



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 81/2014

(Before Hon. Justice Hellen Wasilwa on 31st July, 2014)

EVANS KAIGA INYANGALA 1ST CLAIMANT

ELMANUS ANGALUKI VODOTI 2ND CLAIMANT

NEWTON JOHN OKWIYA 3RD CLAIMANT

-VERSUS-

COUNTY GOVERNMENT OF VIHIGA

& 2 OTHERS RESPONDENTS

RULING

The application before court is the one dated 15.4.2014. The application was filed under certificate of urgency through the firm of Wesonga Wamalwa and Associates. It was filed through chamber summons (under the Judicature Act Cap 8, The High Court (Practice & Procedure Rules (Part 1 rule 3) and all other enabling rules. The application is based on the grounds that:-

1. **On 10th April 2014, the claimants obtained termination letter from the 2nd respondent.**
2. **The 2nd respondent was compelled to do the termination letter by the Vihiga County Assembly presided over by the 1st respondent.**
3. **That the said County Assembly failed to provide a clear and fair hearing to the claimants prior to compelling the 2nd respondent to issue the termination letter.**
4. **The 1st and 2nd respondent have already began formalities of replacing the claimants herein.**
5. **The applicants now urgently requires an order of this court to stay such actions of the respondents pending determination of this application.**

The application was supported by the supporting affidavit of **Keith Wesonga** the claimants advocate herein.

The applicants submitted that this court has powers under S. 12(3) (iii) of Industrial Court Act 2011 to order for reinstatement. They also want the respondents restrained from replacing the claimants and that the claimants should continue receiving their salaries pending hearing of this suit. In support of the prayer for reinstatement, the applicants contend that this court can order reinstatement. They cited **Prof. Gitile J. Naituli VS Multi Media University College & Another – Industrial Court of Kenya at Nairobi Case No. 1200 of 2012** to submit that they have established a *prima facie* case to warrant being granted orders sought.

The applicants also contend that their rights under Article 47 of the Constitution have been breached by reason that they were not subjected to fair administrative action. It is claimants contention that on 25.3.2014 is when they learnt that they should appear before the Committee. They appeared on 28.3.2014 and informed the Committee that they needed to prepare for their defence. They were given upto 30.3.2014 a Sunday to make their submissions. On the day of hearing they met with 2 witnesses to give evidence against them without prior notification of allegations against them.

On 31.3.2014, the County Assembly met and voted to send them home and the 2nd respondent issued termination letters to them. The claimants submitted that the action taken against them was administratively unfair. They were employees of the respondents and cannot get alternative employment. They asked court to reinstate them or at most treat them as though on interdiction with half pay.

They also want the court to order respondents not to replace them as this would render the suit nugatory. They also cited the **Industrial Court of Kenya at Kisumu, Cause No. 182/2013 Timothy Omolo & 79 Others Vs Kakamega County Government & Another** where the court made similar orders in similar circumstances. The applicants also submitted before this court that the replying affidavit filed before this court was drawn and filed by Legal Department Vihiga County Government an entity unknown in law for which this court in a previous ruling had directed should be amended within 7 days. To-date the respondents have not corrected the mistake.

The respondents opposed this application. They filed their replying affidavit sworn by **James Oyundi Mukabi**, Legal Counsel employed in the County Government of Vihiga on 12.6.2014.

It is their contention that the appointment of County Executive members is strictly governed by the Constitution and the County Government Act and not the Industrial Court Act and it's regulations. They further content that in exercise of their powers under the Constitution and County Government Act, the respondents properly relieved the claimants of their respective offices. They further contend that the orders sought will greatly hamper the performance of the County Government as the vacant membership has to be filled for effective discharge of the County Government functions. They further submit that to reinstate the claimants would be grossly prejudicial to the County Government operations as the claimants cannot discharge their functions as County Executive Committee Members without the good will of the County Assembly which is to approve their departments development plan and budgets. It is therefore their submission that the orders are against public good, policy and order.

Having considered the submissions of the parties, the issues for determination are as follows:-

- 1. Whether the pleadings in form of replying affidavit drawn and filed by Legal Department County Government of Vihiga are properly before court.**
- 2. Whether the claimants were subjected to due process before being terminated.**
- 3. Whether this court can order for prayers being sought.**

On the 1st issue, this court made a ruling on the form of pleadings expected in court in it's ruling dated 15.7.2014. In that ruling, the court directed that the respondents amend their pleadings to indicate the name of the advocate appearing for the respondents. The court observed that to have pleadings drawn by Legal Department County Government of Vihiga was vague and against provisions of the Advocates Act which requires that the identity of an advocate if any appearing for a client must be known to prevent unqualified persons filing pleadings as advocates. I then directed that the respondents must then amend their pleadings within 7 days from 15.7.2014 to show the correct position. The respondents have not complied with that directive to-date and the replying affidavit they are relying on sworn by **James Oyundi Mukabi** dated 12.6.2012 is still drawn and filed by Legal Department Vihiga County Government.

The applicants have submitted that the said affidavit be struck out as the respondents have not complied with the court's directive. The respondents have in answer replied that that is a matter of form and not substantive justice and their omission should be disregarded. The 1st time the applicants raised

this omission was when they raised a preliminary objection in the 1st instance to the pleadings on the file. I made a ruling to have the same corrected in and did not strike out respondents pleadings. It was for the reason that the court's main objective is to realize ends of justice. However, the respondents cannot keep making the same submission when this court had made a ruling on it. To rely on their submission that the omission should be ignored is to tell this court that they do not care the least as to the directive of this court even after their omission was ignored by the court and they were ordered to correct it.

In the circumstances, it is this court's finding that the affidavit sworn by **James Oyundi Mukabi** and drawn and filed by Legal Department Vihiga County Government is a document filed by an improper entity and I proceed to strike it out of the file. This in effect means that the respondents did not file any documents to oppose the application on the file. They proceeded to file their submissions though which this court will consider.

On the second issue, is the process through which the claimants were subjected to. On 27.3.2014 the claimants were served with summon to appear under Article 195(1) of Constitution and S. 40(v) of the County Government Act No. 17 of 2012. The County Assembly's allegation against the claimants were incompetence, abuse of office and gross misconduct. They were expected to appear before the Committee on 28th March 2014 at 9 am. From the affidavit of the claimants, they appeared and requested for time to prepare and defend themselves and were only given upto 30th March to appear on a Sunday. On 31.3.2014, the report of the Committee was presented to the County Assembly who voted to terminate the services of the claimants. On 9.4.2014, the claimants were dismissed. The claimants contend that they were not subjected to due process as they were not accorded enough time to prepare and defend themselves. Their contention is further supported by their contention that they were forced to appear before the County Committee on a Sunday to answer to the charges levelled against them and they do not understand the urgency that made the County Committee summon them for hearing on a Sunday.

The respondents in their submissions have submitted that they adhered to procedure as set out under S. 40 of the County Government Act.

S. 40(3) of the County Government Act states that:-

“If a motion under subsection (2) is supported by at least one 3rd of the members of the County Assembly -

(a) the County Assembly shall appoint a select Committee comprising five of it's 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 Members to be substantiated.”

It is apparent from the reading of this provision that it is the finding of the select Committee which should be submitted to the County Assembly within ten days. The process of investigation can take a longer period. The law never intended that a member under investigation should be gagged up and forced to present his defence in a record 2 days. The claimants stated that they were not ready to appear and give their defence on 28.3.2014. they were only given an extra 2 days upto 30.3.2014 to appear and give their side of their story. The urgency within which these proceedings were carried out smirks of mischief and when the claimants contend that they were not given adequate time to prepare themselves that stands out to be true. Further, to be subjected to a hearing on a Sunday was even more telling given that Article 196(1) of the Constitution provides that:-

“ A County Assembly shall;

(a) Conduct it's business in an open manner and hold it's sittings and those of it's committees in public and,

(b) Facilitate public participation and involvement in it's legislature and other business of the Assembly and it's Committees.”

To hold a meeting of a County Committee on a Sunday is tantamount to conducting the business of the committee in an unopen manner and meant to exclude public participation. The contention therefore that due process was not followed in the hearing accorded to the claimants is therefore true and this court finds it so.

The last issue is on remedies sought by the applicants. The applicants want this court to order them to be reinstated in their former positions pending the hearing and determination of this suit. The Industrial Court indeed can order for reinstatement of a dismissed employee. This is provided for under S. 12(3) (vii) of the Industrial Court Act 2011.

However, in determining whether reinstatement can be ordered, this court falls back on S. 49(4) of the Employment Act which provides for parameters that courts should consider before ordering for reinstatement.

Upon considering the provision of S. 49(4) of Employment Act 2007, I find it impracticable to order reinstatement at this stage given circumstances under which the termination took place.

I decline to order for reinstatement as this should only be granted in exceptional circumstances and upon consideration of all the circumstances. At an interlocutory stage it will be difficult to order reinstatement as this court has not been seized of all facts pertaining to the termination and it is unsafe to order for the reinstatement. This was the same finding in the case of *Zakoya Kagombe Nderi Vs Kenya National Chamber of Commerce Industry.*

The only remedy I grant the claimants is to order that the respondents be and are hereby restrained from advertising, interviewing and filling the positions/portfolios previously held by the claimants pending hearing and determination of this suit.

Since the claimants have already been dismissed, to order that they be allowed to receive their salary and benefits is not tenable as they are capable of being compensated in damages if reinstatement or any other order is ordered in the future.

These are the orders of this court.

HELLEN WASILWA

JUDGE

31/7/2014

Appearances:-

Osabwa h/b for Wesonga for 1st claimant present

Osabwa for 2nd & 3rd claimants present

Musiega for respondents

CC. Wamache