



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 30 OF 2014**

**SILAS KIPRUTO.....1<sup>ST</sup> CLAIMANT**

**JOSEPH KOECH.....2<sup>ND</sup> CLAIMANT**

**- VERSUS -**

**THE COUNTY GOVERNMENT OF BARINGO.....1<sup>ST</sup> RESPONDENT**

**THE CHAIRMAN, BARINGO COUNTY ASSEMBLY BOARD.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 4<sup>th</sup> April, 2014)

**JUDGMENT**

The claimants filed the memorandum of claim on 12.02.2014 through Angu Kitigin & Company Advocates. The claimants prayed for judgment against the respondents for:

- a. **A declaration that the claimants are legitimate employees of the 2<sup>nd</sup> respondent.**
- b. **A declaration that the 2<sup>nd</sup> respondent's instructions barring the claimants from accessing their respective offices were unlawful.**
- c. **A declaration that termination of the claimants' employment contract by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was in contravention of the law.**
- d. **An order reinstating the claimants to their respective capacities as the Chief Finance and Accounting Officer for 1<sup>st</sup> claimant and the Clerk to the County Assembly for the 2<sup>nd</sup> claimant in that order.**
- e. **An order of permanent injunction barring the respondents jointly and severally from arbitrarily terminating the employment of the claimants.**
- f. **Damages.**
- g. **Costs of the suit.**

The 2<sup>nd</sup> respondent filed the response to the claim and counterclaim on 24.02.2014 through Kipkoech B. Ngetich of Gordon Ogola, Kipkoech & Company Advocates. The 2<sup>nd</sup> respondent prayed that the claim be dismissed with costs and counterclaimed for judgment to be entered against the claimants for:

- a. **A declaration that there were no appointment of the claimants and if there were such appointments then they were illegal *ab initio* for want of advertisement, competitive recruitment, short listing, public participation, and approval by the County Assembly and the appointments are thus illegal *ab initio* hence null and void.**
- b. **Costs of the claim and counterclaim.**

The claimants filed on 28.02.2014 a reply to the 2<sup>nd</sup> respondent's response and response to counterclaim. The 1<sup>st</sup> respondent filed the memorandum of appearance on 06.03.2014 through Z. K. Yego Law Offices. The claimants by a notice of appointment filed on 6.03.2014 appointed Nyekwei & Company Advocates to act alongside their initial Advocates.

The case was heard on 6.03.2014 when the claimants testified to support their respective cases; and William Kamket, the 2<sup>nd</sup> respondent (**RW1**) and David Ng'eno, the Sergeant at Arms at the Baringo County Assembly (**RW2**) testified to support the 2<sup>nd</sup> respondent's case. The 1<sup>st</sup> respondent opted to rely on the documents on record and to file final submissions.

The claimants are career civil servants. They were employed in the civil service competitively in accordance with the relevant regulations made by the Public Service Commission.

The 1<sup>st</sup> claimant was 38 years of age at the time of hearing of this case. He was employed by the Commission as an officer under the local authorities' services. The 1<sup>st</sup> claimant served as the Town Clerk for the Municipal Council of Kabarnet prior to his service in the county government. He held that position from September, 2011 to the date of the 1<sup>st</sup> general elections under the Constitution of Kenya 2010 as held on 4.03.2013.

By the letter dated 19.06.2013, the 1<sup>st</sup> claimant was deployed by the Transitional Authority as the Interim Principal Finance Officer for the Baringo County Assembly. Prior to the deployment, the Transitional Authority had advertised the positions in December 2012, the 1<sup>st</sup> claimant had applied in December, 2012 for the position of Finance Officer and he was successful to be shortlisted as one of the candidates to be seconded in the constitutional transition arrangements.

The Transitional Authority conducted interviews whereby the claimant attended and was appointed to the position of Chief Finance Officer, Baringo County effective 25.2.2013. On 5.08.2013, the 1<sup>st</sup> claimant received a letter conveying the decision of the County Assembly Service Board that the 1<sup>st</sup> claimant was appointed on permanent basis as the head of finance and accounting with effect from 1.07.2013. Minutes of the Board confirmed that the board had resolved that the serving 27 officers be confirmed and the 1<sup>st</sup> claimant was one of the 27 officers confirmed by the Board. The claimant testified that serving officers were entitled to priority in employment by county government as provided for in section 60 of the County Government Act, 2012. The 1<sup>st</sup> claimant's further testimony was that under section 138 of the Act, former local governments' staff would be seconded to county governments. His testimony was that he was seconded and absorbed and no law was contravened.

The Transitional Authority wrote the letter dated 20.01.2014. The letter explained that the authority recruited officers to lay foundation to devolved governance and the officers were then seconded to county governments by the Public Service Commission. The letter stated that the Authority lacked funds to sustain payment of top-up allowances to the seconded officers. Accordingly, if a county government needed services of the seconded officers then the county government was to meet payment of the requisite allowances; if services of seconded officers was still needed, then the county government was to consider absorbing the officers; and if the services of the seconded officers were not required, then the officers were to be released back to the Authority for deployment to their former stations. The preferred option by the county government was to be conveyed to the Authority by 31.01.2014 to enable the Authority to advise the affected officers accordingly. The 1<sup>st</sup> claimant testified that at time of the letter, he had already been absorbed into the service of the County Assembly.

The 1<sup>st</sup> claimant received the letter dated 2.02.2014 recalling him to report to the Authority and to handover to the Principal Budget Officer, Baringo County. The claimant reported to the Authority which apologised by the letter dated 7.02.2014 nullifying the recall in the letter of 2.02.2014 and stating that the recall decision had been made without the knowledge that the claimant had been confirmed in the position.

On 7.02.2011, the 1<sup>st</sup> claimant reported on duty and security officers at the County Assembly's gate told the claimant that the 2<sup>nd</sup> respondent had declared the claimant to be a former employee and the claimant testified that the position was confirmed in press reports attributable to the 2<sup>nd</sup> respondent as firing the claimant.

The claimant then received by email the letter dated 7.02.2014 alleging that the claimant had, as per the meeting of the County Assembly Service Board held on 7.02.2014, contravened the public service code of conduct including engaging in politics. The charges levelled against the claimant included leaking confidential issues to unintended consumers; insubordination; disclosure of privileged information, careless interpretation of Public Finance Management Act which led to surcharging of members and staff; deduction of funds and failure to remit the same to the bank that has led to members or staff pay charges in the bank; disrespecting some members of staff; and harassing junior staff. The claimant was given 14 days from 10.02.2014 to respond to the issues in writing. He was to appear before the Board in person on 24.02.2014 at 10.00 am with a person of his choice. In the meantime, he was to hand over his duties to the principal budget officer, Ronald Cherutich. The claimant decided to sue the 2<sup>nd</sup> respondent because, in his testimony, all the relevant letters he had signed had no backing of the Board's minutes. The claimant lamented that Ronald appears to have taken over his job from 4.02.2014 as the vouchers filed in court showed that he had been using the claimant's stamp of head of finance and signing in that capacity. The 1<sup>st</sup> claimant testified that there had been no valid disciplinary proceedings against him. The claimant had not received any communication that he had been removed from office. The claimant further testified that effective 31.01.2013, the 2<sup>nd</sup> respondent had refused to pick his telephone calls. He testified that he had not been terminated and he did not therefore seek reinstatement. The claimant stated that he felt victimised because he was from Nandi County and not Baringo County and he was concerned that he may be terminated unfairly.

The 2<sup>nd</sup> claimant has worked for local authorities for 23 years moving from a Human Resource Officer to a Clerk to the County Council or Town Clerk. He served as clerk to the County Council of Koibatek. On 12.12.2012, the Transitional Authority advertised and the 2<sup>nd</sup> claimant applied for the position of Clerk to County Assembly. He was interviewed for the job by the Public Service Commission; he was successful and deployed to the Baringo County Assembly as the Interim Clerk. He worked from 25.02.2013 to August, 2013 when the County Assembly Board confirmed him as the Clerk effective 1.07.2013 as per the letter dated 5.8.2013 and minutes of 3.08.2013.

On 30.01.2014, the 2<sup>nd</sup> claimant testified he was preparing for a foreign trip and on 1.2.2014, he travelled to the US on official business. He came back on 7.2.2014 and he went to the premises of the County Assembly to take his car. Two security officers at the gate told the claimant that the 2<sup>nd</sup> respondent had instructed that the claimant should not enter the premises because he was a former employee of the Assembly. He asked for written instructions and the officers said they had been verbal. The claimant testified that he took the car on 8.2.2014 and on 10.02.2014, he read reports in the print media that he had been sacked.

The 2<sup>nd</sup> claimant testified that the Board was new and had not developed procedures for recruitment, appointment, promotion, retirement, disciplinary control and other human resource functions. The claimant testified that he saw the letter by the 2<sup>nd</sup> respondent dated 4.2.2014 which referred to him as a former employee. The letter expressly stated that the claimants were former officers and would therefore cease to be bank signatories. The letter was done on the 2<sup>nd</sup> respondent's letter head as the County Assembly Speaker and addressed to the 1<sup>st</sup> respondent to effect changes in the bank account signatories.

The 2<sup>nd</sup> claimant also testified that he received the letter dated 7.02.2014 from the 2<sup>nd</sup> respondent alleging that he had contravened the public service code of conduct as noted in the County Assembly Service Board meeting of 7.02.2014. The allegations included harassing junior staff; incompetence, laziness and insubordination; withholding vital information from the speaker and failure to advise the speaker; careless interpretation of Public Finance Management Act which led to surcharging of members and staff; revealing and leaking confidential matters to unintended customers; undermining the County Assembly Service Board and slow implementation of the Service Board recommendations; inability to coordinate the induction and orientate the new staff; and carelessness, in contravening the service board resolutions by confirming the newly appointed staff instead of putting them on 12 months' probation as resolved. The letter gave the 2<sup>nd</sup> claimant 14 days from 10.02.2014 to respond to the issues in writing and to appear before the board in person on 24.02.2014 at 2.00 pm without fail and in company of a person of the claimant's choice. He was to hand over his functions to one Jepkemoi Chemase, the deputy clerk-administrative.

It was the 2<sup>nd</sup> claimant's testimony that he could not hand over because there had been no disciplinary procedure occasioning his removal and therefore, to hand over. The claimant testified, and RW1 confirmed that there were no known procedures guiding decision making and delivery of human resource functions by the County Assembly Service Board. The claimant testified that they relied on labour laws generally. The claimant lamented that on 30.1.2014, he had not left on foreign travel and the Board purportedly met in his absence as the secretary. He had arrived from Nairobi to be told that the meeting was on. He did not recall issuing the 7 days usual notice for the meeting of 30.1.2014 and the 2<sup>nd</sup> respondent was running the business of the Board without any procedures of good governance. As secretary, he had not delegated his duties and the meeting was therefore not valid and one of his deputies that had acted did not have his authority to act or represent him as secretary. The claimant further lamented that as per vouchers filed, other persons were approving payments without his approval as the accounting officer and as provided in section 147 of the Public Finance Management Act, 2012. The claimant testified that the 2<sup>nd</sup> respondent had precluded him from performing duties as the accounting officer between 1.2.2014 to 12.2.2014 and he could not be held accountable.

The 2<sup>nd</sup> claimant's case was that he had been absorbed into the service of the County Assembly by decision of the Board and he had never been told by his employer that the appointment was irregular. The claimant admitted that under the County Government Act, his appointment was subject to approval by the County Assembly and he was not aware of any such approval.

RW1 testified that he was not aware of the claimants being locked out of their offices and at time of the hearing they were at work. RW1 testified that there were issues at the county and the claimants came to court prematurely without giving the Board a chance to deal with the issues amicably and conclusively. RW1 referred to his letters of 7.2.2014. He denied that the claimants had been victimised because they came from outside the County of Baringo. It was his case that the claimants and 25 others in the transitional engagement had been confirmed on probationary terms and the 2<sup>nd</sup> claimant had acted incompetently by issuing the confirmation letters. The chief officers had been appointed without parliamentary approval because the 2<sup>nd</sup> claimant had failed to advise RW1. It was his further testimony that staff was being deducted because they were overpaid due to the 1<sup>st</sup> respondent's incompetence. He denied that the Board was going to terminate the 1<sup>st</sup> claimant's employment.

It was RW1's testimony that the decisions he made as the speaker were the decisions of the Board. He admitted that the appointments of the claimants had been confirmed by the Board. RW1 testified that he had helped the claimants by asking the Transitional Authority to recall them because his help was that they do not undergo disciplinary procedure and action. When the transitional authority revoked the recall, he invoked the disciplinary process. RW1 testified that he had not advertised the positions held by the claimants. He admitted that the Board had appointed the 2<sup>nd</sup> claimant to the position of Clerk but without approval of the Assembly.

RW1 testified that he applied for the Speaker's job to the Independent Electoral and Boundaries

Commission as a transitional function. The 2<sup>nd</sup> claimant had presided as Clerk at the election of the 2<sup>nd</sup> respondent as Speaker. RW1 testified that he had a clerk in office and there was no vacancy. RW1 also testified that the meeting of 7.2.2014 for the Board members took place but he had no notice of the meeting, the agenda or the minutes filed in court. It was his testimony that there was no published procedure that guided the business of the Board and the relevant county bill was with the Government Printer. RW1 further testified that he did not seek the advice of the Attorney General in the ensuing litigation and running of the Board's affairs because it was not his business to seek such advice.

The testimony by RW2 was that RW1 had not instructed the security officers at the gate to lock out the claimants from accessing their respective offices.

The issues for determination in this case are as follows:

- a. **Whether the claimants are lawful employees of the County Assembly and the County Assembly Service Board at all Material times.**
- b. **Whether the claimants were removed from office by the second respondent, and if yes, whether the removal was lawful and valid.**
- c. **Whether the claimants are entitled to the remedies as prayed for.**
- d. **Whether the 2<sup>nd</sup> respondent is entitled to the remedies as prayed for.**
- e. **Whether there are uniform norms and standards for performing human resource functions in the county governments**

The court has considered the pleadings, the evidence and the submissions and makes the following findings.

**Whether the claimants are lawful employees of the County Assembly and the County Assembly Service Board at all material times**

The facts are clear on this issue. The claimants were serving civil servants. They applied and the Transitional Authority recruited them for secondment by the Public Service Commission to the County Government of Baringo. The court holds that the recruitment and secondment was founded upon section 15 (2) (a) of the 6<sup>th</sup> schedule to the Constitution which provided that through legislation, the national government was mandated to facilitate the devolution of power; to assist county governments in building their capacity to govern effectively and to provide the services for which they are responsible; and support county governments. The Transition to Devolved Government Act, 2012 empowered the Transitional Authority to facilitate the young county governments, among other things, to have competent staff at inception and in accordance with section 15 of the 6<sup>th</sup> schedule to the Constitution. The court finds that the claimants being serving civil servants were legitimately identified in a transparent and accountable process and secondment to the Baringo County Government - which under Article 176 of the Constitution consists of the respective county assembly and county executive.

The claimants' case is that they were absorbed into the service of the County Assembly by the decision of the County Assembly Service Board. There is no dispute that the claimants were "**confirmed**" in that service and the Board made the relevant decision. The only dispute as urged for the 2<sup>nd</sup> respondent is that the claimants were confirmed on probationary terms. There are minutes of the Board meeting of 3.08.2013 relied on by the claimants stating that the 27 serving officers were confirmed. Those relied on by the 2<sup>nd</sup> respondent and with respect to the same date and meeting, state that the officers were confirmed but on probationary terms. The conflicting minutes confirm the case as urged for claimants and the 2<sup>nd</sup> respondent that the Board operated without proper rules and procedures of conducting its business and making human resource decisions. Thus, it is difficult to confirm the genuine set of the minutes but weighing the evidence, as already found by the court, the staffs was absorbed. The court has

carefully analysed the situation and circumstances of the officers that were being confirmed. They were all experienced civil servants carefully identified as fit for the job by the Transitional Authority and seconded by the Commission. The court reckons that the usual employment practice is to replace new officers upon recruitment and appointment to probationary service and if probation is successfully served, confirmation in appointment would follow. The officers in issue were not such newly appointed employees. The court finds that the officers including the claimants were not eligible to probationary service as they were seasoned public officers constitutionally provided to build capacity of the county government. It would be misconceived and untenable for any authority in the county government to emplace the experienced officers on probationary service. In the circumstances of the case, the court finds, and as submitted for the claimants, that “**confirmed**” as used by the Board could only mean absorbed in the service of the County Assembly on applicable permanent terms of service. The court finds that the claimants were absorbed into the County Assembly service. The court further finds that the absorption decision once made by the Board exhausted the Board’s jurisdiction in that respect and the claimants became entitled to remain in the permanent service as absorbed unless the employment was lawfully terminated.

For avoidance of doubt that the claimants could not be emplaced on probationary service by any authority in the county government, section 138 (1) of the County Governments Act provides that officers serving on such secondment would retain their terms of service and the same would not be altered to their disadvantage. The court holds that if the claimants were to be placed on probationary service, then that would amount to adverse variation of their respective terms and conditions of service and any such probationary service decision would be unlawful, null and void.

For the 2<sup>nd</sup> respondent, it was submitted that the recruitment of the claimants was not open, it was not advertised, it was not competitive recruitment, it was devoid of public participation, it was illegal and it was null and void. The 2<sup>nd</sup> respondent relied upon **David Kariuki Muigua –Versus- Attorney General and Another Petition No. 161 of 2011**; Article 10 of the Constitution ; and **Trusted Society of Human Rights-Versus- Nakuru Water and Sanitation Service Limited and Another[2013] eKLR** to urge that the claimants’ employment had not been competitive. The court has considered the submission and finds that it was misconceived because this case did not relate to recruitment of public officers. Far from that, it entailed an option, first by serving officers to agree to provide their experienced services to county government, and second, an option by the county government to absorb the officers into their permanent service. The concerned public officers had long time ago before the transitional circumstances been competitively or in accordance with the prevailing laws, been appointed and promoted through their respective ranks in the civil service.

The court has considered that the 2<sup>nd</sup> claimant’s appointment as Clerk required approval by the County Assembly. Section 13 (1) of the County Governments Act, 2012 provides that there shall be a Clerk of the County Assembly, appointed by the County Assembly Service Board with approval of the County Assembly. The court has noted the unique transitional arrangements and further noted that the 2<sup>nd</sup> claimant has continued to serve the assembly as appointed with full knowledge of the assembly. The court finds that by conduct of the assembly, the assembly is deemed to have approved the 2<sup>nd</sup> claimant’s appointment and in reliance on that conduct and the express decision by the County Assembly Service Board, the claimant substantially and irreparably shifted his position by accepting the absorption into the county government’s permanent service and thereby relinquishing his national government employment.

The court has weighed the balance of conveniences and the fairness in the circumstances of the case and finds that the 2<sup>nd</sup> claimant is the duly appointed Clerk of the Baringo County Assembly under section 138 of the County Governments Act, 2012 and the assembly or its service board is stopped from going back on that concluded transitional employment and especially in view of the transitional constitutional and statutory arrangements that formed the basis of the appointment.

In any event, the 2<sup>nd</sup> claimant as the 1<sup>st</sup> Clerk of the County Assembly was appointed under the transitional arrangements in interim capacity long before the appointment of the county assembly service board and then absorbed into permanent service by the board. The court holds that the claimants were

appointed under the transitional arrangements under section 138 of the County Governments Act, 2012 and more specifically subsections (2) and (3) of the Act and the unique appointments were to the benefit of the county government and the best public interest so much so that the historical practical usefulness of the secondment and then the appointments by absorption or confirmation as it was called cannot be erased to the disadvantage of the claimants.

The other collateral issue is the effect of the consent in High Court Petition No.5 of 2014 at Eldoret entered into on 17.02.2014 by the Board and one Stephen Kemei. The court was reluctant to delve into that issue for obvious reasons of jurisdiction. It is sufficient to state here that it was submitted for the 1<sup>st</sup> respondent that the consent order in that case did not have any effect on the lawful employment of the claimants and that the suit was compromised to achieve malicious agenda against the claimants. The court finds that submission by the County Government which consists of the County Assembly and the County Executive to be the overriding position of the County Government in this dispute.

Thus, to answer the 1<sup>st</sup> issue for determination, the court returns that the claimants are lawfully employed in permanent capacity by the Baringo County Service Board in the respective offices they serve in the Baringo County Government, be it in the assembly or the executive.

**Whether the claimants were removed from office by the second respondent, and if yes, whether the removal was lawful and valid**

The 1<sup>st</sup> respondent submitted that the claimants were constructively dismissed on 7.2.2014 and 8.02.2014 respectively when they were prevented from accessing their offices. It was further submitted that the claimants were not accorded any due process and the dismissal was unfair.

For 2<sup>nd</sup> respondent, it was submitted that the Board enjoyed delegated disciplinary powers from the Public Service Commission as per the circular dated 21.02.2014. The claimants, it was submitted for the 2<sup>nd</sup> respondent, had been suspended in accordance with the delegated powers.

The claimants submitted that they were not liable for any misconduct as charged, they had not been dismissed and they were not seeking reinstatement but that they wanted to continue in employment.

The court has considered the evidence and the submissions. First, RW1 was clear in his testimony that his decisions as Speaker were the decisions of the Board. Secondly, RW1 testified that he arranged to help the claimants by releasing the claimants to the Transitional Authority but the Authority upheld the claimants' absorption in the county assembly's service. Thus, he decided not to help them anymore and instead fired the allegations of breach of the public officer code of conduct so as to deal with the claimants. The court finds that the 2<sup>nd</sup> respondent (**RW1**) invoked fictitious authority and made unilateral decisions to deny the claimants their justified employment in the county government.

By his own evidence, RW1 testified that he usurped the authority of the County Service Board as he stated that his decisions as speaker were decisions of the Board. While admitting that the board had not published any regulations, rules or procedures of its business including those for making of human resource decisions, evidence showed that the 2<sup>nd</sup> respondent had authored and conveyed decisions affecting the claimants' employment but without any substantive or procedural authority to do so. Of particular interest, was the letter of 4.02.2014 in which the 2<sup>nd</sup> respondent declared the claimants to be former officers, suggesting in his mind their employment had been terminated, yet there was no board decision that the claimants were no longer employees. By that letter, the court finds that the 2<sup>nd</sup> respondent effectively barred the claimants from performing their duties and thereby prevented them from accessing their offices. RW1 further authored the letters for the alleged contravention of the public officer code of conduct against the claimants and without any evidence of minutes showing the Board's decision in that regard.

The court has considered the circular by the Commission as relied upon in the 2<sup>nd</sup> respondent's submissions. The court finds that the circular provided for the Commission's delegated disciplinary

powers for officers seconded or deployed by the Commission to serve in the county governments. At the time of the offending actions and decisions by the 2<sup>nd</sup> respondent, the court finds that the claimants had long before been absorbed or as it was called, been confirmed, in the permanent service of the county assembly. They were no longer deployed or seconded staff of the Commission and the provisions of the circular did not apply to the claimants.

The court has carefully examined the circumstances of the case and find that the transitional provisions in section 138 of the County Governments Act, 2012 applied to the disciplinary control of the claimants. Subsection 138 (1) (b) is clear that the claimants could not be removed from service except in accordance with the terms and conditions applicable to the claimants as at the date immediately before the establishment of the county government or in accordance with the law applicable to the claimants at the time of commencement of the proceedings for the removal. There is no dispute that at all material time, there was no specific law to guide the county service board in a disciplinary procedure for removal of the claimants from office so that the law as provided in the relevant Public Service Commission Regulations was to apply and the Commission therefore retained residual disciplinary powers for disciplinary control of the claimants (as absorbed into permanent service of the county government and until specific law for that purpose is legislated).

To answer the second issue for determination, the court finds that the claimants were not terminated from employment and the pretended removal from office by the 2<sup>nd</sup> respondent was unlawful, null and void.

While making that finding, the court finds that by RW1's evidence, he made the offending decisions as the speaker and the board was not shown to have made or even ratified the decisions. The court therefore finds that the 2<sup>nd</sup> respondent and not the board was the proper party to the suit.

#### **Whether the claimants are entitled to the remedies as prayed for**

In view of the earlier findings by the court, the court makes the further finding that the claimants are entitled to the following orders:

- a. A declaration that the claimants are legitimate employees of the County Government of Baringo.
- b. A declaration that the 2<sup>nd</sup> respondent's instructions barring the claimants from accessing their respective offices or performing their duties were unlawful.
- c. A declaration that the purported termination of the claimants' employment contract by the 2<sup>nd</sup> respondent was in contravention of the law.
- d. An order that the claimants to continue in employment in their respective capacities as the Chief Finance and Accounting Officer for 1<sup>st</sup> claimant and the Clerk to the County Assembly for the 2<sup>nd</sup> claimant in that order.
- e. An order of permanent injunction barring the respondents jointly and severally from arbitrarily terminating the employment of the claimants.
- f. Costs of the suit.

The court finds that the claimants did not provide evidence and did not urge for damages as prayed and that prayer shall fail.

#### **Whether the 2<sup>nd</sup> respondent is entitled to the remedies as prayed for**

The court has already found that this was not a case of competitive recruitment of public officers but it was a case of open identification, secondment and absorption of the serving public officers to serve the county government within the relevant transitional, constitutional and statutory framework for facilitating,

building capacity and supporting the county governments to take up the devolved functions. The court finds that the case was about protection of the claimants, as public officers with long experience and mandated to provide capacity for realisation of devolved governance, from victimization for performing their respective public office duties and from removal from public office or punishment without the due process of law and as provided for in Article 236 of the Constitution. Accordingly, the prayers in the counterclaim as made will fail.

### **Uniform norms for human resource functions in county government**

A final issue that emerged in this case is whether there existed uniform norms and standards prescribed by legislation to be applied by the County Assembly Service Boards and the County Public Service Boards as envisaged in Article 235 of the Constitution.

The 2<sup>nd</sup> respondent confirmed in his evidence and the 2<sup>nd</sup> claimant also testified that there were no known or published uniform standards or norms that bound the county government and particularly the two service boards established in the County Governments Act, 2012 to be followed in the discharge of the human resource functions. What transpired in the proceedings established that the County Governments Act, 2012 prescribed general provisions applicable to the County Public Service Boards and the County Assembly Service Boards and falling short of the uniform norms and standards as envisaged in Article 235. The mischief as unearthed in this case was that the boards are vested with functions without enabling operational statutory provisions including basic matters such as the procedures for conducting the business of the service boards. The boards, it was established, were not vested with statutory authority to make any subsidiary legislation to guide their business and discharge of their functions. The elaborate provisions of Part VII of the County Governments Act, 2012 on county public service are found not to apply to the County Assembly Service Board with the consequence that the County Assembly Service Board is particularly not enabled by legislation to perform its human resource functions.

Thus, in the instant case, it was obvious that the 2<sup>nd</sup> respondent had made decisions without guidance from any specific applicable human resource standards made for that purpose. The disciplinary action as purportedly initiated by the 2<sup>nd</sup> respondent was not based on any disciplinary regulations and rules. Similarly, if the service boards wanted to recruit, appoint, promote, exercise disciplinary control or retire the officers, there exist no step by step procedures and rules as well as substantive provisions to guide their decision making. This case has established that in absence of such legal provisions, individual players may take initiative that may undermine the purpose for which the service boards were established to serve and with outcomes that disastrously suppress fairness and due process in running of the public service in the counties.

Accordingly, it is the opinion of the court that this judgment will be served upon the Attorney General, the Transitional Authority, the Commission for the Implementation of the Constitution, and the Public Service Commission to take steps towards concluding the relevant legislation under Article 235 of the Constitution.

In conclusion, judgment is entered for the claimants against the respondents and for:

- a. A declaration that the claimants are legitimate employees of the County Government of Baringo.
- b. A declaration that the 2<sup>nd</sup> respondent's instructions barring the claimants from accessing their respective offices or performing their duties were unlawful.
- c. A declaration that the purported termination of the claimants' employment contracts and the purported disciplinary action by the 2<sup>nd</sup> respondent was in contravention of the law.
- d. An order that the claimants to continue in employment in their respective capacities as the Chief Finance and Accounting Officer for 1<sup>st</sup> claimant and the Clerk to the County Assembly for the 2<sup>nd</sup> claimant in that order.

- e. An order of permanent injunction barring the respondents jointly and severally from arbitrarily terminating the employment of the claimants.
- f. The 2<sup>nd</sup> respondent to pay costs of the suit.
- g. The Deputy Registrar to serve this judgment within 7 days upon the Attorney General, the Transitional Authority, the Commission for the Implementation of the Constitution, and the Public Service Commission towards taking priority steps for initiating the relevant legislation under Article 235 of the Constitution.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 4<sup>th</sup> April, 2014**.

**BYRAM ONGAYA**

**JUDGE**