



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 103 OF 2014

TOM LUUSA MUNYASYA1ST CLAIMANT

JOHN KENNEDY MUTETI2ND CLAIMANT

VERSUS

THE GOVERNOR MAKUENI COUNTY 1ST RESPONDENT

COUNTY GOVERNMENT OF MAKUENI 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

Musyoka Advocate [**Kuonah & Co. Advocates**] for the Claimants

Nyamu Advocate [**Nyamu & Nyamu Co. Advocates**] for the 1st and 2nd Respondents

Odhiambo- **State Counsel** for the 3rd Respondent

RULING

1. On 30th January 2014, the 1st claimant filed his application dated the same date seeking for orders to restrain the respondents from terminating his employment and that status quo be maintained until the suit is heard. On 5th February 2014 the 2nd claimant was enjoined herein and allowed by the court to reply on the same prayers as the 1st claimant. The claimants Notice of Motion by the claimant is therefore based on section 41 of the Employment Act, section 76(1) and (2) of the County Government Act, 2012 and section 33A of the Civil Procedure Act. The application is supported by the annexed affidavit of the 1st claimant, Tom Luusa Munyasya. The respondent filed the Replying Affidavit sworn by 1st respondent, Kivutha Kibwana and dated 7th March 2014. The claimants filed a Supplementary Affidavit sworn by the 1st claimant and dated 17th march 2014. The 3rd respondent made oral submissions in court.

2. The application by the claimants is based on the grounds that on 28th January 2014; the respondents without notice illegally terminated their employment with the 2nd respondent contrary to the law. The 1st

claimant was the Executive Committee Member ICT and Special Programmes whereas the 2nd claimant was the County Secretary who had served the 2nd respondent for 8 months. The claimants were diligent in their work but on 28th January 2014 they were terminated without due process or justification. That all efforts to seek audience and explanation from the respondents have not been successful and hence the termination was inhumane and unfair. The claimants also state that they were not accorded a hearing or given the reasons for their termination against the rules of natural justice making their termination a nullity and to avoid further injustice, they should be reinstated.

3. In the Supporting Affidavit, the 1st claimant in support of the application reiterates the grounds in the application noting that he was employed by the 1st respondent and there is a Gazette notice to his appointment. He performed well in his duties, there was no complaints or warning against him for the duration of his service but was shocked with the abrupt and wrongful perdition of his employment by the respondents on 28th January 2014. That the respondent should therefore reinstate him to his position without loss of his benefits as the action of his termination is unlawful.

4. In the further affidavit, the 1st claimant states that under Article 179(6) of the Constitution, County members are accountable to the Governor for the performance of their work but the same law does not give the Governor Powers to dismiss at will. He was not involved in procurement, save for the time he was required to sign the Local Purchase order (LPO) as user department on account that there was nobody appointed as ICT Director as the head which was the case for all departments. The respondent in this case did not comply with Article 50 of the Constitution as the claimants were never given a hearing before their termination or allowed to tender any defence, the investigations were ad hoc, biased and the committee set to make enquiries was meant to only interrogate the claimants. The committee in interrogation was biased, the committee head Dr. Mulwa was known to have bad blood with the 1st claimant and had been indicted by the Kenya national Audit Office and the outcome report relied by the respondents to terminate the claimants was already eschewed against them. There was no evidence to support the allegations made against the claimants, no reasons were given for the termination and the claimants should be reinstated as the actions of the respondents are a nullity.

5. The respondent in reply states that the 1st respondent as an Executive member of the 2nd respondent County was appointed in accordance with section 30(d) of the County Government Act (CGA) upon approval by the County Assembly. These officers are also dismissed by the Governor under section 31(a) and 40 of the CGA. The terms of service and termination of the County Secretary are governed by section 44 of the CGA and the claimants are misleading the court that they are governed by the Employment Act, 2007. Under Article 179 (6) of the Constitution members of the country executive committee are accountable to the Governor for the performance of their functions and exercise of their powers, they do not do procurement as outlined under the Public Finance Management Act and in the two positions held by the claimants the same are not governed by the County Public Service Board. That the Governor has the mandate to within GCA to dismiss and terminate the services of both members of the County Executive Committee and the County Secretary for gross misconduct and abuse of office and when this was done to the claimants it was lawful and within the mandate of the Governor.

6. The respondent also states that before the claimants were terminated there were investigations on upon suspicious purchases where the claimants were directly involved, a special cabinet investigatory committee was appointed, which made findings that implicated the claimants who had engaged in fraudulent procurement which amounted to gross misconduct. This was in violation of the law as the 1st claimant signed LPO contrary to the Public Procurement Act regulations while the 2nd claimant introduced to the 2nd respondent a system of employment where the 2nd respondent lost huge sums of money.

7. That the orders sought by the claimants are not tenable as no prejudice will be occasioned to them as they can be paid in damages for unlawful termination as a substantive prayer, the claimants have failed to disclose material facts as they were terminated following a committee hearing, a reinstatement will not be feasible as the respondents have lost confidence in the claimants, they were terminated for gross

misconduct, abuse of office, gross violation of the constitution and hence their application lacks merits and should be dismissed.

8. In submissions, the claimant reiterated the grounds of the applications and noted that the act of terminating the claimants was arbitrary and without justification and they should be reinstated without loss of benefits. That the respondents are aware that the 1st claimant signed the LPO as there was nobody substantively appointed as head of ICT department and these officers have recently been appointed. The committee appointed to interrogate the claimants was by the 1st respondent and thus compromised as the claimants were never given a hearing.

9. The respondent submitted that the claimants were not subject to the Public Finance Board, there is a separate regulatory mechanism on the appointment and terms of service and termination of the claimants. Section 44 of CGA the 2nd claimant is appointed by the 1st respondent upon approval by the County Assembly. That the orders sought are overtaken by events as the termination has taken effect and to seek status quo is to seek reinstatement pending the hearing of main claim which is not feasible as the Court has set precedence that reinstatement may not be granted at the interlocutory stage. There is no evidence that the claimants were unprocedural terminated and the court cannot decide on this facts without call of evidence and there are no exceptional circumstances to warrant a reinstatement. Section 43(1) of the Employment Act presupposes where an employer ought to tender evidence to prove that a termination was lawful. The power to reinstate has to be preserved and allowed on specific grounds especially in case where termination is done based on pregnancy or race but in this case, there is need to call evidence before the orders sought at this stage can be interrogated.

10. That the respondents have not been served with summons to enable them file a defence and the court can only evaluate the matters before after the defence is filed. That the claimants had only served for 8 months and based on section 43(3) they cannot lodge a complaint as they need to have been employed for a period of 13 months. The respondent further relied on the case of *Alfred Nyungu Kimungui versus Bomas of Kenya, Cause No. 620 of 2013* that the court held reinstatement is a permanent relief that can only be granted after full hearing. In this case under section 30 of CGA the Governor is accountable for management of country resources and section 31 gives the governor powers to dismiss any executive member upon a resolution by the County Assembly and section 40 allow the Governor to dismiss any employee. Equally under section 44 of the Employment Act, an employer may dismiss an employee for gross misconduct. The 1st claimant has admitted to signing LPO and on this evidence there can be no reinstatement.

11. That the interim orders granted to the claimants stopping new officers of the respondent appointment are selfish as they affect the 2nd respondent operations and holding them at ransom which is unfair. If the court will find unfair practice, the claimants have a relief in compensation. The interim orders should be vacated and the application by the claimants dismissed.

12. The 3rd respondent not her part opposed the claimant's application on grounds of law noting that Article 6(1) of the Constitution establish counties as distinct and independent entities and can only cooperate with the national government as the County is autonomous and not subordinate to the national government. Article 152(2) of the constitution establish the Cabinet and makes the AG a member therein at the national level where the AG thus represents the national government apart from in proceedings in criminal cases. This is a labour relations case where the national government should not be a party rather the County is the responsible party. However under Article 165(5) the AG with leave of the court may appear as a friend of the court where the national government is not a party. In this case the AG has no such leave to be enjoined. Based on the Attorney General Act, 2012 at section 5, it explicitly provides that the AG is only to be a party to proceedings where the national government is a party. Where the court were to grant the orders sought by the claimants against the AG, the net effect would be to bind the AG with orders that have no legal force to enforce and would mean the 2nd respondent is subordinate to the national government and offend article 6(2) of the Constitution which provide for two levels of government as distinct.

13. The provisions of section 43(3) of the employment Act grant the court discretion with regard to these provisions. The intention of the law should not be defeated in the purpose of the section.

Which law/s are applicable with regard to the claimants herein

Whether the orders sought by the claimants can be granted in the interim

Whether the 3rd respondent should be a party herein

14. The substantive law governing all employees in Kenya subject to the exceptions as outlined in the law is the Employment Act, 2007. Any other law that address any labour relations must be read together with the Employment Act and Article 41 of the Constitution as well as the Article that establish the Industrial Court being Article 162(2) of the Constitution. Any other law or laws can only give more meaning to the established conceptual framework of rights and responsibilities of an employee and employer but cannot go below the set standards as the substantive applicable laws. This would defeat the constitutional context, purpose and the objectives of the Industrial Court as outlined under section 3 of the Industrial Court Act.

15. It must however be noted that within the devolution process, certain officers/officials and elected representatives have been granted the mandate under various statutes to manage, control and regulate relations, resources and other processes at the County level so as to give meaning to devolution as against a systems where everything is centralised under a central government. These functions of management, control and regulation must however be undertaken on the basis of the law as to do contrary would be found as unconstitutional. Labour relations remains governed substantively as under Article 41 of the Constitution and the Employment and labour laws of Kenya as outlined above.

16. Article 176 of the Constitution establishes County Government with powers;

(2) Every county government shall decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.

17. Thus under the CGA Part V and section 30, the functions and responsibilities of a Governor are outlined which includes at 30(2) (d);

(d) Appoint, with the approval of the County assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution;

18. Which function should be undertaken in a manner as under section 30(3) (f) that the Governor is to;

19. However under section 30, the Governor is granted more powers that;

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;*
- b. shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;*
- c. may appoint an accounting officer for each department, entity or decentralized unit of the county government; and*
- d. Shall have such powers as may be necessary for the execution of the duties of the office of governor.*

20. The question here then on the finding that the Employment Act is the substantive law with regard to employment relations is whether in the exercise of these powers the 1st respondent acted in an appropriate manner and or in a manner that was necessary to do so in the circumstances of this case. In

this regards and in the interim, these are matters that the court would require evidence to arbitrate as the appropriateness of the 1st respondent action must be subjected to examination upon evidence as well as the reasons necessary for this action for an audit as to whether they were valid, justifiable in an open and democratic society and in the due performance of functions now outlined for the office of the 1st respondent. To commence such interrogation here would be to pre-empt the main course by the claimants which is not the purpose of this motion and determination by this court.

21. With that outline it must be noted that this Court has powers as under section 12 of the Industrial Court Act to act and make orders for;

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) Interim preservation orders including injunctions in cases of urgency;

(ii) A prohibitory order;

(iii) An order for specific performance;

(iv) A declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

23. Where the court finds a good case that warrant preservative orders, specific performance or declaratory orders as necessary and useful to so grant, these will be made in pursuance to the principles objectives of this court as under section 3 of the Industrial Court Act that of;

3. (1) the principal objective of this Act is to enable the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by this Act.

(2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).

(3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.

24. Contrary to the submissions made by the 1st and 2nd respondent advocate, orders of reinstatement are part of specific performance orders that the court may grant if the court find the same as an appropriate relief in the interim or as a final order. The circumstances outline in the case of **Alfred Nyungu Kimungui versus Bomas of Kenya, Cause No. 620 of 2013** and the case of Joab Mehta Oudia versus Coffee Development Board of Trustees Cause No. 1984 of 2013 can clearly be distinguished with the case here. It is not just in cases of discrimination on the basis of race pregnancy or disability that one can make a claim for specific performance, this remains a remedy available to all cases of unfair termination subsection to the provisions outlined under section 49 of the Employment Act.

25. Section 43(3) of the Employment Act is worth mention as there were extensive submissions in this regard. The case of *Samuel Momanyi versus The Hon. Attorney General and SDV Transami Kenya Ltd, HCCC No. 341 of 2011* where the court held that all employees deserve equal protection of the law under Article 27 of the Constitution which also apply in this regard as this section looked at vis-à-vis the Constitution was found to be unconstitutional. There is no good reason to disagree with this position as well as the submissions by the 3rd respondent that the intention and purpose of the law is seeking protection of labour relations should not be limited in time.

26. On the more fundamental issues raised by the 3rd respondent, there is now clarity with regard to what a County Government can do and cannot do, this is outlined under the Constitution as well as statute particularly the CGA. A County is now an entity that sues and be sued and further the Attorney General Act, 2012 now remove certain functions of this office which are retained in the national government to ensure the County functions effectively as an entity with duties and responsibilities. This function of the 3rd respondent should only be applied as the claimants have with leave of the court, upon request by the County government or where there is a particular cause of action that warrant the national government to respond and or act in the enforcement of any constitutional right or rights. In this case and without going into the merits of the case, the claimants indicate in their application that they were employees of the 2nd respondent and the nature of claim is that of unfair termination by the 1st and 2nd respondents. Without going further I will allow and extricate the 3rd respondent herein.

With this outline, I find there are fundamental issues that the claimant requires to address with regard to their termination for the court to determine as to whether the orders being sought should be granted. These are matters that require evidence and cannot be addressed as in this application. However, to avoid a frustration of any orders that the court may grant to the claimants and for to facilitate the just, expeditious and proportionate resolution of the dispute herein, the preservative orders granted in the interim shall remain in force. It is therefore directed that;

- a. **the respondent is hereby restrained from making any substantive appointment to the positions earlier held by the claimants until the hearing and determination of the suit herein;**
- b. **the 3rd respondent appearance herein is dispensed with;**
- c. **the respondent has 14 days within which time to file the defence;**
- d. **the claimants will have 7 days to make any response that may be found useful and or necessary upon being served with the defence of the 1st and 2nd respondent;**
- e. **Noting (a) above, parties herein be allocated a hearing date on priority basis at the Court Registry.**
- f. **Costs in the cause.**

Delivered and dated at Nairobi this 9th day of April 2014.

M. Mbaru

JUDGE

In the presence of: