



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 103 OF 2014

BETWEEN

1. TOM LUUSA MUNYASYA
2. JOHN KENNEDY MUTETI..... CLAIMANTS

VERSUS

1. GOVERNOR, MAKUENI COUNTY
2. COUNTY GOVERNMENT OF MAKUENI..... RESPONDENTS

Rika J

CC. Edward Kidemi

Mr. Musyoka and Ms. Githogori, instructed by Kounah & Company Advocates for the Claimants

Mr. Nyamu and Mr. Kitonga SC, instructed by Nyamu & Nyamu Advocates for the Respondents

RULING

1. The Respondents filed an Amended Statement of Response dated 10th July 2014, in which they challenge the jurisdiction of the Industrial Court to hear and determine this dispute. Under paragraphs 22, 23 and 24 of the Amended Statement, the Respondents aver:-

- a. **The Constitution of Kenya creates a pure Presidential System of Government, and under Article 132, confers upon the President the power to appoint Cabinet Secretaries and Principal Secretaries;**
- b. **This Article recognizes the fact that these Officers are political appointees, subject to the politics of the Country and the policies of the President and/or his Political Party;**
- c. **This formulation is replicated at County Government level and any enabling legislation is required to respect and conform to the same;**
- d. **To the extent that Section 40, 44, and 45 and other relevant provisions of the County Governments Act 2012 do not respect and conform to the said Presidential System of**

government formulation, they contravene the letter, intent, context, spirit and tenor of the Constitution and they are therefore unconstitutional, null and void *ab initio*;

- e. In consequence, the dismissal of the Claimants was lawful and proper and in accordance with the Constitution of Kenya, and their reliance on the County Governments Act 2012 and other provisions is misconceived and without constitutional validity; and,**
- f. By virtue of the premises aforesaid, the Employment Act 2007 and other Labour Statutes have no application to the subject matter hereof *and this Court has no jurisdiction to entertain the Claim.***

2. The 1st Claimant was employed by the 1st Respondent as Executive Committee Member ICT and Special Programmes. The 2nd Claimant was employed as the County Secretary. Both were Members of the County Executive Committee, the equivalent of the Cabinet in the National Government. The appointments were announced by the CEO Governor Kivutha Kibwana, through gazette notices dated 10th May 2013.

3. The Claimants' services were terminated through letters of termination issued by the Governor, dated 28th January 2014. Termination was based on alleged acts of gross misconduct.

4. They approached the Court seeking the Court to find that termination was illegal and unlawful; the 1st Respondent be compelled to rescind termination; or, the Claimants be paid service pay, damages for unlawful termination, and costs of the Claim.

5. The Parties had earlier appeared before Hon. Mbaru J, on an application in which the Claimants sought an order, restraining the Respondents from terminating their services. The question whether the Employment Act 2007 applied to the Claimants' terms and conditions of service was raised, and a finding made that yes, it does. The Court concluded that the substantive law governing all Employees is the Employment Act 2007. The Respondents nonetheless amended their Statement of Response, raising this jurisdictional challenge, in which the argument is expanded beyond the applicability of the Employment Act 2007, to the incongruence of the County Governments Act 2012, and the prerogative of Governors, like the President, to hire and fire his appointees.

6. The Parties agreed before the Court to file Submissions on the Preliminary Objection. The matter was deemed urgent enough by the Court, and the Learned Advocates were allowed to underscore their Submissions, during the Court vacation, on the 21st August 2014.

7. Mr. Nzamba Kitonga, Senior Counsel submits that the Objection is necessitated by a question of the constitutionality of the Claim. It is a question which needs to be addressed. The Claim is based on Sections 40, 44 and 45 of the County Governments Act 2012. It is also based on the Employment Act 2007. These laws, which relate to the powers of the Governor to hire and fire County Executive Committee Members and the County Secretary, are in serious conflict with the pure Presidential System of Government.

8. These Officers are the equivalent of Cabinet Secretaries and Principal Secretaries in the National Government. Article 132 of the Constitution gives the President the power to hire and fire Cabinet Secretaries and Principal Secretaries at any time. The President has no obligation to give reasons for his decision. The President is not called to justify termination of his Executives' services, on grounds such as their involvement in acts of gross misconduct, or engagement in criminal activities. The President can just wake up one morning and fire. He enjoys the mandate of the People.

9. The Cabinet Secretaries and Principal Secretaries were unknown when brought in to serve as Executives. There are reasons in constitutional thinking for this: the President may wish to reorganize the Government to bring in talent; the President may wish to achieve regional balance; or the Cabinet Secretaries or Principal Secretaries may become disloyal to the President, necessitating the President

removes them. The President must therefore have the discretion to fire.

10. The Constitution left it for Parliament to legislate, to enable Counties have their own structures. Legislation must reflect similar principles at both levels. The system of appointing Executives at both levels resonates. This should be the case in firing of the Executives. County and National Systems must be similar. The particular provisions of the County Governments Act 2012, contradict the pure Presidential System.

11. The Governor, like the President has the People's mandate. The legislations upon which this Claim is based, are saying no, even if these Officers are disloyal, the Governor is stuck with them. The Respondents rely on the ***High Court of Kenya at Nairobi Petition No. 16 of 2011 between Centre for Rights Education and Awareness [CREAW] and 7 Others v. the Attorney General [2011] e-KLR [Hon. Musinga, JJ]*** in persuading the Court to observe Article 259 of the Constitution of Kenya, and apply the Constitution holistically. On the unconstitutionality of the two legislations relating to the Claim, the Respondents direct the attention of the Court to the holding of the ***High Court at Nairobi Petition No. 227 of 2013 as consolidated with [Petition Nos. 281 of 2013 and 282 of 2013] between Okiya Omtata and Others v. The National Assembly the Republic of Kenya and Others [2014] e-KLR, [Hon. Lenaola, Ngugi and Korir JJ]***, in which the National Assembly Remuneration Act Cap 5 was declared unconstitutional. The Industrial Court would be within its mandate to declare the provisions of the County Governments Act 2012 upon which the Claimants' termination of services was based, unconstitutional. The Employment Act 2007 has no application and the law which must supersede all else, is the Constitution of Kenya.

12. Mr. Kitonga submits that the Ruling made earlier by Hon. Mbaru J in this Cause was on entirely different submissions. The Response had not been amended. The pure Presidential System was not cited. This is the first time the incongruence of the County Governments Act 2012, vis-a-vis a pure Presidential System, has been raised. It is an important determination, which would guide the President and the Governors on their mandates. The decisions relied on by the Claimants, the Respondents submit, are not applicable in this case as they relate to Employees of County Public Service Boards, not County Executives as the Claimants were.

13. In associating himself with the submissions by Mr. Kitonga, Mr. Nyamu adds that the Industrial Court has the same status as the High Court of Kenya under Article 162 of the Constitution of Kenya. It has the jurisdiction to interpret the Constitution. It is not inhibited from doing so, as urged by the Claimants.

14. The County Governor, just like the President, may dismiss a County Executive Member without having to justify the decision, on reasons such as gross misconduct. The 48 County Governments work in collaboration with the National Government. Procedures in appointment and dismissal of Executives should be the same at the two levels. The County Governments Act 2012 is contradictory in that it acknowledges the Governor's power to dismiss, and then subjects such power to the principles regulating termination of employment.

15. Public Officers are placed under the County Public Service Boards. Executives are not in this category. Section 76 of the County Governments Act 2012 invoked by the Claimants in arguing they were entitled to the rules of natural justice before termination, should only apply to appointees of the County Public Service Boards. Executives such as the Claimants are appointed by the Governor under a political power. They have to enjoy the confidence of the Governor, in meeting electoral ideals. The 2nd Claimant served as the County Secretary. He was an appointee of the Governor. He served under the instructions of the Governor. He served as the Secretary to the County Public Service Board, and could pre-exist this Board. He was the equivalent of Secretary to the Cabinet in the National Government. The Court has the jurisdiction to declare legislation inconsistent with the Constitution. The Claimants were not even interviewed; they were employed directly by the Governor. He should have the sole mandate to fire. Mr. Nyamu submits that the decisions relied on by the Claimants in responding to the Preliminary Objection are from the Industrial Court; they are only of persuasive value and do not bind the Court. This Court has the legal and moral obligation to build jurisprudence. The Respondents pray the Court to uphold the

Objection.

16. Ms. Githogori submits the arguments made by the Respondents in the Preliminary Objection, were raised by the Respondents in the interlocutory application before Judge Mbaru, and a determination made on some of the issues. The Employment Act 2007 was found to apply to the Claimants as a primary legislation.

17. The Respondents base their Objection on the pleasure doctrine. Public Officers held their positions at the pleasure of the Queen. This was the position under the condemned Constitution of Kenya. It no longer is, under the Constitution promulgated in 2010. Article 236 protects Public Officers from unfair and unlawful termination. The pleasure doctrine has been replaced with the due process doctrine. This was the conclusion of the *Industrial Court of Kenya in Petition No. 4 of 2014 between Geoffrey Asanyo v. Nakuru Water and Sanitation Services Company and 6 Others [2014] e-KLR* and *Industrial Court of Kenya Petition No 1 of 2014 between Richard Bwogo Birir v. Narok County Government [2014] e-KLR [both Hon. Ongaya J]* and *Industrial of Kenya Petition No. 11 of 2014 between Nick Githinji Ndichu v. Clerk Kiambu County Assembly [2014] e-KLR [Hon. Nduma JJ]*. The thread, running through these recent decisions of the Industrial Court, is that Public Officers are without exception, entitled to due process under Article 236 of the Constitution. The pleasure doctrine, no longer defines this employer-employee relationship.

18. The Claimants submit it would be improper for them to delve into the issue of the pure Presidential System, as the right forum for canvassing such an issue, would be at the Constitutional Division of the High Court. The provisions of the County Governments Act, whose constitutional validity is questioned by the Respondents, are still in place; they have not been declared unconstitutional. The applicability of the Employment Act 2007 has been made clear by the Industrial Court in the above decisions. The law is not concerned with whether a person is elected or appointed. All that the Court should look at is whether the person has a written or oral contract; whether he is providing services; and whether he is receiving a wage or salary for those services.

19. The Claimants are properly before the Court. Their remedies are to be found in the Employment Act 2007 and the Industrial Court Act 2011. The Claimants were appointed by the Governor through an Advisory Committee. In supplementing these submissions, Mr. Musyoka argues that the Constitution of Kenya places sovereignty in the People, not the President. Sovereign power is exercised at both the County and National level. The Respondents rely on the same Act of Parliament which they are disputing, in arguing on the powers of the Governor to appoint. They are selective in challenging the constitutionality of legislation. The Claimants pray the Court to dismiss the Preliminary Objection, and allow them to prosecute the Claim on merits, on an accelerated basis, considering they came to Court under certificate of urgency.

20. The Court understands the issues to be:-

- a. **Do County Governors have the prerogative to hire and fire Members of the County Executive Committee, in the same way the President at the National level, has the prerogative to hire and fire Cabinet Secretaries and Principal Secretaries?**
- b. **Is the Employment Act 2007 applicable in determining the terms and conditions of Employment of Members of the County Executive Committee?**
- c. **Is the County Government Act 2012, on the firing of Members of the County Executive Committee inconsistent with the pure Presidential System?**
- d) **Does the Industrial Court have jurisdiction to hear and determine this dispute?**

21. The first question calls for a background check of the doctrine of pleasure. Under the English Public Employment law, Civil Servants were historically appointed through the royal prerogative. It was by virtue of the royal prerogative, not legislation, that the Crown had the authority to appoint, and determine

the terms and conditions of employment of Civil Servants, and to dismiss such Employees at pleasure.

22. Civil Servants were treated differently, because of the authority by which they were employed. They were not deemed to have contracts of employment. They could not sue to recover unpaid wages, and could be dismissed at pleasure. They were treated at common law as a special category of Employees, dismissible at any time at the discretion of the Crown.

23. The Compendium *Harvey on Industrial Relations and Employment Law [1996]* explains that, ‘historically one of the privileges of the Crown was immunity from suit. The King, could not be impleaded before his own Court, therefore, in the eyes of the Courts, the King could do no wrong. The King’s servant could never sue him in contract [or otherwise], and therefore, in practice, and probably in theory, the Crown servant was regarded as having no contract. In particular, he was only employed during the good pleasure of the Crown, and could never sue for wrongful dismissal.’”

24. This position has metamorphosed, and the relationship between the Crown, and a majority of cadres of Civil Servants, moved in the direction of private, rather than public law. Judicial precedents, particularly those that determined prerogative writs are not appropriate remedies in employment relationships, and Legislation such as the English Employment Rights Act of 1996, did away with the unfavourable legal treatment to which most Civil Servants were exposed to, under the royal prerogative. Corporate values became ingrained in the public sphere, with Governments embracing private sector similes, methods and values. Most Civil Servants now have access to protections against unfair termination, can pursue non-discrimination suits and join trade unions. They have the benefit of collective representation and enjoy labour contracts.

25. In Kenya the pleasure doctrine was predominant both in public and private sector employment relationships. The Employment Act Cap 226 the Laws of Kenya, and most of the Public Service Codes recognized the pleasure doctrine, which was also characterized as employment at-the-will of the Employer. Employers could fire for good cause, bad cause or no cause at all.

26. The *High Court of Kenya in the case of Menginya Salim Murgani v. Kenya Revenue Authority [2008] e-KLR* and the Court of Appeal decision, overturning that of the High Court, *Court of Kenya Appeal No. 108 of 2010 Kenya Revenue Authority v. Menginya Salim Murgani*, sharply capture the doctrinal tension between the concept of employment at –will / pleasure of the Employer, and the concept of fair termination.

27. The High Court adopted the approach which had been long articulated in the Awards of the Industrial Court, which was that Employers had an obligation to give their Employees a fair hearing before termination. The Industrial Court based its jurisprudence on Section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya. The High Court imported, and applied, Section 77 of the former Constitution of Kenya which granted the right of a fair hearing. The High Court also relied on the tort of misfeasance in public office, in availing remedies beyond notice pay, to Menginya. The Court of Appeal, in overturning the decision of the High Court, appears to have reverted to the doctrine of employment at will. It upheld a long chain of decisions from the Civil Courts which, have since been overtaken by the Employment Act 2007, that the only obligation an Employer had on termination, was to issue written notice to the Employee, or pay salary in lieu of notice. The Court of Appeal nevertheless pointed out that there should be no distinction between public and private employment contracts, which in itself, was an important recognition of the move into the era of contractual model, as opposed to the *ancien’ regime* relationship of ‘status’ or the royal prerogative.

28. The current legal framework in employer-employee relationship in Kenya has endorsed the due process doctrine as submitted by the Claimants. This is so in both private and public sectors. The Labour Reforms of 2007/ 2008, which resulted from the Cockar Task Force of 2001, did away with the pleasure doctrine. The Employment Act 2007 expressly codified the concept of unfair termination, which had gradually crept in our employment law through Section 15 of the Trade Disputes Act 234, and through a succession of Industrial Court decisions. The due process doctrine was finally entrenched in the Constitution of Kenya 2010, under such Articles as 41, 47, 50 and 236. This is not to say however, that

the concept of due process applies without exception, or that employment at pleasure, is completely absent from all employment relationships. Cabinet Secretaries and Members of the County Executive Committees are not employed by the Public Service Commission/ County Public Service Boards. They are employed by the President and the Governor respectively, to assist in the fulfillment of political mandates.

29. The creation of Counties as devolved units of Government under the Constitution of Kenya, has, as seen in this preliminary objection introduced fresh questions, on the relationship between Public Officers and the Governments which employ them. As the Court understands it, the structure of the National Government is replicated at the County level. The CEO at the National level, in the Corporation that is the State, is the President. At County level, his reincarnation is the Governor. The principles and structures at the two levels, under Chapter 9 and 12 of the Constitution basically espouse a pure Presidential System.

30. The President and his Deputy are popularly elected, as is the Governor and his Deputy under the Constitution. These are political offices, discharging political mandates, and accountable to the electorate. These CEOs and their Deputies may be removed from Office through the mechanism of impeachment, initiated by Members of the respective Legislative Assemblies, culminating in a vote in the Senate on whether they should cease holding office.

31. To enable them pursue implementation of the policies sold to the electorate at the ballot, the elected CEOs are granted the discretion, in appointing the persons to execute these policies. The National President appoints Cabinet Secretaries with the approval of the National Assembly, while the Governor appoints Members of the County Executive Committee with the approval of the County Assembly. Under Article 152 [5] of the Constitution, the President may re-assign a Cabinet Secretary; dismiss a Cabinet Secretary; and shall dismiss such a Cabinet Secretary if required to do so, under the National Assembly procedures contained in Article 152 [6] to 152 [10]. He is not required by any law, to justify his decision. Under Article 154 [2] [b] the President has the discretion to dismiss the Secretary to the Cabinet without assigning reasons for the decision.

32. Section 31 [a] of the County Governments Act 2012, allows the Governor to dismiss a Member of the County Executive Committee, like the President is allowed to dismiss Cabinet Secretaries under Article 152 [5], if the Governor considers it appropriate or necessary to do so. He is not required under this law, to justify his decision. The Governor shall also dismiss a Member of the County Executive Committee under Section 31 [b], if required to do so by a resolution of the County Assembly made under Section 40 of the Act.

33. The resolution of the County Assembly under Section 40 is made following investigations of a Special Committee of the County Assembly into particular allegations, as set out under Section 40 [1]. This procedure is similar to that of the National Assembly under Article 152 [6] to 152 [10]. The involvement of the respective Assemblies is to ensure the Member of the Executive is availed procedural justice as well as substantive justice and avoid the possibility of innocent Officers falling victim to political lynching and hounding out of Office. At the same time, the Assembly mechanisms serve as a check on the CEO, in that he does not appoint and retain unproductive Members of the Executive, as the people helplessly watch.

34. This Court is of the view that the Members of the Executive at both National and County levels are political appointees, whose assumption of, tenure, and removal from office, hinges on the political mandate granted to the appointing Authorities by the People. The President and the Governor have the prerogative in dismissing their Members of the Executive whenever they deem it appropriate or necessary to do so. Secondly, they must dismiss such Members if valid resolutions, made by the National or County Assemblies are made. The two processes are political processes, which cannot be challenged under the unfair termination law contained in the Employment Act 2007 and other Labour Legislations, which extend jurisdiction to the Industrial Court. The Constitution itself does not contemplate that Cabinet Secretaries, who are removed from Office by the President under Article 152 [5], could sue the President disputing their removal. County Executive Committee Members similarly, cannot validly challenge the

decision of the Governor to remove them under Section 31 [a] of the County Governments Act 2012. The President and the Governor retain the prerogative. The pleasure doctrine has been preserved, with respect to these special categories of Employees. Removal of Cabinet Secretaries or Members of the County Executive Committees, whether by the CEOs or through the respective Assemblies, cannot be treated as Claims for unlawful and unfair termination, which are remediable under the contract of employment, or the Employment Act 2007, at the Industrial Court of Kenya.

35. It would seem to this Court that the finding of the Hon. Principal Judge Nderi Nduma in *Petition Number 11 of 2014 between Nick Githinji Ndichu v. Clerk Kiambu County Assembly and Another*, that the law does not concern itself with whether a person was elected or appointed, needs to be robustly debated in the context of emerging labour and employment issues, relating to the pure Presidential System. If the term 'Employee' is applied to all elective or appointive positions, and the Employment Act applied unqualifiedly to all 'Employees,' we could see Cabinet Secretaries and Members of Parliament, seeking redress at the Industrial Court upon being removed from Office by the President or by the People, seeking compensation or even reinstatement. We need to be clear on the scope and application of the Employment Act 2007. The Cabinet Secretaries, as well as their equivalent in the County Assemblies, the Members of the Executive Committee, are a special category of Employees. They are appointees of elected Chief Executive Officers, discharging a political mandate. The CEO must have a free hand in meeting political considerations such as regional balancing, or precisely, getting his ethnic arithmetic right, and other considerations such as retention of political loyalty, and professionalism. This requires he has a substantial degree of latitude in managing his labour force. The appointees of the President and the Governor must be fully compliant to the wishes of the President and the Governor. They cannot sue their Employer at the Industrial Court for unfair termination. These are political appointees, who properly are, Employees of the People. Their Employers are only Trustees of the People, exercising sovereignty which belongs to the People. Removal is through the unquestionable prerogative of the Trustee, or through the Representatives of the People.

36. The Members of the National and County Executives do not have an ordinary contract of service. The President and the Governor are given the prerogative to dismiss them, whenever they deem it appropriate or necessary. The Constitution and the County Government Act 2012 have given the President and the Governor a prerogative in dealing with their Executive Employees, much similar to the royal prerogative enjoyed by the Monarch in dealing with Public Servants, before the era the contractual model.

37. The Employment Act 2007 recognizes that it cannot possibly apply to all employment relationships, and defines the scope of its application, under Section 3 which excludes certain Employees such as Members of the Disciplined Forces, and Employers and their dependants, where the dependants are the only Employees in a family undertaking. Under Section 3 [5] the Minister for Labour may, upon consulting the National Labour Board, by order exclude from the application of all, or part of the Act, categories of employed persons, whose terms and conditions of employment are governed by special arrangements: provided those arrangements afford protection that is equivalent or better than that part of the Act, from which those categories are being excluded. This Court is of the view that Members of the County Executive Committees as well as Cabinet Secretaries have a special employment relationship, calling for exclusion from the application of the Employment Act 2007.

38. The Claimants were not employed by the County Public Service Board. County Public Service under the Act excludes the Governor, his Deputy, County Executive Committee Members and County Assembly Members. These are State Officers, whose procedures in removal from Office must be distinguished from those of Public Servants. Section 76 of the County Governments Act 2012, covers Officers employed by the County Public Service Board. It states no Public Officer shall be punished in a manner contrary to any provision of the Law or the Constitution. Like Article 236 of the Constitution, this law seeks to strengthen the protections afforded to Public Officers against wrongful removal from Office; it does not intend to limit the prerogative of the Chief Executive Officer in acting against his appointees. The Public Officers referred to under Section 76 must be understood to be the Employees of the County Public Service Board, not Members of the County Executive Committee, who are State Officers, working completely at the pleasure of the County Governor.

39. Article 236 of the Constitution protects Public Officers as a whole from victimization and discrimination for having discharged their functions in accordance with the Law and the Constitution. It also protects Public Officers from removal from Office, demotion or otherwise subjected to other disciplinary action without due process. In the view of the Court this Article was meant to strengthen the procedural guarantees available to Public Officers in termination processes, contained in the various Service Codes. It was not intended to take away the prerogative of the Governor, and the President is dismissing their Cabinet Secretaries and Members of the Executive Committees. Otherwise the laws which grant the respective CEOs the power to remove their appointees when they deem it appropriate or necessary, would have no meaning. An interpretation of Article 236, which would require the Governor or the President to give reasons, or impose other procedural requirements such as required under the Employment Act 2007, in demoting, removing or subjecting their Executive appointees to disciplinary sanctions, would negate the prerogative of the Governor and the President in running their Cabinets. This would infringe the tenets of pure Presidential System at both levels of government. Cabinet Secretaries at National Level, and Members of the Executive Committee at County Level, cannot bring Claims against the Crown for unfair or unlawful dismissal, whether removal is through the prerogative of the President /Governor, or that of the respective Assemblies. These Officers serve at the pleasure of their appointing Authority.

40. Due process is traditionally understood to comprise notice to the affected party about the intended adverse action; the right to grieve, which entails the right to complain or disagree with the decision; and the right to appeal. It is analogous to concepts such as natural justice, procedural justice, and the broad concept of the rule of law. How will the Governments operate if the Governor and the President have to issue notices before taking action against wayward appointees, allow these appointees the right to grieve, and the right to appeal against removal from Office? Why should Cabinet Secretaries be allowed the right to grieve, or appeal against their sacking? For the Governor and the President to discharge the mandate given by the People, they must retain some form of the royal prerogative. They employ their Members of the Executive at will. Article 236 needs therefore to be read as part of an integrated, whole, of the Constitution, which does not place unreasonable conditions on the President and the Governor in exercise of their prerogatives. If the Court reads Article 236 of the Constitution, and Section 76 of the County Governments Act 2012, as imposing the obligation of due process on the President and the Governor in dismissal of Cabinet Secretaries, Principal Secretaries and Members of the Executive Committee, the consequences would be absurd, and the fundamental principle of a pure Presidential System would be violated. As stated in *the High Court at Nairobi Petition No. 16 of 2011 between CREAM and Others v. the Attorney General*, the Constitution must be read holistically, in a manner that preserves its fundamental principles.

41. The Court is not able to agree with the Respondents that Section 40 of the County Governments Act is a distraction, departure, and negation of the pure Presidential System. This law is in fact, a faithful reflection of the procedure of removal of Cabinet Secretaries at the National Level, under Article 152 [6] to 152 [10]; it strengthens rather than weakens, the pure Presidential System. It does not take away anything given to the Governor under Section 31. Section 31 [a] makes it clear that the Governor may take unilateral action against Members of the Executive Committee, “*despite Section 40.*” Section 44 [c] of the County Governments Act 2012 subjects the removal of the County Secretary to the terms and conditions of appointment. This in the view of the Court has the potential to limit the prerogative of the Governor through contract, in the removal of the County Secretary. It is inconsistent with the pure Presidential System. The President at the National Level is not restricted by contract, in removing the Secretary to the Cabinet, a man whose name the Respondents gave to be Mr. Kinyua. Article 154 [2] [b] places unfettered power in the hands of the President in dismissing the Secretary to the Cabinet. The Constitution would supersede any contractual arrangements limiting the Governor. The Court does not think however, that the Governor is denied his prerogative by Section 44 [c], as he would determine the terms and conditions of appointment of the County Secretary. He is not prohibited from including the prerogative clause in any terms and conditions of appointment. This is therefore an inconsistent law, which can be read down, and has no material effect on the prerogative of the Governor, in removing his Members of the Executive Committee.

42. The answer to the first question must in the respectful view of this Court be, that the Governors have

the same prerogative to hire and fire their Members of the Executive, as the President possesses at the National level. The pure Presidential System confers them with such mandates. They are not limited by the demands of the Employment Act 2007 in doing so, or by Article 236, and Section 76 of the County Governments Act 2012, on due process. They are answerable to the people who elected them. Cabinet Secretaries and Principal Secretaries at the National Level, and Members of the Executive Committees such as the Claimants at the County Level, are subject to the full control and direction of their appointing Authorities. They assist their Principals in discharge of a political mandate. They qualify the tag of 'Employees' under Section 2 of the Employment Act 2007, but are a special category of Employees, deserving exclusion such as contained under Section 3 of the Employment Act 2007. In the absence of such exclusion, the spirit, letter, intention, purpose of the Constitution must prevail. They cannot claim under the Employment Act 2007. In the case of ***of Inland Revenue Commissioners v. Hambrook [1956] 1 All E.R. 807*** the Court declined a claim for damages brought by the Employee for damages against the Crown for loss of employment. Lord Goddard held that there was no master-servant relationship between the Crown and its Employee. In the Canadian case of ***Reilly v. the King [1934] 1 D.L.R 434***, the Officer petitioned the Court for damages against the Crown, after his Office was abolished. The Court held that the relationship might be contractual, but that if so, the contract must be subject to an implied term that the Crown can dismiss the Officer at pleasure. This position prevails in Kenya today, in relation to the exercise of executive power by the President and the Governor, on removal of the Members of their Cabinets. The prerogative has been preserved under the Constitution and the County Governments Act 2012. ***Leo Blair, in 'The Civil Servant- Political Reality and Legal Myth', [1958] Pub. L. 32*** suggests Executive Employees such as Cabinet Secretaries and Members of the County Executive Committees can be considered 'status' Employees, whose terms and conditions of work are not generally a matter of contract. He acknowledges the difficulty posed by the term 'status,' but concludes that the contract approach confuses issues because of the need to import such contractual terms as 'unenforceable' 'unilateral' and 'implied term' and so on. These subterfuges would be unnecessary, if it was accepted the relationship between the Crown and its Executive Officers is one of status, Blair argues.

43. The answer to the question, whether the Employment Act 2007 applies to Members of the County Executive Committees, must therefore be that it does not. This is a category of special Employees, in special employment relationships who, like Cabinet Secretaries at National level cannot just pop up in Court on dismissal, allege they were unfairly terminated, and seek reinstatement or compensation. The President and the Governor cannot be asked to issue these Officers notice of termination, or pay salaries in lieu of notice. The prayer for service pay made by the two Members of the Executive Committee is misplaced. The Court cannot intervene in their removal. They cannot sue the Crown. They hold office at the pleasure of the Governor. The President and the Governor enjoy a residue of the royal prerogative, which cannot be done away with, without imperiling the functioning of the pure Presidential System. While the Court endorses the argument by the Claimants, that pleasure doctrine is as dead as a dodo, it must also embrace the paradox that in so far as the relationship between the County and National CEOs, and their appointed Executive Officers is concerned, the King lives. Article 143 protects the President from criminal and civil proceedings during his tenure, so that in relation to the exercise of his prerogative in dismissal of Cabinet Secretaries, it would not be possible to bring such proceedings against the President. This Article protects the prerogative of the President. In an ideal pure Presidential System, Governors should enjoy some degree of protection from civil and criminal legal proceedings. This would ensure they concentrate on executing their roles, and are not hauled to Court by their appointees, when they remove such appointees from Office.

44. The answer to the third question is that Section 40 of the County Governments Act 2012 is consistent with the Constitution and the pure Presidential System. Section 44 [c] which creates the potential for limiting the prerogative of the Governor, is inconsistent with the Constitution, but this inconsistency has no effect on the prerogative of the Governor created under Section 31 [a] of the County Governments Act 2012. Section 76 which refers to natural justice, appears to this Court directed at Employees of the County Public Service Boards. It is not relevant to Members of County Executive. The Court does not think it should interfere with this law in the way invited to by the Respondents. This law does not have the distractive effect on the pure Presidential System, as argued by the Respondents, and can be read down. It does not render inoperable the principle of a pure Presidential System.

45. The last question is on the jurisdiction of the Industrial Court to hear and determine this dispute. This was a little bit confusing as both Parties appeared to challenge the jurisdiction of the Court, at various turns. There are two aspects to the question of jurisdiction. The first is raised by the Respondents. If the Court finds that Governors have the unfettered discretion in hiring and firing Members of the County Executive Committee, it must declare it no longer has any issues left for trial, and decline jurisdiction. The second question was suggested by the Claimants, which is that the Industrial Court does not have jurisdiction to rule on the constitutional validity of statutes.

46. In the ***Supreme Court of Kenya Application No. 2 of 2011, involving Samuel Kamau Macharia and v. KCB and Others [2012] e-KLR***, it was held that jurisdiction flows either from the Constitution or Legislation, or both. The Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred by the law. It must not expand its limits through judicial craft or innovation. This pronouncement was preceded by the decision of the ***Court of Appeal of Kenya in the Owner of Motor Vessel Lillian ‘S’ v. Caltex Oil Kenya Limited [1989] KLR***, where it was held that that without jurisdiction the Court has no power to make one more step.

47. The jurisdiction of the Industrial Court in interpreting the Law and the Constitution in all matters touching on employment was reaffirmed in the ***High Court Case of United States International University [USIU] v. the Attorney General [2013] e-KLR*** and the ***Court of Appeal at Nairobi Appeal No. 6 of 2012 between Prof. Daniel Mugendi v. Kenyatta University and 3 Others***. There is no doubt in the mind of the Court that it has jurisdiction in ruling on the constitutional consistency of the provisions of the County Governments Act 2012, relating to the removal of the County Executive Committee Members. The Industrial Court is created under the Industrial Court Act 2011, pursuant to Article 162 [2] of the Constitution, and has the status of the High Court. Jurisdiction flows from this constitutional fountain, and from Section 12 of the Industrial Court Act, as well as Section 87 [2] of the Employment Act 2007. The Court has the full power to adjudicate on constitutionality of legislation which touches on labour and employment disputes.

48. The second question is whether there would be anything left for trial, if the Court finds the Governor is not limited by the Employment Act 2007, and exercised his prerogative appropriately, in removing the two Members of his Cabinet. The Court is satisfied the Claimants were removed from Office in accordance with the Law and the Constitution, which create a pure Presidential System. The Employment Act 2007 which grants Employees notice, notice pay, service pay, reinstatement or compensation such as are sought by the Claimants, among other employment rights, has no application to the Claimants. By reason of politics and public policy, the President and County Governor should not be, and are not bound to employ Members of their Cabinets, otherwise than at pleasure. Although these Employees are not ‘status’ Employees, there is a strong reason to view them as working under special contracts, contracts which carry in them an implied term, that the Officers are dismissible at any time, at the will of the Crown. The President and the Governor exercise their roles as popularly elected CEOs. They exercise a sovereign power which belongs to the People under Article 1 of the Constitution, as submitted by the Claimants. ***Dr. Saul J. Frankel, in ‘Staff Relations in the Public Service; the Ghost of Sovereignty’ [1959], 2 Can Pub Admin, 65, 67***, states “*the People as Sovereign may hold their Civil Servants in virtual bondage-recruit them by conscription and maintain them in monastic isolation...*” The Claimants cannot question the People’s sovereignty. There are certain deprivations which go with service to the Crown, and which cannot be seen as unfair Labour Practices. It is accepted there is a prerogative of management in Crown employment. It is a prerogative that has been preserved in the Constitution and the County Governments Act 2012, and which can be distinguished from the managerial prerogative in respect to employment in the private sector, and in a large portion of the public sector. Whether looked at from the standpoint of the law, or the contract, the relationship between the Claimants and their Governor Professor Kivutha Kibwana, was terminable through the prerogative of the Governor, without assigning reason, and without recourse for the Claimants to the Employment Act 2007. The record indicates the Governor did not in fact, act capriciously, if due process required he does not, having investigated allegations against the Claimants, and given specific grounds for termination. This process of investigation and justification of the decision, were not legally necessary in light of the prerogative intended to be enjoyed by the Governor. The Court agrees that the President and the Governor could

wake up in the morning and announce dismissal of their entire Members of the Cabinet, without exposure to claims of unfair removal from Office. If they are erratic and irrational in deciding so, they answer to the People, not to the Court. The pure Presidential System does not distinguish between the prerogative of the President and that of the Governor. There is nothing left for the Court to adjudicate, and the Court must respectfully, down its tools and decline further jurisdiction in this dispute. The Court Orders:-

[a] The preliminary objection is sustained, to the extent stated in this ruling.

[b] The Employment Act 2007 has no application in the removal of County Executive Committee Members.

[c] The County Governments Act 2012 is not in material departure from the pure Presidential System.

[d] The Claim is hereby struck out with no order on the costs.

Dated and delivered at Nairobi this 17th day of September 2014

James Rika

Judge