as having already been effected as per the above procedure. The demonstration would entail provision before this court by the respondents:-

- 1. The advertisements for these posts**
- 2. Their nomination by the County Governor**
- 3. The hansard reports of the Kakamega County Assembly approving their respective appointments**
- 4. The official appointments letters from the County Governor.**

What the respondents have however referred this court to is the *Kenyalaw website*. By all means this court is a court of law but must be guided by proper facts and evidence of the parties. It is therefore imperative that the respondents must extract the relevant provisions of the legal notice appointing the Kakamega County Service Board and submit it before court as proof of the alleged appointment. To refer court to a website is to ask this court to go on a fishing expedition and look for evidence to fill up their case which the court cannot do. In the absence of any evidence to the contrary, this court makes a finding that at the time the applicants were purportedly suspended the 2nd respondent had not been established as envisaged under Section 58 of the County Government Act 2012.

On the second issue, under Article 235 (1) (c) of the Constitution:-

“A County Government is responsible within a framework of uniform norms and standards prescribed by an Act of Parliament for exercising disciplinary control over and removing persons holding or acting in those offices.”

Whereas the County Government has this responsibility, it is noted that the general elections were held on 4.3.2013. In July 2013, when the applicants were suspended by the respondents the County Government were in a transition stage. This is why by a letter dated 16th January 2013 Ref: No. MLG/2314/VII (19) addressed to all Local Governments Ref: Management of Council Affairs on dissolution of Councils, signed by the then PS for Local Government Prof. Karega Mutahi, he stated:-

“2.3 Recruitment, promotion and dismissal. Matters related to recruitment, promotion, demotion and dismissal shall be deferred. All disciplinary cases shall be handled in accordance with regulations”.

The regulations envisaged herein are those made by the Transition Authority established under

Section 4(1) of The Transition to Devolved Government Act 2012.

Under Section 7 (1):-

“the Authority shall facilitate and co-ordinate the transition to the devolved system of government as provided under Section 15 of the Sixth Schedule to the Constitution.”

Under Section 7 (1) (h) of the said Act:-

“Pursuant to Section 15(2) (b) of the Sixth Schedule to the Constitution, develop the criteria as may be necessary to determine the transfer of function from the national to the County Government including-

(i) ----

(ii) the criteria to determine the transfer of previously shared assets, liabilities and staff of the Government and Local Authorities.

Under this provision, the Transition Authority made regulations to aid the County Government in its performance including performance in Public Finance Management, human resources, procurement, assets and liabilities, etc.

In their Guidelines For Governors explaining the Administrative Arrangements for the Transition to Devolved Government Second Edition, published May 2013, the Transition Authority had this to say under bullet 6.17:-

“who manages HR function in relation to officers deployed or seconded to County Governments? Once an officer is seconded; he/she is deemed to be an officer of the County Government and Human Resource Management function pass to the organization to which the officer is seconded. Until County Public Service Boards are established and secondments formalized the Public Service Commission will continue to manage public officers until the County Public Service Boards are established. When they are established, the County Public Service Boards will be fully responsible for Human Resource Management. From this point on, the Public Service Commission will only be responsible for hearing and determining appeals. There will be collaboration and co-operation between County Public Service Boards and Public Service Commission in management of staff in the Counties”. (emphasis is mine).

Under bullet 6.18:-

“Has a discipline process been determined for Public Servants or other staff employed in the County?

The discipline procedure under the Public Service Commission regulations will apply during the transition period. Counties will develop uniform discipline procedures in line with the Constitution, relevant regulation and public service norms and standards.” (emphasis is mine)

The regulations are very elaborate and also provide issues of termination at bullet 6.14 which can only be done by the Public Service Commission until the County Public Service Boards are established.

From the above analysis, it is clear that there are laid down procedures for disciplining seconded staff to the County Governments and the County Public Service Board could only do so upon being established. Otherwise it is only the Public Service Commission which could do the discipline of such staff. In purporting to suspend staff seconded to them, during the period when the County Public Service Board had not been established, the County Public Service Board was usurping the powers of the Public Service Commission and therefore the suspension was of no effect.

On the 3rd issue. Did the respondent follow the laid down procedures before suspending the applicants. The process that should be followed is the one provided by the Public Service Commission given that the County Public Service Board had not yet been established. Under the Public Service Regulations the Public Service Commission has delegated certain powers to authorized officers who are mainly responsible for handling discipline cases of officers in job groups **A** to **L** for Civil Servants and Salary Scale 20 to 10 for former Local Authorities. Job group **M** and above for Civil Servants and Salary Scales 1 to 9 for former Local Authorities are handled by the Commission. All appeals and applications for review are usually forwarded to the Commission for deliberations and decisions.

The processes of disciplining officers in public service is found in the Public Service Commission of Kenya Discipline Manual July 2008. Bullet 10 deals with suspension and provides that:-

(a) If a public officer has been convicted of a serious criminal offence, he or she shall be served with a show cause letter which shall contain a communication on suspension, a sample of which is provided in App IV.

(b) If the misconduct is one which can lead to dismissal, the officer shall be served with a show cause letter which shall also contain a communication on the suspension, a sample of which is provided in App V.

(c) ----

(d) A public officer who is on suspension shall be entitled to be paid house allowance, medical and other allowances as may be applicable.

(e) Interdiction and suspension can only be uplifted by the Authorized Officer on recommendation or advice of the MHRMAC.”

In the case of the applicants, they were served with a show cause letter as expected. However, they were not being paid other allowances as envisaged which is against the above provisions.

What remedies are the applicants entitled to? I have already alluded to the fact that the County Public Service Board which suspended them was not properly constituted at the time of their suspension. That being the case, the action taken was illegal and cannot stand the test of time.

In the circumstances I lift the suspension and order that the applicants be paid all their salaries and entitlements since the suspension was effected. The respondents are otherwise free to institute proper discipline processes backed by law as the case may be. These orders will be in force until this case is heard and determined. Upshot is I allow orders in terms of prayers 3, 4 and 5. Costs to the applicants.

HELLEN WASILWA

JUDGE

11/2/2014

Appearances:-

Mwamu h/b Madialo & Co. for claimants

Orengo h/b Nyachae for Respondents present

CC. Wamache