



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

JUDICIAL REVIEW NO. 106 OF 2014

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 16TH OCTOBER, 2014)

MERITA AKINYI OMBUOR APPLICANT

-VERSUS-

THE COUNTY GOVERNMENT OF KISUMU RESPONDENTS

R U L I N G

The applicant Merita Akinyi Ombuor filed an application before the High Court at Nairobi on 17.4.2014 seeking leave to apply for an order of certiorari to bring to court to quash the decision of the 1st and 2nd respondents issued on 1st April 2014 terminating the applicant's contract of employment as Chief Officer – Public Relations, Marketing and Change Management of Kisumu County.

The application was allowed by **Hon. J. Odunga** who further directed that the matter be placed before the Industrial Court for hearing with the leave granted operating as stay. Following the leave granted to the applicants, they filed their application through a Notice of Motion dated 9th May, 2014 and filed on 23.5.2014 before this court. The Notice of Motion is brought pursuant to Order 53 Rule 1(3) of the Civil Procedure Rules Cap 21 Laws of Kenya. The applicants seek orders :-

1. **That pursuant to an order dated 17.4.2014 issued by Hon. Mr. Justice Odunga granting leave to the applicant to apply for an order of certiorari, the applicant is hereby granted an order of certiorari to quash the decision of the 1st and 2nd respondents issued on 1st April 2014 terminating the applicant's contract of employment as Chief Officer – Public Relations, marketing and Change Management of Kisumu County.**
2. **That the costs of this suit be awarded to the applicant.**

The application is based on the following grounds:-

1. **That the applicant was granted leave by this Honourable court pursuant to an order dated 17th April 2014 issued by Hon. Mr. Justice Odunga to apply for an Order of Certiorari.**
2. **That the 1st respondent exercised powers which he does not possess and acted *ultra vires*.**
3. **That the 1st and 2nd respondents having no authority to terminate the applicant's employment contract, issued a letter dated 1st April 2014 having the effect of irregularly, illegally and unfairly terminating the applicant's employment.**
4. **That the 1st and 2nd respondents violated the applicant's right to a fair administrative action and fair hearing by resorting to draconian and humiliating disciplinary action in total disregard to laid down procedure and in total violation of Sections 56 and 59 of the County Government Act no. 17 of 2012.**
5. **That the 1st and 2nd respondents in arriving at its decision issued on the 1st April 2014 was**

- a contravention of the fundamental principles of Natural Justice regarding fairness, notice to the applicant, principle of *ultra vires*, due process *inter alia* as enunciated in the relevant Articles of the Constitution of Kenya which include articles 47, 48 and 50.
6. That the 1st and 2nd respondents directly discriminated against the applicant deliberately targeting her due to her gender by terminating her contract of employment without regard to the laid down principles.
 7. That the respondents employ unwarranted differential treatment towards the applicant as opposed to other male officers within her job cadre employed under the 2nd respondent and thereby illegally discriminating against the applicant.
 8. That the respondents having breached fair administrative practice, procedures and treating the applicant in a discriminatory manner have otherwise been biased in their attitude towards the applicant and therefore subjecting her to undue and illegal treatment contrary to Public Officers Ethics Act relating to Rule of Law under section 10; Performing of duties under section 8 and Disciplinary Action under section 36.
 9. That the 3rd respondent is by law mandated to make appointments, deploy, and promote Chief Officers of the 2nd respondent. Further, the 3rd respondent has the sole mandate of regulating appointments on contract which include *inter alia* meting out disciplinary action in accordance with the Constitution and relevant statutes.

10 That the 1st and 2nd respondents failed/ignored to give the applicant reasonable notice with regard to the alleged claims/reasons put forth in justification of the unlawful termination.

11 That the 1st and 2nd respondents breached the principles of natural justice as they condemned the applicant without giving her an opportunity to rebut the allegations.

12 That the 1st and 2nd respondents acted beyond its scope and disregarded due process in arriving at an illegal decision against the applicant.

The application is also supported by an affidavit of Merita Akinyi Ombuor sworn on 9.5.2014. It is the applicant's contention that she was appointed the Director, Governors' Press Service for 2nd respondent for a contract period of 5 years on 6.8.2013. A copy of her appointment letter is exhibited and marked as **App. MAO – 1**. She avers that she faithfully discharged her duties as stipulated under the employment letter of 6.8.2013 till 29th August 2013 when she was confirmed and appointed by the 2nd respondent which decision was conveyed through the 1st respondent as the Chief Officer – Public Relations, Marketing and Change Management – Kisumu County as per her appointment letter marked **Exh MAO – 2**.

It is the applicant's contention that she discharged her duties diligently and never received any verbal or written reprimand, complaint, notice or warning letter from the 1st and 2nd respondents regarding her performance. That further without notice, justification, authority and disregarding fundamental principles of law and procedure, the 1st and 2nd respondents issued her a termination letter dated 1.4.2014 – **Exh MAO – 3**.

The termination letter indicated that her services had been terminated because of her under performance resulting in failure to meet the set targets in her department. The applicant contends that this termination letter was made without adherence to set principles of Law and Procedure as the County Public Service Board of Kisumu has the role mandate to make appointments deployments and promote Chief Officers of 2nd respondent. That further the 3rd respondent has the sole mandate of regulating appointments on contract which include meting out disciplinary action in accordance with the Constitution and relevant statutes. As such, the applicant contends that the 1st and 2nd respondents lack the authority to terminate the appointments of Chief Officers and further the decision was based upon unfair fallacious and unjustified reasons.

The applicant avers that she could not discharge her functions as expected as her department was underfunded being allocated Kshs 80,000/= monthly compared to other Counties where departments such as hers were allocated 3m monthly for proper discharge of duty (**App MAO – 4**). The applicant's

contention is that she discharged her work faithfully and even successfully made a proposal to the UNDP for funding which funding was approved as per her *App MAO – 5*. Further she avers that she successfully conducted a conference dubbed “**one year into Devolution celebrating the milestones, confronting the challenges**” which was a great success (*App MAO – 6*).

The applicant avers that the 1st and 2nd respondents violated her right to a fair administrative action and fair hearing by resorting to draconian and humiliating disciplinary action in total regard to the laid down procedure and in total violation of S. 56 and 59 of the County Government Act No. 17 of 2012. She further avers that the 1st and 2nd respondents in arriving at their decision issued on 1st April 2014 contravened the fundamental principles of natural justice regarding fairness, notice to the applicant, principle of *ultra vires*, due process as enunciated in the relevant Articles of the Constitution of Kenya which includes Articles 47, 48 and 50.

She further argues that she was discriminated upon due to her gender as she was condemned without regard to the laid down principles a treatment which was not visited upon male colleagues within her job cadre or below. The applicant further contends that she was ill treated contrary to the Public Officers Ethics Act relating to the rule of Law Section 10, Performance of duties under 58 and Disciplinary Action under s. 36.

The applicant therefore prays to this court to remedy the situation and quash the decision of the 1st and 2nd respondent to terminate her services as being irregular and illegal.

The respondents filed their replying affidavits to the application on 9.6.2014 through the firm of Rodi Orege and Co. Advocates. Their replying affidavits were sworn by Daniel Otuoma who are the Secretary/CEO of 3rd respondents and the Human Resource Manager of 2nd respondent respectively. Mr. Owuor deponed that at the time the 3rd respondent was constituted, on 27.11.2013 the applicant had already been employed on 6.8.2013. That therefore the 3rd respondent was not involved in the employment of applicant nor her termination. They contend that the 3rd respondent has not made any decision capable of being quashed in respect of the matter. It is therefore their contention that the applicant against the 3rd respondent is frivolous, incompetent and otherwise an abuse of the court process and the same should be dismissed with costs.

Mr. Otuoma on behalf of the 2nd respondent depones that the applicant was engaged as political appointee within the office of the governor as advised by the Transition Authority as per annex **DO1** a letter from the secretary to the Transition Authority. That the Transition Authority had advised about this appointment on temporary basis in order to facilitate the office of the governor to function effectively. That the appointment was on temporary basis pending approval of the Kisumu county Public Service Board.

They further deponed that the applicant failed in her duties and failed to prepare a strategic plan for her department, lagged behind in formulation of information policy and coordination with media houses. She was served with several show cause letters which they annexed as **DO 3**. **DO 4** is another show cause letter dated 3.3.2014 where the applicant was apparently asked to show cause why she should not be dismissed from the service. She was expected to make representation if any within 21 days. The letter was authored by the Ag. Chief of Staff of the Office of the Governor. The 2nd respondent therefore contend that the application by the applicant lacks merit and is an abuse of the court process and should be dismissed accordingly.

There was no reply from the 1st respondent. When this application came up for hearing on 17.9.2014, the parties agreed to file their respective submissions which the court was to consider. The submission were filed accordingly as agreed upon.

Upon considering the averments of both parties and their respective submissions, the issues for determination by this court are as follows:-

1. **Whether the applicant's engagement as Chief Officer – Public Relations, Marketing and**

Change Management of Kisumu County was a temporary appointment as a political appointee.

- 2. Whether due process was accorded to the applicant before she was terminated.**
- 3. Whether the applicant is entitled to the orders sought.**

On the 1st issue, the applicant was employed on 6.8.2013 to the office of Director Governors Press Services on contract basis for 5 years. The same month, this position seems to have changed and on 29.8.2013, she was now appointed to the position of Chief Officer – Public Relations Marketing and Change Management with effect from 5.8.2013. The appointment remained on contractual basis but without stating the duration of the contract. The respondents have averred that this appointment was on temporary political basis on the advise of the Transition Authority. The respondents referred court to their *Appl. DO 1* which is referenced:-

“Advisory on political appointments – office of the Governor and Deputy Governor.”

Part of the advise was that:-

“Firstly, the Governor and Deputy Governor should fill the political positions as negotiated between the Governors, the Public Service Commission, Salaries and Remuneration Commission and the Transition Authority.”

It is worth noting that this letter is dated 6th September 2013 after the applicant had been appointed and did not therefore affect her appointment in a political or whatever position she had been appointed to. It is also noteworthy that there is no indication that her position was political in nature given that her work was of Chief Officer in the County Government of Kisumu as per her appointment letter *App MAO – 2*.

The appointment letter never stated that she had been appointed on temporary basis pending approval of the County Public Service Board. The assertion that she was engaged temporarily on a political basis is therefore unfounded and it is the finding of this court that she was employed on contractual basis for 5 years as per *App MAO -2*. or whatever period as per *App MAO -2*.

Given this finding, the next question is whether she was accorded due process before her services were terminated. The respondents alluded to her under performance of duty as to the reasons she was terminated. However, if that was the issue and not the temporary political nature of her appointment, then due process ought to have been followed. The applicant's submitted that she was purportedly terminated by the 1st and 2nd respondents who had no authority to do so.

S. 56 of the County Government Act No. 17 of 2012 envisages a situation where each County Government shall in accordance with Article 235 of the Constitution have it's own Public Service known as the county Public Service Board headed by a County Secretary appointed under S. 44 of the County Government Act.

Functions of this County Public Service Board, CPSB are set out under S. 59(1) of the County Government Act and the functions include:-

“(a) Establish and abolish offices in the County Public Service.

(b) Appoint person to hold or act in offices of the County Public Service including in the Boards of cities and urban areas within the County and to confirm appointments.

(c) Exercise disciplinary control over and remove persons holding or acting in those offices as provided for under this part.

(d) ---

(e) ---.”

It is clear therefore that the County Public Service Board was the one with sole mandate to exercise disciplinary control over the applicant including her removal. However, the applicant's termination letter was authored by one Humphrey Nakitare who was the County Secretary (1st respondent) and not the County Public Service Board nor its officer. The said Humphrey did not have the authority to dismiss the applicant and he usurped the functions of the 3rd respondent.

The applicant was therefore not subjected to fair administrative action as envisaged under Article 47 of the Constitution which states that:-

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

Assuming even that the 1st and 2nd respondents could terminate the applicant's services which they couldn't, the applicant was also denied a chance to be heard. The right to be heard is enshrined in our Constitution under Article 50(1) which states that:-

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

This same provision is enshrined in S. 41 of the Employment Act 2007 which states that:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”

The applicant was denied all the tenets of law and fair procedure and was condemned unheard without being given a chance to defend herself. It is therefore the finding of this court that due process was not accorded to the applicant before being terminated.

Is the applicant then entitled to the prayers sought? Given that the applicant was condemned unheard and terminated by persons without authority to terminate her services, I find that the applicant is entitled to orders sought and I find for her and order that an order of certiorari do issue and is hereby granted to quash the decision of the 1st and 2nd respondents issued on the 1st April 2014 terminating the applicant's contract of employment as Chief Officer – Public Relations Marketing and Change Management of Kisumu County.

The respondents will meet the costs of this petition.

HELLEN S. WASILWA

JUDGE

16/10/2014

Appearances:-

Rodi for respondents present

N/A applicant

CC. Wamache