



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**PETITION NO. 43 OF 2014**  
**RULING**  
**RICHARD MUIMO PARSITAU**  
**VERSUS**  
**KAJIADO COUNTY GOVERNMENT & 2 OTHERS**  
**DELIVERED BY**  
**HON. LADY JUSTICE MAUREEN ONYANGO**  
**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**PETITION NO.43 OF 2014**

**RICHARD MUIMO PARSITAU .....PETITIONER**

**VERSUS**

**KAJIADO COUNTY GOVERNMENT ... 1<sup>ST</sup> RESPONDENT**

**HIS EXCELLENCY THE GOVERNOR**

**KAJIADO TOWN .....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Petitioner herein filed a petition dated 24<sup>th</sup> June 2014 seeking the following orders:

- a. A declaration to issue to declare that the removal and dismissal of the petitioner as the Executive Committee Member in charge of Lands, Physical Planning, Environment, Natural Resources and Wildlife vide the 2<sup>nd</sup> Respondent's letter dated 16<sup>th</sup> June 2014 is unconstitutional and therefore unlawful on account of violation of Sections 31 and 40 of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and Section 41 of the Employment Act.

- b. An order of certiorari to issue to bring into the Honourable Court for purposes of being quashed the decision of the 2<sup>nd</sup> Respondent removing and dismissing the petitioner as the Executive Committee Member in charge of Lands, Physical Planning, Environment, Natural Resources and Wildlife vide the 2<sup>nd</sup> Respondent's letter dated 16<sup>th</sup> June 2014 for being in contravention of Sections 31 and 40 of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and Section 41 of the Employment Act.
- c. A declaration to issue to declare that under Sections 31 and 40 of County Governments Act 2012 as read with Article 236 of the Constitution the Petitioner remains the lawful holder of the position of the Executive Committee Member in charge of Lands, Physical Planning, Environment, Natural Resources and Wildlife of the County Government of Kajiado.
- d. The Honourable Court to find and uphold that the decisions, actions and omissions of the 2<sup>nd</sup> Respondent in respect of the removal and dismissal of petitioner from his position constitute conduct that violates Articles 10, 41 and 236 of the Constitution.
- e. The Honourable Court to be pleased to order for compensation to issue for violation of the Petitioner's rights.
- f. The Petitioner to be paid costs.

The Petition was supported by the Petitioner's affidavit sworn on the same date.

Together with the Petition, the Petitioner filed a Notice of Motion seeking the following orders:

1. **THAT** this application be certified urgent and heard immediately or as the Honourable Court may deem fit and that service thereof be dispensed with in the first instance.
2. **THAT** pending the hearing and determination of this application this Honourable Court do issue an injunction restraining the Respondents whether by themselves, their agents, servants, employees or whomsoever from undertaking any exercise in as far as advertisement, recruitment or appointment to fill in the position of Executive Committee Member for Lands, Physical Planning, Environment, Natural Resources and Wildlife pending the hearing and determination of inter-parties hearing of this Application.
3. **THAT** the Respondents especially the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be compelled to re-instate forthwith the Applicant to his office and to perform his functions as Executive Committee Member for Lands, Physical Planning, Environment, Natural Resources and Wildlife.
4. **THAT** pending the hearing and determination of this Application the Honourable Court do issue an injunction restraining the Respondents whether by themselves, their agents, servants, employees or whomsoever from undertaking any exercise in as far as advertisement, recruitment or appointment to fill in the position of Executive Committee Member for Lands, Physical Planning, Environment, Natural Resources and Wildlife pending the hearing and determination of this Petition.

The Petition first came for hearing before me as duty Judge on 25<sup>th</sup> June 2014 when I issued the following interim orders:

1. **THAT** the Application be and is hereby certified as urgent.
2. **THAT** the Status quo be maintained pending inter- parties hearing of this application.
3. **THAT** the Application is fixed for hearing inter parties on 7<sup>th</sup> day of July, 2014.

4. **THAT** Applicant to serve the application on Respondent forthwith.

The parties thereafter appeared in court for inter-parties hearing on 7<sup>th</sup>, 16<sup>th</sup>, and 22<sup>nd</sup> July, 2014 for hearing of the application when for one reason or another the hearing was adjourned at the request of one of the parties. On 30<sup>th</sup> September 2014 the parties appeared before me for highlighting of submissions following directions on 22<sup>nd</sup> July 2014 to the parties to file written submissions to fast track the application. The parties informed the court on that day that they would rely entirely on their written submissions as filed in court.

Besides the affidavit filed in support of the Notice of Motion on 25<sup>th</sup> June 2014, the Petitioner filed a further affidavit on 21<sup>st</sup> July 2014 and a further list of documents on 31<sup>st</sup> July, 2014.

The Respondents filed a replying affidavit of Dr. Kennedy Ole Kerei, the Secretary County Government sworn on 15<sup>th</sup> July 2014 and filed in court on 16<sup>th</sup> July 2014. Dr. Ole Kerei filed another replying affidavit sworn on 25<sup>th</sup> September and filed in court on 26<sup>th</sup> September 2014 together with 1<sup>st</sup> and 2<sup>nd</sup> Respondents list of authorities and undated written submissions.

The facts emerging from the affidavits and submission, which are undisputed, are that the Petitioner/Applicant was employed by the 1<sup>st</sup> Respondent by letter of appointment dated 15<sup>th</sup> July 2013 as member of County Executive Committee in charge of Lands, Physical Planning, Environment, Natural Resources and Wildlife. He was dismissed on 16<sup>th</sup> June 2014 by the Governor, the 2<sup>nd</sup> Respondent herein. Before he was dismissed, he was suspended by letter dated 17<sup>th</sup> January 2014 and issued with a letter of Notice to show cause why he should not be dismissed from employment dated 9<sup>th</sup> June 2014. The Petitioner responded to the Notice to show cause by his letter dated 12<sup>th</sup> June 2014.

The grounds for suspension and subsequent dismissal was that the Petitioner had without consultation with the office of the Governor and the Executive, written a letter to authorize the transfer of land parcel reference number KAJIADO/NTASHRT/5. That by so doing he misled public officers and the general public. He was further accused of withholding information from the office of the Governor that could have stopped the illegal transfer of the land in question.

In the letter of notice to show cause the Petitioner was informed that preliminary investigations pointed that he played both a direct and indirect role in the fraudulent transfer of the land from the County Government to individuals.

The notice to show cause further stated that investigations **“alluded to the fact that you may have inadvertently erred due to lack of experience, I find this to be inexcusable as the relevant laws applicable to this situation were always at your disposal. In any case, ignorance of law is no defence. The unauthorized, unilateral and excessive action on your part placed the County Government into an embarrassing and expensive situation. This amounts to abuse of office and a clear contravention of Article 179 (6) which clearly stipulates that *“members of a county executive committee are accountable to the County Governor for the performance of their functions and exercise of their powers.”* Furthermore, without consultation with my office or the Executive Committee, you deliberately contravened provisions of Article 63(4) of the constitution thus compelling the county government to defend the suit filed in court to protect both its interest and that of the community. Further, your acts of commission and or omission in handling this matter have clearly contravened Articles 73 and 75 of Chapter six of the Constitution and Section 34(a) of the County Government’s Act among other relevant laws and logical practice”**.

The Petitioner was required to respond by 12<sup>th</sup> June 2014. In his 4 page response to the notice to show cause the Petitioner stated that he issued a letter of no objection based on information given to him by the Member of Parliament but withdrew the letter as soon as he learnt that the Member of Parliament had given him false information. He further stated that due to his quick action the land was not transferred, that he had personally followed up the matter with both the National Land Commission and the Ngong

Land Registrar and carried out a search which confirmed that the land is intact and in the name of Olkejuado County Council, the 1<sup>st</sup> Respondent's predecessor. He thereafter received the letter of dismissal dated 16<sup>th</sup> June, 2014. The letter of dismissal reads as follows:

**COUNTY GOVERNMENT OF KAJIADO**

**OFFICE OF THE GOVERNOR**

P.O. Box 11

KAJIADO

Date: 16<sup>th</sup> June 2014

Our Ref: CGK/EXEC/CONF/DISCIPLINARY MATTERS/1/VOL.1/4

Dear Richard

**RE: DISMISSAL**

Further to my letter to your reference CGK/EXEC/CONF/DISCIPLINARY MATTERS/1/VOL.1/2 dated 17<sup>th</sup> January, 2014, on the Olosho Oiborr issue regarding the fraudulent transfer of land parcel No. KJD/NTASHART/5, and the response you wrote to me dated 12<sup>th</sup> of June, 2014.

I have considered all the available relevant factors and found that the buck stopped at your office regarding the matter. The letters you signed as the person responsible for the docket bear me witness. The most blatant of them was the transfer form dated 25<sup>th</sup> of November 2013 where you not only signed as the transferor (for the county Government) but you also affixed your passport photograph. You abused your office, ignored advice, and caused embarrassment to the government. You have even caused the government financial loss as we have to defend the Count Government's interest in a court of law, just to mention a few of the problems you caused. As a result of that, I do hereby relieve you of your duties as a County Executive committee Member. This letter takes effect immediately.

Sincerely,

H.E David K. Ole Nkedianye, PhD

**GOVERNOR**

It is against this background that the Petitioner filed the petition and the notice of motion before me for consideration.

The Petitioner alleges that the transfer documents alleged to have been signed by him bear his forged signature and that he was cleared by the divisional Criminal Investigations Officer, Kajiado North who in a letter dated 26<sup>th</sup> March 2014 stated that the Petitioner had "*demonstrated his innocence in the whole saga by revoking his letter CGK/DG/LANDS /02/VOL.1/13 dated 20/11/2013 of no objection if the subject parcel of land is reverted to the community by indicating that the County Government of Kajiado has no intention of transferring any of the parcel of land to either to the community, a registered trust, individuals or anybody else and the same should not be interfered with but remain in its original state in the hands of the County Government of Kajiado and managed by the national Land Commission. Accordingly they are not criminally liable for any act or omission they did in the course of their capacity in good faith for the benefit of the community*".

The Petitioner submits that even after being cleared by the Criminal Investigations Officer the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents dismissed him on 16<sup>th</sup> June 2014. He further submits that on 10<sup>th</sup> June 2014 the Petitioner was summoned and appeared before the Kajiado County Assembly Ad-Hoc Committee which after interrogation cleared him and recommended that:

- i. *The two suspended CECM be reinstated to their positions with immediate effect. However, they are advised that in future, they should be cautious and exercise due diligence on matters touching on land as the same has been invaded by fraudsters who can go to any lengths to scheme in order to arrive at their desired end.*
- ii. *The CECMs be further trained on public management policies, rules and regulations to familiarize themselves with the same.*

The Petitioner further submitted that his counterpart in charge of Roads, Public Works and Energy who was cleared by the same Ad-Hoc committee was reinstated but he was discriminated by not being reinstated. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents infringed his rights under Articles 2(4), 3, 41(1) and (2), 47, 50, 20(1), 10(2), 21(1), 27, 28, 232, 235(1) and 236 of the Constitution.

The Petitioner further submitted that Sections 31 and 40 (1) of the County Government Act 2012 are invalid for contravention of the Constitution and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to apply the rules of natural justice. The Petitioner also submitted that the Respondent's action was taken without authority of the law, was against the findings and recommendations of various authorities/bodies which cleared him and were therefore unlawful.

The Petitioner prayed that his application dated 24<sup>th</sup> June 2014 together with the Petition dated 24<sup>th</sup> June 2014 be allowed as prayed with costs.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents objected to the application. The 3<sup>rd</sup> Respondent took a non-partisan position and did not file any pleadings or submissions.

In both the replying affidavits and the submissions, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioner was appointed by the Governor in exercise of his powers as C.E.O of the County Government. The actions carried out by the county Government were all within the confines of the legal framework governing administration and management of county affairs as contemplated under the Constitution of Kenya 2010. Reading through all the documents supplied by the Petitioner and Respondents a few things are clear. The Petitioner did commence the process of transferring land that was held by the County Government without following the right channels.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioner conveniently failed to be accountable to the 2<sup>nd</sup> Respondent contrary to the provisions in his employment contract as well as contrary to the county Government Act and the Constitution. The report by the ad-hoc Committee admitted that the suspended CEC's needed to learn policy, a direct admission that the Petitioner had acted incompetently and without following procedure. The same report did recommend further investigation on the matter and the prosecution of the accomplices of the two people to whom the land was transferred to. The 2<sup>nd</sup> Respondent acted on the report did further investigation and it was crystal clear the Petitioner was an accomplice in the fraud deal, that saw the county loose revenue and land and fail in his duty to protect the rights of the citizens of that county.

They submitted that the Petitioner was appointed by the 2<sup>nd</sup> Respondent and ought to have been reporting to the 2<sup>nd</sup> Respondent and not the Area Member of Parliament. The letter of appointment clearly stated that the Petitioner "...is not at liberty to differ from the County Government decisions neither are you at liberty to announce major policy decisions without having put the matter in question before the Executive Committee. If however the matter is one of extreme urgency, then such announcement of police must first be cleared with the Governor...".

That the Petitioner commenced the process that saw illegal transfer of almost 800 acres of community land to individuals. That the Petitioner wrote the letter of no objection without performing due diligence nor informing his appointing authority.

That the assertion by the Petitioner that he tried to stop the transfer is neither here nor there especially based on the fact that the act he purports to have wanted to stop had already happened. The law clearly stipulates that a person holding public office and serving the people should be a competent person with integrity and the Petitioner fails this test miserably. The events all leading to the illegal transfer of land and violation of the right of the community to whom it belonged was a result of the gross misconduct, incompetency, and mishandling by the Petitioner.

That the Petitioner admitted to having commenced that process without consulting and without carrying out due diligence. The Employment Act and in particular Section 4(c) and (e) provides grounds for which an employee can be terminated summarily and the Petitioner's conduct falls under acts that constitute gross misconduct.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further submitted that Section 29 of the County Government Act provides ...” Members of the County Executive committee are individually and collectively accountable to the governor in the exercise of their powers and performance of their duties and responsibilities. Section 40 of the County Government Act gives the grounds under which a county Executive Member may be removed from office which include:-

- i. Incompetency
- ii. Abuse of office
- iii. Gross misconduct
- iv. Gross violation of the Constitution or any other law inter alia

Section 31 of the County Government Act confers authority upon the Governor to dismiss a County Executive committee member if he considers it appropriate or necessary to do so.

That based on the above and on the fact that the Petitioner had indeed demonstrated he lacked competency in handling the sensitive docket he was in charge of, the Governor had absolutely no reason to keep the Petitioner in that position and risk having more illegal and corrupt deals occur and put the county Government in a precarious situation.

The 1<sup>st</sup> Respondent referred to the following authorities:

Honourable Justice Rika in his ruling in **Tom Luusa Munyasya & another v Governor Makueni County & 2 others (2014) eKLR** clearly explained how the Governors exercise their powers in appointing and dismissing County Executives. In part he stated ***County Executives are not Public Servants but appointees of the Executive hired at will just like the President, Governors enjoy the sovereign power which belong to the people of Kenya by dint of Article 1 of the Constitution through the vote***’.

The 2<sup>nd</sup> Respondent acted squarely within the powers conferred upon him by the supreme law of the land.

**In Industrial Court Number 1200 of 2012**

**Professor Gitile vs University council Multi Media University College & another**

Court on refusing to grant temporary injunction against the employer states ***“the Employment Act does not intend that Courts take away Managerial prerogative from employers. To give interim order would***

***be to stifle the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the employment Act which is meant to protect the weaker of the bargaining partners not deprive the employer power to run its business altogether.***

**In *Salmat B. Oguye vs K.N.T.C.A No. 125 of 1995* the Court of Appeal stated that “*the courts do not order reinstatement in such cases because such an order would be difficult to enforce, besides, it is pliantly wrong to impulse an employee who has fallen out of favour with the reluctant employer*”.**

The same view was held by the ***Court of Appeal in Civil Appeal 63 of 2007 Michimikumi Tea Factory vs Geoffrey Kithela Kanaa*** in which the Court stated that “***The appellant who was the employer in the instant case has shown displeasure with the respondent and had lost confidence with the respondent. The appellant opted to exercise its right of termination of the contract between itself and the respondent. Whenever there were good reason or none, an employer cannot be forced or compelled to retain services of an employee who it has no confidence in...***”.

In ***Sergean vs Paul (1949) E.A.C.A*** the court was held that “one, the granting or refusal of a temporary injunction which is an interlocutory order is an exercise of judicial discretion which must be exercised judiciously. Two, the purpose of a temporary injunction is to preserve the status quo. Three, conditions well in East Africa before the order can be granted include:-

- a. An applicant must show a prima facie case with a probability of success.
- b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages

Section 49 (3) of the Employment Act provides that Courts in deciding in reinstatement must take into account the following:-

- a. Wishes of the employer
- b. ....
- c. The practicably of recommending reinstatement or re-engagement
- d. The common law of principle that there should be no order for specific performance in contract for service except in very exceptional circumstances.

Inter alia

In petition 39 of 2013 Gladys Boss Shollei vs Judicial Service Commission in the Industrial Court of Kenya at Nairobi held inter alias that though it may be unnecessary to derive into the issue of balance of convenience in view of the Court’s finding above, it is opportune to note that the office of the Chief Registrar of the Judiciary plays the role of head of judiciary administration and accounting functions. It is in public interest that the office which is critical to the functioning of the judicial arm of Government does not remain vacant. That is where the balance of convenience falls with regard to this matter.

It was submitted that the petitioner had not demonstrated that he would suffer any irreparable loss if the orders sought were not granted. That the burden of the vacant position has been shouldered by other Executive committee Members who are completely over worked and unable to fulfill all the duties of the vacant office.

I have considered the pleadings, the written submissions and the authorities relied upon by the parties.

At this juncture, I only have to decide on whether or not the Petitioner is entitled to the prayers in the notice of motion dated 24<sup>th</sup> June and filed in court on 25<sup>th</sup> June 2014. Only prayers 3, 4, and 5 of the Notice of Motion are pending for determination as prayers 1 and 2 are spent. The issues for determination are therefore whether the applicant has demonstrated that he deserves the orders of injunction to restrain then Respondents from advertising, recruiting, appointing or filling the position previously held by the claimant as Executive Committee Member for Lands, Physical Planning,

Environment, Natural Resources and Wildlife pending the hearing and determination of his petition and secondly, reinstatement of the Applicant to his office as above.

I will first consider the issue of injunction.

The Industrial Court Act gives this court powers to grant temporary injunction for ends of justice to be met. Before an applicant can be granted an injunction he must meet the conditions set in the case of *Giella V. Cassman Brown & Company Ltd* (1973) EA 358.

The conditions are that first, the applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will normally not be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if in doubt, the court will decide an application on the balance of convenience.

In the present case the applicant alleges that his constitutional rights were infringed. He alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to observe natural justice. It is further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to comply with recommendations of the Ad-Hoc Committee and that it discriminated against the Petitioner as the Roads, Public works and Energy Executive Committee Member was reinstated following recommendations of the Ad-Hoc committee but the Petitioner was not.

The Respondents did not deny these specific allegations. There is no evidence that the Petitioner was given a hearing by the 1<sup>st</sup> Respondent before the dismissal. He was never involved or given a copy of the investigation report that is said to have found him guilty. Section 41 of the employment Act requires that an employee be given a hearing before his employment is terminated. Natural justice and fair administrative active also require that a person is given a fair hearing before adverse action is taken against him.

The foregoing point to the fact that the Petitioner has a prima facie case with high chances of success.

Having found that the applicant has a prima facie case, I have to consider if he can be compensated by damages. In the Petition, the Petitioner seeks an order of certiorari to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dismissing him from service. Should the orders be granted, the applicant would go back to occupy the position from which he has been dismissed. It is therefore important to preserve the position until the petition is heard and determined. If the position is not preserved he will not be able to go back to work should he be successful.

For the foregoing reasons I hereby issue an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from filling the position of Executive Committee Member for Lands, Physical Planning, Environment, Natural Resources and Wildlife pending the hearing and determination of the petition.

The second prayer is for re-instatement of the applicant to his office.

This court has had to address this issue on several occasions and the general view is that courts are reluctant to issue orders of reinstatement at interlocutory stage of hearings. Section 49(3) of the Employment Act as read together with Section 12(3) (vii) of the Industrial Court Act, 2011 gave this court powers to re-instate an employee only after reaching a conclusion that the employee was unfairly terminated and considering the other factors under Section 49(4) of the Employment Act. This can only be done after a full hearing of the case. Again this is the effect of the substantive prayer of the Petitioner. In the case of *Joab Mehta Oudia V. Coffee Development Board of Trustees* (2014) eKLR, Justice Rika stated that "Reinstatement of an employee is ordinarily given after the full hearing of the parties". In the case of *Muslims for Human rights (MUHURI) & 2 others V. Attorney General & 2 others* (2011) eKLR Justice Ibrahim (as he then was) stated that courts must be careful not to reach final conclusions and make final findings when dealing with a matter as an interim prayer.

For the foregoing reasons I think to reinstate the Petitioner at this stage would result in granting final

orders at an interlocutory stage of a hearing, a situation that would make nonsense of the full hearing.

For these reasons I decline to grant orders for reinstatement of the Applicant pending the hearing and determination of the petition herein.

The upshot is that the court grants the Applicant only prayer 4 of the application. The costs of the application will be in the cause.

Delivered and Dated in open court this 13<sup>th</sup> day of October, 2014.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

Kwamboka for Petitioner

Ms. Muigai for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

No appearance for 3<sup>rd</sup> Respondent