



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

PETITION NO. 1 OF 2014

RICHARD BWOGO BIRIR.....PETITIONER

-VERSUS-

NAROK COUNTY GOVERNMENT.....1ST
RESPONDENT

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

THE HONOURABLE ATTORNEY GENERAL.....3RD
RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th March, 2014)

JUDGMENT

The petitioner is **Richard Bwogo Birir**. He filed the petition on 10.02.2014 through Geoffrey Otieno & Company Advocates. He also filed an application under certificate of urgency. The application was certified urgent at the ex-parte hearing on 11.02.2014 when the court made an interim order thus, **“Pending the hearing of the application or further orders by the court, the respondents by themselves, their agents or servants are restrained from undertaking an advertisement, recruitment or appointment to fill the position of the Executive Committee Member for Agriculture Livestock and Fisheries of the 1st respondent in view of the vacancy flowing from the 2nd respondent’s letter dated 23.01.2014 dismissing the petitioner.”**

In subsequent proceedings when the application was scheduled for hearing, by consent of the parties, the interim orders were extended pending the hearing and determination of the main suit on priority basis.

The petitioner, with the leave of the court, filed the amended petition on 4.03.2014. The petition invoked Articles 10, 27, 28, 41, 47, 50, 176, 179, 232, 235, and 236 of the Constitution. The petition further alleged contravention of the petitioner’s fundamental rights and freedoms under Articles 27, 28, 41, 47 and 50 of the Constitution. The amended petition was supported by the claimant’s affidavit sworn on 4.03.2014 as a further supporting affidavit to his affidavit sworn on 10.02.2014 supporting the initial petition. The petitioner subsequently appointed Kipkoech B. Ng’etich Advocate of Gordon Ogola, Kipkoech & Company Advocates to act for him together with the initial firm of Advocates.

The petitioner in the petition as amended prayed for:

- a. **A declaration to issue to declare that the removal and dismissal of the petitioner as the**

Executive Committee member for Agriculture, Livestock and Fisheries vide the 2nd respondent's letter dated 23.01.2014 is unconstitutional and therefore unlawful on account of violation of sections 31 and 40 of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and section 41 of the Employment Act.

- b. An order of certiorari to issue to bring into the honourable court for purposes of being quashed the decision of the 2nd respondent removing and dismissing the petitioner as the Executive Committee member for Agriculture, Livestock and Fisheries vide the 2nd respondent's letter dated 23.01.2014 for being in contravention of sections 31 and 40 of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution, 2010 as well as the section 41 of the Employment Act.**
- c. A declaration to issue to declare that under sections 31 and 40 of the County Governments Act, 2012 as read with Article 236 of the Constitution the petitioner remains the lawful holder of the position of the Executive Committee member for Agriculture, Livestock and Fisheries of the County Government of Narok.**
- d. The honourable court to find and uphold that the decisions, actions and omissions of the 2nd respondent in respect of the removal and dismissal of petitioner from his position constitute conduct that violates Articles 10, 41 and 236 of the Constitution.**
- e. The honourable court to be pleased to order for compensation to issue for violation of the petitioner's rights and an inquiry into quantum be gone into.**
- f. The petitioner to be paid costs.**

The 1st and 2nd respondents appointed Havi & Company Advocates to act on their behalf. The 1st and 2nd respondents opposed the petition by filing the affidavit of Lenku Kanar Seki, the 1st respondent's secretary, as sworn on 27.02.2014. For the 3rd respondent, the Honourable Attorney General of the Republic of Kenya, the memorandum of appearance was filed on 11.03.2014 and Mr. Kirui, the learned state counsel who appeared at the hearing stated that the 3rd respondent would associate with the case and submissions as made for the 1st and 2nd respondents.

The facts of this case are as follows. The petitioner was offered appointment to serve in the position of the Executive Committee Member for Agriculture, Livestock and Fisheries of the County Government of Narok with effect from 14.05.2013 and as conveyed in the letter dated 16.05.2013. The petitioner accepted the offer by his letter dated 20.05.2013. The petitioner, and is not disputed, served diligently and dutifully in accordance with the law until he received the letter dated 23.01.2014 signed by Samuel K.Tunai being the 2nd respondent cited in the petition. The letter stated as follows:

“Hon. Richard Bwogo Birir

RE: DISMISSAL AS COUNTY EXECUTIVE COMMITTEE MEMBER

The above subject refers.

Pursuant to section 31(a) of the County Government Act 2012, you are hereby relieved of your duties as the Executive Committee Member for Agriculture, Livestock and Fisheries effective from the date hereof.

I would like to thank you for your service to the county government.

Signed

GOVERNOR”

The petitioner stated that his termination or removal from the office he held was actuated by apparent malice and ill-will against him and on the part of the 2nd respondent. The petitioner further pleaded that the removal undermined his constitutional and statutory rights. The petitioner, being dissatisfied by the dismissal, filed the petition. He urged the court to protect the Constitution, uphold the principles of constitutionalism and rule of law by halting unconstitutional and blatant disregard of the law by public officers such had been directed against him by the 2nd respondent. In the petition as amended, the petitioner further pleaded as follows:

- a. Under Article 2(1) of the Constitution, the Constitution binds all persons including the respondents and under Article 2(4) of the Constitution, any act or omission in contravention of the Constitution by the respondents (like the petitioner’s dismissal) is invalid.
- b. Article 3 of the Constitution obligates every person to respect, uphold and defend the Constitution.
- c. The respondents were bound by provisions of Article 10 on national values and principles of governance, but in dismissing the petitioner, the 1st and 2nd respondents acted in contravention of the provisions and in particular the values and principles of rule of law, participation of the people, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability, and sustainable development.
- d. The petitioner was entitled to protection of Articles 232 on values and principles of public service, 235 (1) on legislation for a framework of uniform norms and standards for exercising disciplinary control over and removing persons holding or acting in county public offices, 236 on protection of public officers, and 200 (2) (c) on the legislation on the manner of election or appointment of persons to and their removal from offices in county governments.
- e. The petitioner was entitled to protection of section 41 of the Employment Act, 2007 on due notice and a hearing if he was to be terminated on account of misconduct, poor performance or ill-health.
- f. The dismissal of the petitioner was in contravention of Article 41(1) that entitled the petitioner to fair labour practices and 41(2) (b) that entitled him to reasonable working conditions.
- g. The petitioner was protected under Article 47 of the Constitution to a fair administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair; and Article 50 on fair resolution of any dispute.

For the 1st and the 2nd respondent, the replying affidavit stated that the petitioner had been dismissed as per the dismissal letter quoted above; the dismissal was by the 2nd respondent and in accordance with the provisions of section 31(a) of the County Governments Act, No.17 of 2012; the dismissal was not in violation of Article 10 of the Constitution; the claimant had not particularized the accusations of malice and ill-will on the part of the 2nd respondent; the relationship between the petitioner and the 1st respondent was contractual; the relationship could be lawfully terminated as it was done; and the petitioner’s dismissal that was in accordance with the law cannot be said to have offended the rule of law or violated the petitioner’s dignity and rights. The 1st and 2nd respondents’ further case was that the petitioner’s injury flowing from the dismissal, if any, would be remedied in damages and not the other remedies as prayed for in the petition.

The court has taken into account the petition, the affidavits, the documents and submissions on record and considers that the following issues and questions emerge for determination by the court:

- 1. Whether the pleasure doctrine applies in Kenya’s public service and particularly in this**

case.

2. **What was the meaning and effect of the letter for dismissal dated 23.01.2014?**
3. **Whether the petitioner's dismissal was in contravention of the cited constitutional and statutory provisions.**
4. **Whether the judicial review order of certiorari is available in this case.**
5. **Whether the petitioner is entitled to the remedies as prayed for.**

The court makes its findings as follows.

1. Whether the pleasure doctrine applies in Kenya's public service and particularly in this case

The pleasure doctrine is a legal principle under jurisprudence in England that public officers within Her Majesty's service hold office at the pleasure of the crown. By reason of that doctrine, the public officers in her Majesty's service could not question their dismissal from office in judicial proceedings and could only initiate other remedial measures such as political intervention. The classical effect of the pleasure doctrine was considered in **Mitchell – versus – Regina (1896) 1.Q.B. 121 at 122**, where Esher M.R. was emphatic on the effect of the pleasure doctrine in the following terms:

“The law is as clear as it can be, and it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the crown and the crown are voluntary only on the part of the crown and give no occasion for an action in respect of any alleged contract”.

In **Ridge – versus – Baldwin (1964) A C 40 at 65**, the appellant being a Police officer had been dismissed by the watch committee from the position of Chief Constable without being given a chance to attend the meeting or to be heard. Lord Reid listed the three categories of dismissal namely dismissal of servant by a master; dismissal from office held during pleasure; and dismissal from an office where there must be something against a man to warrant his dismissal. Where a man holds office during pleasure, Lord Reid cited servants and officers of the crown who held office at the pleasure of the crown in which cases an officer had no right to be heard before dismissal. In such cases, the person having the power of dismissal need not have anything against an officer and therefore need not give any reason for the action taken.

Under the former Constitution of Kenya that ceased operation effective 27.08.2010, the framework for Kenya's public service was modelled along the pleasure doctrine. Thus, the former Constitution in section 24 provided that subject to its provisions, the power of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment shall vest in the President. Further, section 25 of that Constitution provided that public officers held office at the pleasure of the President. The effect was that except where the Constitution provided otherwise (like in the case of judges who enjoyed security of tenure under that Constitutional dispensation) public officers in Kenya held office at the pleasure of the President and whose effect was that the President would terminate the engagement of such officers at will without any due process or assigning reasons. The former Constitution also provided that the pleasure doctrine was subject to provisions of any contract of employment that may have applied to the public officer in issue. Thus, under the former Constitution, public officers were servants of the President, serving at the pleasure of the President. Nevertheless, under that former Constitution, Constitutional, statutory and contractual provisions were available measures that could chain the pleasure doctrine. The sections provided as follows:

“24.Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.”

And:

“25.(1) Save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President.

Provided that this subsection shall not apply in the case of a person who enters into a contract of service in writing with the Government of Kenya by which he undertakes to serve the Government for a period which does not exceed three years.

(2) In this section “office in the service of the Republic of Kenya” means office in or membership of the public service, the armed forces of the Republic, the National Youth Service or any other force or service established for the Republic of Kenya.”

The pleasure doctrine under the former constitutional dispensation as per the provision of section 25 of the former Constitution was judicially considered in the case of **Muriithi – versus – Attorney General (1983) KLR 3**. The plaintiff who was a senior police officer filed a suit against the Attorney General claiming a declaration that the letter by the Chief Secretary dated 13th April, 1981 notifying him of his retirement from the Police Force was bad in law. He argued that section 25 of the former Constitution relating holding of office at the pleasure of the President did not apply to him because it was provided under section 108 of the former Constitution that the power to appoint and remove persons to and from offices in the Kenya Police Force, except for the office of the Commissioner of Police, was vested in the Public Service Commission. In deciding the case the court held that:

- a. The prerogative powers of the President were contained in section 25 of the former Constitution which provided that presidential appointees such as the plaintiff shall hold office at the pleasure of the President.
- b. The Government had the prerogative power to dismiss persons holding offices at the President’s pleasure under section 23 of the Constitution. That authority vested in the President and could be exercised through officers subordinate to him. The Chief Secretary as a subordinate to the President could therefore validly exercise the powers.
- c. The President was entitled under the former Constitution to exercise his prerogative absolutely and if he made a decision to retire his appointee earlier, there was no restriction or fetter imposed by the former Constitution or by any other law on his prerogative. The subsequent appointment of the plaintiff to another office had no bearing on the exercise of the prerogative.
- d. The provisions in section 108 of the former Constitution which provided for the powers of the Public Service Commission to appoint or remove certain members of the Police Force did not have the effect of removing from the President the prerogative right set out in section 25 of the former Constitution to dismiss at his pleasure; it only had the effect of providing an additional method of dismissal. Hence the detailed provisions providing for the discharge of a member of the Police Force supported rather than negated the Presidential prerogative right in section 25 of the Constitution.
- e. The President had the power under section 25 of the former Constitution to dismiss a police officer or any other officer at pleasure and none of the provisions in the former Constitution amounted to a restriction or clog on this power, especially the provisions of section 108 being additional to and not in derogation thereof.
- f. In exercise of his power under section 25 of the former Constitution, no explanation or reason needed to be given by the President for removal of an officer from a position. In principle it was fair and reasonable to give the officer opportunity of presenting his case before being removed or

given an explanation, but there was no legal obligation to do so, especially where that would not be in general interests of public security. That there was no restriction of dismissal at pleasure.

- g. Under the Public Service Commission, “secondment” meant to remove an officer temporarily from his usual employment posts or some other extra duties. While on secondment, the officer continues to hold his substantial post, the terms remain the same and he reverts back to his previous position upon completion of the secondment term (meaning that an officer on secondment is open to removal at presidential pleasure under section 25).

The long-term general rule is that civil servants in England hold office at the pleasure of the crown. However, it is also the enduring settled law in England that the tenure of government servants can indeed be altered by statute. Thus in **Gould – versus – Stuart (1896) A.C.**, the Privy Council held that the rule that civil servants may be dismissed at the pleasure of the crown was overridden by the New South Wales Civil Service Act, 1884.

With the foregoing background on the pleasure doctrine, the court now turns to the pertinent question. What are the implications of the Constitution of Kenya, 2010 on the application of the pleasure doctrine in Kenya? The court considers that the following provisions of the Constitution of Kenya 2010 are relevant:

- a. Article 1(1) provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.
- b. Article 1(4) provides that the sovereign power of the people is exercised at both the national level and the county level.
- c. Article 2(1) provides that the Constitution is supreme law of the Republic and binds all persons and all state organs at both levels of government.
- d. Article 2(2) provides that no person may claim or exercise state authority except as authorized in the Constitution.
- e. Article 3(1) provides that every person has an obligation to respect and defend the Constitution.
- f. Article 10(1) provides that every person, state officer, state organ and public officer is bound by the national values and principles of governance set out in the Article and which among those listed include rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability.
- g. Article 73 (1) (b) states that authority assigned to a state officer (like the 2nd respondent) vests in the state officer the responsibility to serve the people rather than the power to rule them.
- h. Article 73 (2) (e) declares that leadership and integrity for a state officer shall include discipline and commitment in service to the people.
- i. Article 129 provides that executive authority derives from the people of Kenya, shall be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya; for their well being and benefit.
- j. Article 236 provides for protection of public officers from dismissal, removal from office, demotion in rank or otherwise being subjected to disciplinary action without due process of law.

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.

The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at

the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service. Due process of law or simply, "**due process**" entails according the concerned person proceedings in which rules and principles for the protection and enforcement of private rights are upheld by the decision maker or relevant authority. At the core of due process is according the concerned person a reasonable notice with sufficient particulars to prepare for a fair hearing, the second crucial element of due process (**see definition and explanation in Black's Law Dictionary, 9th Edition**). Thus the court holds that due process will not be said to exist in absence of a reasonable notice with sufficient particulars to prepare for a fair hearing. In the court's considered opinion, the holding in **Muriithi – versus – Attorney General (1983) KLR 3** is no longer the law in Kenya as it has expressly been overridden by the Constitution through the demise of the pleasure doctrine. 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.

In this case it was submitted for the 1st and 2nd respondent that the 2nd respondent dismissed the petitioner under section 31(a) of the County Governments Act, 2012. The section provides that the governor may, despite section 40 of the Act, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so. It was submitted for the respondents that under the section the governor enjoyed unchained discretion and as in the case of the servants of the crown and the pleasure doctrine, due process of the law and reasons were not necessary.

For the petitioner it was submitted that the dismissal adversely affected the petitioner's human dignity and livelihood. That the petitioner's right to written reasons under Article 47(2) of the Constitution was not accorded by the 1st and 2nd respondents. Further, it was submitted that the petitioner's right to fair labour practices and terms and conditions of service under Article 41 of the Constitution including the safeguards of notice and hearing in termination such as are envisaged in section 41 of the Employment Act, 2007 was not accorded. Finally, it was submitted for the petitioner that section 31(a) of the County Governments Act, 2012 required the 2nd respondent to remove the petitioner under the section only if and as provided, thus "**...the governor considers that it is appropriate or necessary to do so.**" It was submitted that "consideration", "appropriateness" and "necessity" in the removal of the petitioner by the 2nd respondent were not demonstrated or conveyed to the petitioner or any other person. It was submitted that the employment of the petitioner had entailed public participation through open advertisement, interviews and approval by the county assembly yet the dismissal had been void of corresponding participation of the people. It was further submitted that the wording of the section inferred due process and giving of reasons as per the relevant and the cited constitutional provisions.

The court has considered the plain language of section 31(a) of the County Governments Act, 2012 and finds that under the section the governor is required to make a judgment (consider) that it is suitable(appropriate) or needed (necessary) that the executive member is removed from office. As submitted for the petitioner, the court finds that the 1st and 2nd respondents were obligated to accord the petitioner due process of law and to give reasons to satisfy the provisions of the section. Due process of law would establish that the 2nd respondent made a consideration and giving of reasons would show that the removal was appropriate or necessary.

In the opinion of the court and on the basis of the material on record, nobody, including the 2nd respondent, knows what went through the 2nd respondent's mind and whatever may have justified the removal of the petitioner from office. Such mysterious decisions cannot obtain under the new Republic. The court holds that a governor as established and provided for in the Constitution and the enabling legislations is not an imperial ruler. The court finds that tenets of good governance, human rights, transparency and accountability as envisaged in Article 10 of the Constitution cannot be said to have been

upheld by the respondent and the dismissal cannot be said to have met the tests of responsibilities of leadership as provided for in Article 73 of the Constitution. The court's considered opinion is that mysterious decisions like the dismissal of the petitioner by the 2nd respondent in the present case cannot be in furtherance of the donated sovereign power that vests in the people because such mysterious decisions are incapable of being submitted to accountability and transparency as they are opaque decisions that belong to the murky world and not a civilized democratic Republic like ours.

To answer the 1st 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 2nd 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 subordinated by the people who are the holders of sovereign power in the new Republic.

2. What was the meaning and effect of the letter for dismissal dated 23.01.2014?

The court has examined the letter of dismissal of the respondent. The letter was made pursuant to section 31(a) of the County Government Act 2012 and was titled thus, "RE: DISMISSAL AS COUNTY EXECUTIVE COMMITTEE MEMBER." The section empowered the governor, the 2nd respondent, to dismiss the petitioner if the 2nd respondent considered it appropriate or necessary. The court has considered the use of the word "dismissal" in the County Government Act, 2012. The court holds that "dismissal" in our constitutional and statutory usage means termination of employment or removal from office on account of an offensive action or omission on the part of the person subject to the dismissal.

In the opinion of the court, the offensive action or omission may entail misconduct, poor performance or contravention of agreed or public interest. Thus, in our law of public service and employment law, dismissal means the punishment of termination of employment of a person attributable to the person's misconduct, poor performance or contravention of agreed or public interest. Dismissal is distinguishable from "**removal**" which is a wider term that means dismissal and termination of employment other than by dismissal such as retirement and redundancy or retrenchment. To support the court's opinion, specific reference is made for example to Article 236(b) of the Constitution on protection of public officers, and section 44 of the Employment Act, 2007 on dismissal on account of gross misconduct.

In the instant case, submissions for the respondents suggested that under section 31(a) of the County Government Act 2012 the process was not disciplinary as opposed to section 40 of the Act where the governor may remove on disciplinary or adverse grounds attributable to the county executive committee member. The two sections provide as follows:

"31. Powers of the governor

The governor -

- a. **may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;"**

And:

"40. Removal of member of executive committee

(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds -

- (a) incompetence;
- (b) abuse of office;
- (c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

of (e) physical or mental incapacity rendering the executive committee member incapable performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

(2) A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).

(3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly-

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations-

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5) (b) is supported by a majority of the members of the county assembly-

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member.”

The court has considered the provisions of the two sections and is of the opinion that both sections prescribe a disciplinary action in a due process that may conclude into imposition of the punishment of dismissal. Under section 31, the procedure is initiated by the governor and concluded by the governor as an in-house executive process. Under section 40, the process is initiated by a member of the county assembly.

In the opinion of the court, the mischief is obvious; there may be instances of adverse circumstances against a given county executive committee member and the governor fails to invoke the executive disciplinary process under section 31(a) and in which event a county assembly member may invoke the oversight jurisdiction of the county assembly under section 40 to deal with the mischief. In the considered opinion of the court, that is where the difference in the provisions of the two sections ends.

Otherwise they are both disciplinary proceedings that demand due process of law. The governor's executive disciplinary process under section 31(a) and the county assembly's process under section 40 of the Act must comply with the established rules of natural justice; the due process of law.

In particular, section 76 of the Act provides for prohibition of imposition of punishment contrary to the Constitution. Subsection 76(2) provides that no public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament. The court holds that the 1st and 2nd respondents were bound by the provision and it was not open for the 2nd respondent to dismiss the petitioner under a fictitious unchained discretion misconceived on the basis of section 31(a) of the Act. The dismissal was a punishment and could be imposed only after due process of law. The court holds that the step by step procedure for imposing dismissal under sections 31(a) and 40 of the Act is not provided for in the sections but is found in the relevant constitutional and statutory provisions such as Article 236 of the Constitution and section 41 of the Employment Act, 2007.

To answer the question for determination, the court finds that the meaning and effect of the letter for dismissal dated 23.01.2014 was that the 2nd respondent imposed the punishment of dismissal against the claimant without due process. By the dismissal, the 2nd respondent thereby infringed the petitioner's right to inherent human dignity and its protection under Article 28 of the Constitution because the unfair dismissal suggested that the petitioner was a person who had one way or the other failed to perform as a county executive member of the 1st respondent but which in the findings of the court and the 2nd respondent's own submissions before the court, was not true. Needless to repeat, the dismissal infringed upon the petitioner's constitutional protections such as is provided in Articles 10, 41, 47, 50, 232 and 236 and as was urged for the petitioner during the hearing.

3. Whether the petitioner's dismissal was in contravention of the cited Constitutional and statutory provisions

The court has found that the claimant was entitled to the due process of law. The court finds that the 2nd respondent dismissed the petitioner in obvious contravention of the enumerated relevant provisions of Articles 10, 41, 47, 50(1) and 236 of the constitution as read together with section 41 of the Employment Act, 2007 that entitled the claimant to a notice and a hearing before termination.

While making the finding, the court further finds that the petitioner was entitled to move the court as he did both under Article 22 to enforce his cited fundamental rights and freedoms and Article 258 to enforce the other cited constitutional provisions that protected his public service.

4. Whether the judicial review order of certiorari is available in this case

It was submitted for the 1st and 2nd respondents that the order of certiorari was not available to the petitioner because in any event there was no public right revolving around the employment relationship and which was purely a private law right. The respondents relied on the case of **The Staff Disciplinary Committee of Maseno University & 2 others –versus- Prof. Ochong' Okello [2012] eKLR**, where the court held that the order of certiorari was not available to remedy the dismissal of an employee.

For the petitioner, it was submitted that the order of certiorari was the most efficacious remedy to deal with the 2nd respondent's actions and omissions that contravened the cited constitutional and statutory provisions.

The court has carefully considered the submissions against the prevailing doctrine of servants of the people as opposed to servants of the crown and the prevailing doctrine of the due process of law as opposed to the pleasure doctrine. The court has considered that under the doctrine of servants of the people and the doctrine of the due process of law, the power to dismiss a public or state officer in the new Republic derives not merely from the contractual terms and conditions but mainly from the constitutional and statutory safeguards that protect the sovereign power that is constitutionally vested in the people of Kenya.

The engagement of public and state officers in the new Republic does not rest and revolve upon the private consent of the persons who are involved to conclude the employment contract. The court holds that the persons involved conclude the contract for and on behalf of the people of Kenya within the stipulated constitutional and statutory safe-guards and the persons have no private consents that override the safe-guards. The conclusion of the arrangements that constitute the contract of public service is a public rather than a private action. Thus, if only for the dichotomy of private right and public law, the court has arrived at the compelling finding that in the new Republic, public and state officers are employed upon a framework beyond their private consents but predetermined and regulated by constitutional and statutory prescriptions; essentially, largely public and remotely private realms.

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.

Thus, it is the opinion of this court that, it has long been established that the delivery of human resource functions in Kenya's public service is guided by an objective criteria set by the law and that delivery is not based on subjective judgments of individual government actors. The court holds that the subjective judgments of individual government persons should not be allowed to override the objective criteria set in the Constitution and relevant statutes for the good delivery of our public and state service. Where such subjective judgments of individual government persons infringe on others constitutional and statutory rights and protections like in the present case, it is the opinion of the court that a proper remedy would be available to vanquish the offensive decision.

In this case, the court has considered the petitioner's conduct; the availability of alternative potent remedy; and whether an order of certiorari as prayed for will be a useful and efficacious remedy. The court has arrived at the finding that there is no any established bar to the making of an order of certiorari to issue in the circumstances of this case.

The 2nd respondent has dismissed the petitioner without due process, in contravention of clear constitutional and statutory protective provisions and without advancing even the remotest reason for the dismissal. First, the court finds that such dismissal is something that has been done by the 2nd respondent that can be quashed by an order of certiorari. Secondly, the court has looked for but has not found any reason why such offending dismissal should not be quashed. Thirdly, the court has stretched its survey of judicial remedies that would possibly be available to the petitioner to vanquish such unconstitutional and unlawful dismissal and the court returns the finding that the order of certiorari would be the best arsenal in the circumstance of this case.

Thus, to answer the 4th issue for determination, the court finds that the order of certiorari is available as a remedy in this case.

5. Whether the petitioner is entitled to the remedies as prayed for

In view of the findings already made earlier by the court in this judgment, the court finds that the petitioner is entitled to the remedies as prayed for, except that, the prayer for **“compensation for violation of the petitioner's rights and an inquiry into quantum be gone into”** requires specific consideration.

It was submitted for the petitioner that he was entitled to the remedy of compensation under Article 23(3) (e). It was also submitted that the order as prayed for was ordered in the case of **Gladys Boss Shollei – Versus- Judicial Service Commission & Another [2014] e KLR**. The respondents submitted that the petitioner did not plead and specifically prove the measure of his loss flowing from the termination of service. That failure, it was submitted, disentitled the petitioner from any order for compensation. The respondents for that submission relied upon the judgment in **Ronald Kimatu Ngati – Versus- Ukulima Sacco Society Ltd [2011] eKLR** .

The court has considered the submissions and finds that as submitted for the respondents, the prayer for compensation was plunged in the petition without the necessary pleading and evidence to urge its justification. There is nothing on record by way of pleadings, evidence and submissions that would justify and guide the court in making the order for compensation.

It is the opinion of the court that a judgment should as far as possible come with precise finality with subsequent steps, as far as possible, limited to satisfaction of the orders made in the judgment. In the circumstances, the opinion of the court is that litigants were better discouraged from making general and open prayers like the present prayer for compensation for violation of the petitioner's rights and an inquiry into quantum which in effect, if granted, will reopen the dispute rather than bring the dispute to determination with finality.

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

- a. A declaration that the removal and dismissal of the petitioner as the Executive Committee member for Agriculture, Livestock and Fisheries vide the 2nd respondent's letter dated 23.01.2014 was unconstitutional and unlawful on account of violation of sections 31(a) of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and section 41 of the Employment Act.
- b. An order of certiorari quashing the decision of the 2nd respondent removing and dismissing the petitioner as the Executive Committee member for Agriculture, Livestock and Fisheries vide the 2nd respondent's letter dated 23.01.2014 for being in contravention of sections 31(a) of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution, 2010 as well as the section 41 of the Employment Act.
- c. A declaration that under Article 236 of the Constitution, the petitioner remains the lawful holder of the position of the Executive Committee member for Agriculture, Livestock and Fisheries of the County Government of Narok and to continue to hold the office effective 23.01.2014 with full benefits.
- d. A declaration that the decisions, actions and omissions of the 2nd respondent in respect of the removal and dismissal of the petitioner from his position constituted conduct that violated Articles 10, 41 and 236 of the Constitution.
- e. The respondents jointly or severally to permit the petitioner to resume his official duties with effect from the date of this judgment.
- f. The 1st and 2nd respondents to pay the petitioner's costs of the petition.

Signed, dated and delivered in court at **Nakuru** this **Friday, 14th March, 2014**.

BYRAM ONGAYA

JUDGE