



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

**PETITION NO. 2 OF 2014**

**ELIZABETH NZIZA MASAKU.....PETITIONER**

**- VERSUS -**

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

**-AND-**

**COUNTY ASSEMBLY OF NAKURU.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 13<sup>th</sup> June, 2014)

**JUDGMENT**

The Petitioner **Elizabeth Nziza Masaku** filed the petition on 18.02.2014 through Muthanwa & Company Advocates. The petitioner prayed for:

- a. **A declaration that the action of the county assembly in procuring and giving a report to the county government for action is *ultra vires* on the mandate of the county assembly powers and against the doctrine of separation of powers.**
- b. **The rights of the petitioner under Articles 10(2) (b), 27, 28, 41, 47, 50, 176, 236(b) of the Constitution, 2010 have been breached.**
- c. **The memorandum dated 29.01.2014 amounts to disciplining the petitioner unheard.**
- d. **A permanent injunction against the respondent from acting on the February, 2014 report and the memorandum dated 29.01.2014.**

The 1<sup>st</sup> respondent filed on 26.02.2014, the replying affidavit of Joseph Motari to oppose the petition. The firm of Odhiambo & Odhiambo Advocates acted for the 1<sup>st</sup> respondent.

On 5.03.2014, the 2<sup>nd</sup> respondent filed a notice of withdrawal of advocates and intention to proceed in person. The notice purported to withdraw services of Odhiambo & Odhiambo Advocates but which firm of Advocates had filed on 21.02.2014, a notice of appointment of advocates to act for the 1<sup>st</sup> respondent only. Reflecting upon the 2<sup>nd</sup> respondent's action to file the notice, could be that the 2<sup>nd</sup> respondent, correctly so, conceived the 1<sup>st</sup> respondent to include the County Executive and the County Assembly as the court will revisit the issue later in this judgment. The 2<sup>nd</sup> respondent also filed the replying affidavit of Joseph Malinda, the 2<sup>nd</sup> respondent's clerk. Subsequently, Muriithi Wairimu Advocate appeared for

the 2<sup>nd</sup> respondent in the proceedings.

The 1<sup>st</sup> respondent also filed submissions on 3.03.2014, a notice of motion on 13.03.2014, “**applicant’s written submissions**” on 20.03.2014 and a preliminary objection on 13.05.2014 that the court lacks jurisdiction to entertain this matter as against the petitioner and the 1<sup>st</sup> respondent because there was no employer-employee relationship. To oppose the 1<sup>st</sup> respondent’s application, the petitioner filed her replying affidavit on 04.06.2014.

On 13.3.2014, the court directed parties to file further affidavits within stipulated timelines and to file and serve submissions by 20.03.2014.

The petition being certified as an urgent matter was fixed for hearing on 20.03.2014. On 20.03.2014, the petitioner requested for 30 days and was allowed to file and serve submissions in 14 days. On 13.05.2014, the court directed parties to file their final submissions and to serve by 3.06.2014 for hearing of the submissions’ highlights on 5.06.2014. On the hearing date, only the 2<sup>nd</sup> interested party had filed the submissions. The 1<sup>st</sup> respondent opted to rely and highlight the submissions as previously filed in the suit. The petitioner’s Counsel was absent and the Advocate who held his brief advanced no grounds as to why the final submissions had not been filed. The hearing of highlights proceeded on behalf of the respondents and judgment fixed for 13.06.2014.

The petitioner is a public officer serving in the cadre of procurement officers. She previously served at the Ministry of Youth Affairs at the department of National Youth Service. Her case was that on 25.02.2013, she was seconded by the Permanent Secretary at the Ministry of Finance to the Transitional Authority which in turn deployed her to serve as the Interim Head of County Supply Chain Management at Nakuru County. The deployment letter dated 25.02.2013 addressed to the petitioner stated as follows:

**“DEPLOYMENT AS INTERIM HEAD OF COUNTY SUPPLY CHAIN MANAGEMENT**

**This is to convey the decision of the Public Service of Kenya (PSC(K) vide their letter Ref. No. PSC/ADM/91 dated 25<sup>th</sup> February, 2013 that you be deployed to the Transitional Authority with effect from 12<sup>th</sup> February, 2013 as an Interim Head of County Supply Chain Management. You are therefore deployed to Nakuru County and you should report to the County Commissioner.**

**You will also be responsible for the following amongst other relevant duties... (Set out in the letter i to xviii)**

**Your terms and conditions of service will be as per your current appointment in the Public Service. You will be deployed on temporary basis to the county and will continue drawing your salaries and all other allowances from your current parent Ministries/ Department. However, you will be paid an allowance of Kshs.45,000 (Forty Five Thousand) per month for extra responsibilities given to you.**

**Please signify in writing your acceptance of this deployment within one week from the date of this letter by signing in the space provided below and returning a copy of this letter to the undersigned.**

**On behalf of the Transition Authority Board, I take this opportunity to congratulate you for your new appointment and wish you the best in ushering in the new county government. Due to the urgency of this appointment you are expected to report to the county not later than 27<sup>th</sup> February, 2013.**

**Yours faithfully,**

**Signed**

**STEPHEN MAKORI**

## **SECRETARY/CEO**

The petitioner accepted the deployment by signing in the provided space. The arrangement was that the petitioner was to report to the Chief Officer, Finance.

The petitioner's case is that the County Executive Member for Finance and Planning wrote to the County Secretary an internal memo dated 29/1/2014 advising that the petitioner be taken back to the Transitional Authority. Some of the grounds advanced in the internal memo for the county government not to absorb the petitioner into its service but to be released back to the Authority included:

- a. Alleged delay of over 7 months by the petitioner to implement the instructions of 8.07.2013 by the County Executive Member for Finance and Planning to procure the revenue automation system to help in revenue collection and seal all loopholes to allow optimal collections.
- b. Alleged failure by the petitioner to comply with the instructions of 17.09.2013 by the County Executive Member for Finance and Planning to visit various security printing firms the petitioner had given business to print certain accountable documents resulting in delivery of documents without necessary security features being delivered and distributed for use.
- c. The petitioner disregarded the executive member's memo of 12.09.2013 guiding on the process of automation to allow its conclusion by November, 2013.

The internal memo enumerated several other alleged reasons of poor performance or misconducts on the part of the petitioner and concluded that the petitioner's acts amounted to acts of insubordination that made it difficult for the ministry under the County Executive Member for Finance and Planning to operate. The executive member therefore recommended thus, **"Me and my Chief Officer recommend that Madam, Elizabeth Masaku be taken back to Transitional Authority without further delay."**

The petitioner's case was that the internal memo of 29.01.2014 was meant to redeploy her and amounted to disciplinary action without her being heard. In particular, it was the petitioner's case that she did not report to the executive member but to the Chief Officer for Finance and Planning; the executive member was not her supervisor; the executive member's guidelines in the memo of 12.09.2013 contravened the relevant procurement law; she could not reply the executive member's memos because he was a political head and protocols demanded that she answers to the Chief Finance Officer; and it was unfair to unceremoniously redeploy her back to Transitional Authority with disciplinary connotations in the redeployment.

The petitioner's further case was that the county assembly had taken up the matter and discussed it on the floor of the house chambers and made findings that there was bad blood existing between the Supply Chain Manager and the Executive Member for Finance and Planning; and that the petitioner disregarded correspondence, policies and circulars of county executive member which amounted to insubordination pursuant to Public Finance Management Act, Sections 103(1)(c), 104 (1) and 105(1) (c) (e) and (f). The petitioner's case was that the assembly then recommended that the petitioner should be taken back to the Transitional Authority with immediate effect. The petitioner's further case was that if the assembly's report was implemented as forwarded to the county executive government, it would be unacceptable in law because the assembly would then be running the personnel matters of the county staff contrary to the relevant law. The petitioner urged that the court should stop her redeployment without being heard as it would be unfair disciplinary measure.

The 1<sup>st</sup> respondent's case to oppose the petition was that there was no cause of action against the 1<sup>st</sup> respondent. That the county assembly's report resolved that the petitioner be relieved of her duties forthwith and be released to the Transitional Authority. The 1<sup>st</sup> respondent had not acted on the assembly's recommendations but which had been forwarded to the Governor's office. Further, the 1<sup>st</sup> respondent had statutory power to redeploy the petitioner and the petitioner was answerable to the Chief Officer, Finance and Planning but the Chief Officer exercised delegated powers of the executive member under section 45 (4) of the County Government Act, 2012 so that the executive member was entitled to

sanction the petitioner's redeployment. As the 1<sup>st</sup> respondent had not taken action to redeploy the petitioner, the suit was vexatious, frivolous and scandalous.

The 2<sup>nd</sup> respondent opposed the petition and stated that the petitioner was a public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming into force of the County Government Act, 2012. Further, the petitioner was serving Nakuru County on the date of constituting of the county government of Nakuru so that she is deemed to be in the service of county government on secondment from the national government. The 2<sup>nd</sup> respondent's case was that under the transitional provisions the law deemed the petitioner to be an employee of the county government but on interim and not permanent basis. The 2<sup>nd</sup> respondent urged that the county government was entitled to terminate the petitioner's secondment by releasing her back to national government. The 2<sup>nd</sup> respondent's case was that it was therefore entitled to recommend the release of the petitioner to national government not as a punishment but rather as a means of terminating the secondment. The 2<sup>nd</sup> respondent's further case was that under Article 185 (3), the county assembly was entitled to exercise oversight over the county executive committee and other county executive organs. In the 2<sup>nd</sup> respondent's case, other county executive organs included county public service offices within the realm of the executive arm of government. The 2<sup>nd</sup> respondent, it was stated in the replying affidavit, was therefore entitled to recommend the release of the petitioner back to national government and was cautious not to resolve to actually release her. Finally, the 2<sup>nd</sup> respondent urged that the petitioner did not establish the laws she would have breached if she had proceeded to act in accordance with the executive member's directives.

The court has considered the material on record and the issues for determination are as follows:

- 1. Whether the petitioner was an employee of the respondents.**
- 2. Whether the executive member for finance and planning was entitled to recommend that the petitioner be returned back to the Transitional Authority without further delay.**
- 3. Whether the 2<sup>nd</sup> respondent was entitled to recommend that the petitioner be taken back to the transitional authority with immediate effect.**
- 4. Whether the petitioner is entitled to the remedies as prayed for.**

The 1<sup>st</sup> issue for determination is whether the petitioner was an employee of the respondents. The 2<sup>nd</sup> respondent has been eloquent on this issue thus, that the petitioner was a public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming into force of the County Government Act, 2012. Further, the petitioner was serving Nakuru County on the date of constituting of the county government of Nakuru so that she is deemed to be in the service of county government on secondment from the national government. The 2<sup>nd</sup> respondent's case was that under the transitional provisions, the law deemed the petitioner to be an employee of the county government but on interim and not permanent basis. The court agrees with that line of submission. The court finds that the petitioner was deemed to be an officer of the county government under section 138 of the County Government Act, 2012. Under Article 176 (1) of the Constitution, the county government consists of the county assembly and the county executive. It was submitted for the 1<sup>st</sup> respondent that there was no employer-employee relationship between the 1<sup>st</sup> respondent and the petitioner. The court finds that such submission was misconceived and the court finds that by operation of section 138 of the Act, there existed employment relationship between the claimant and the respondents. To answer the 1<sup>st</sup> question for determination, the court finds that the petitioner was an employee of the respondents. Needless to state, in view of that finding, the court further finds that its jurisdiction over the dispute is obvious.

The 2<sup>nd</sup> issue for determination is whether the executive member for finance and planning was entitled to recommend that the petitioner be returned back to the Transitional Authority without further delay. The

reasons for the executive member's recommendations were alleged misconduct or poor performance on the part of the petitioner. The court says "**alleged**" because there was no due process of notice and hearing as envisaged in section 41 of the Employment Act, 2007 to justify the termination of the petitioner's employment as an interim head of county supply chain management by way of what was called "**...being taken back to the Transitional Authority without further delay.**" In the opinion of the court, all the executive officer was entitled to do was to report the alleged allegations of misconduct to the relevant authority that exercised disciplinary control over the petitioner. As an officer of the Public Service Commission serving the county government on transitional arrangements, the opinion of the court is that the Commission's procedures and regulations for disciplinary control were to apply within the relevant transitional framework that the Commission may have put in place such as imposing or delegating its disciplinary powers to relevant county authority.

In the opinion of the court, such relevant county authority would have been the County Public Service Board in view of the Board's wide human resource powers and functions as specifically provided for in section 59 and generally as provided for under Part VII of the County Government Act, 2012. The court was not shown the transitional disciplinary arrangements the Commission may have instituted to apply to interim officers like the petitioner who essentially were the Commission's officers in the service of the county government. Nevertheless, the court finds that the executive member had allegations of misconduct and poor performance against his officer and which could be resolved one way or the other in a due process by the relevant authority exercising disciplinary control over the petitioner.

The court finds that in the circumstances of this case, the executive member acted to make an adverse finding of the alleged misconducts and poor performance against the petitioner in total disregard of the petitioner's entitlement to fair administrative action under Article 47, due process under Article 50(1), fair labour practices under Article 41(1) and protection of public officers under Article 236 of the Constitution. The court finds that the executive member in that regard acted unconstitutionally in a manner that undermined the petitioner's cited constitutional protections. To answer the 2<sup>nd</sup> issue for determination, the court finds that the executive member for finance and planning was not entitled to recommend that the petitioner be returned back to the Transitional Authority without further delay and the recommendation contravened the petitioner's cited constitutional protections and rights.

The 3<sup>rd</sup> issue for determination is whether the 2<sup>nd</sup> respondent was entitled to recommend that the petitioner be taken back to the Transitional Authority with immediate effect. There is no doubt that the county assembly like any house of representatives in the commonwealth is vested with the functions of representation, legislating and oversight or watchdog as it is commonly called. As submitted for the 2<sup>nd</sup> respondent, Article 185 (3) of the Constitution entitled the county assembly to exercise oversight over the county executive committee and other county executive organs including county public service offices within the realm of the executive arm of county government.

However, in undertaking its oversight functions, the 2<sup>nd</sup> respondent must not out-step its mandate by attempting or actually usurping the constitutional and statutory functions of other authorities. In the opinion of the court, the 2<sup>nd</sup> respondent was bound by Article 10 of the Constitution on the values and principles of national governance. In particular, the 2<sup>nd</sup> respondent was bound to respect and protect the petitioner's constitutional and statutory rights and protections already cited in this judgment. By making a recommendation for the petitioner to be taken back to the Transitional Authority on account of the finding that the petitioner had totally disregarded the executive member's correspondence, policies and circulars, the 2<sup>nd</sup> respondent was essentially making a disciplinary finding and imposing a disciplinary measure by way of recommendation to terminate the petitioner's services in county government through the "**take back.**" In the opinion of the court, the assembly was thereby performing an executive function, namely exercising disciplinary control against the petitioner without constitutional or statutory authority to do so and in breach of the clear constitutional and statutory provisions that vested such disciplinary authority in the Public Service Commission and the County Public Service Board.

In the opinion of the court, the assembly's oversight role entailed ensuring that the authority that exercised disciplinary powers and functions over the petitioner discharged its mandate and it was not for

the assembly, by itself, and in breach of known constitutional and statutory protections of due process, to undertake disciplinary process or make disciplinary findings. Such, in the opinion of the court, was an unconstitutional decision and venture that undermined principles and values of national governance in Article 10 of the Constitution. It was unconstitutional.

Thus, to answer the 3<sup>rd</sup> issue for determination, the court returns that the 2<sup>nd</sup> respondent was not entitled to recommend that the petitioner be taken back to the Transitional Authority with immediate effect as that amounted to undertaking a disciplinary process and finding against the petitioner but which was not vested in the assembly by the constitution or statute.

The 4<sup>th</sup> issue for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The petitioner prayed for a declaration that the action of the county assembly in procuring and giving a report to the county government for action is *ultra vires* on the mandate of the county assembly powers and against the doctrine of separation of powers. The court has found that by making the findings and recommendations against the petitioner as was done, the assembly purported to exercise executive disciplinary powers vested by the constitution and the statutes in the Public Service Commission and the County Public Service Board. Our government is structured into three arms being executive, judicial and legislative and the doctrine of separation of powers obligates each arm not to encroach into the realm of the other arm. To enhance checks and balances, our constitutional and statutory framework establishes independent agencies such as the Public Service Commission and the County Public Service Board whose role and function must be respected to achieve the desired protection of the people against tyranny. In the instant case, the court finds that the 2<sup>nd</sup> respondent walked outside its oversight role and purported to exercise disciplinary control over the petitioner, a function that was vested elsewhere and not in the 2<sup>nd</sup> respondent. The court finds that the petitioner is entitled as prayed.
- b. The petitioner prayed that the rights of the petitioner under Articles 10(2) (b), 27, 28, 41, 47, 50, 176, 236(b) of the Constitution, 2010 have been breached. The court has found the petitioner's rights and protections under Articles 10, 41, 47, 50(1) and 236(b) of the Constitution were contravened and the petitioner is entitled to a declaration accordingly.
- c. The petitioner prayed that the memorandum dated 29.01.2014 amounts to disciplining the petitioner unheard. The court has already found as much and the petitioner is entitled accordingly.
- d. The petitioner prayed for a permanent injunction against the respondent from acting on the February, 2014 report and the memorandum dated 29.01.2014. The court has found that the report and the memorandum offended the petitioner's constitutional and statutory protections and the petitioner is entitled as prayed.

One last issue raised for the 1<sup>st</sup> respondent was that the 1<sup>st</sup> respondent had not acted on the report and memorandum that have been found offensive so that the 1<sup>st</sup> respondent was not a proper party to the suit. The 1<sup>st</sup> respondent is the county government of Nakuru. The court has already found that under Article 176 (1) of the Constitution, the county government consists of the county assembly and the county executive. It is obvious that the actions of the assembly and the executive member for finance and planning were properly the actions of the 1<sup>st</sup> respondent. The court finds that the 1<sup>st</sup> respondent was therefore a proper party to the petition. The court further finds that the petitioner's prayer for a permanent injunction makes it clear that the petitioner knew that as at filing of the suit, the 1<sup>st</sup> respondent had not acted upon the offensive report by the assembly and the memorandum by the executive member. In the opinion of the court, that the 1<sup>st</sup> respondent had not acted aids the prayer for injunction and makes the 1<sup>st</sup> respondent a proper party, the subject of the injunctive relief.

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

1. **The declaration that the action of the county assembly in procuring a finding of misconduct or poor performance against the petitioner and giving a recommendation in its report to terminate the petitioner's services through the petitioner being taken back to the Transitional Authority from the county government was *ultra vires* the mandate of the county assembly powers and against the doctrine of separation of powers.**
2. **The declaration that the rights of the petitioner under Articles 10(2) (b), 41, 47, 50(1), 236 of the Constitution, 2010 have been contravened.**
3. **The declaration that the memorandum dated 29.01.2014 by the county executive member for finance and planning amounted to disciplining the petitioner unheard.**
4. **There shall be a permanent injunction against the respondents from acting on the 2<sup>nd</sup> respondent's February, 2014 report and the memorandum dated 29.01.2014 by the county executive member for finance and planning.**
5. **The respondents to pay the petitioner's costs of the suit.**

**Signed, dated and delivered in court at Nakuru this Friday 13<sup>th</sup> June, 2014.**

**BYRAM ONGAYA**

**JUDGE**