



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT KISUMU

CAUSE NO. 308 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2014)

ERASTUS ONYANGO NYAMORI.....CLAIMANT

-VERSUS-

1. COUNTY GOVERNMENT OF MIGORI

2. MIGORI GOVERNOR – ZACHARY OKOTH OBADO.....RESPONDENTS

RULING

The application before court is the one dated 13.11.2014 and is brought by the applicant under certificate of urgency and through a Notice of Motion brought under Order 40 rule 1, 2, 3, 4, and 8, Order 51 rule 1, 3 & 4 of CPR, 2010 and Section 16(1)(2) of Industrial Court Rules 2010 and Sections 3(a) and 63(e) of CPA Cap 21 Laws of Kenya and Articles and pursuant to CoK Article 47(1) & (2), CoK Article 170(2) (b), CoK Article 179(2)(b), CoK Article 162(2), and CGA Article 30(2)(a)(d)(e)(i) CGA, Article 30(3)(b) (c), CGA Article 31(a), CGA Article 35(3)(b)(c)(d), CGA Article 35(4), CGA Article 36(1)(a) or (2), CGA Article 40(1) and CGA Article 40(1)(2)(3)(4)(5)(a) and Section 6 of the Guidelines to Governors and other enabling provisions of the law.

The applicants seek orders that:-

- 1. That this application be certified urgent and the same be heard on priority basis.**
- 2. That the honourable court be pleased to issue a reinstatement order to the respondents to re install the claimant/applicant as CECM in charge of Public Works, Roads and Transport, until the hearing and final determination of this instant application, and that this honourable court be pleased to grant an order of prohibition restraining the respondents by themselves, their agents, employees or servants or any other person or body corporate acting on the instructions of the respondent from barring the claimant/applicant from re-entering his office, performing the duties of his office, withholding his salary or benefits until the hearing and final determination of this instant application.**
- 3. That in the event the respondents may be hell bent on maintaining the dismissal they be condemned to pay damages for the duress caused and salary and benefits as and against the number of years in service remaining up to and including May 2018 together with all benefits and the same be paid in lump sum.**

4. That this honourable court be pleased to grant orders as to costs of this application to be met by the respondents.

The application is based on the affidavit of Erastus Onyango Nyamori and on the following grounds:-

1. The claimant/applicant herein has been dismissed in the most casual/careless manner, without any warning, no letter of termination, no information whatsoever on what could have gone wrong and no word on attainment of his rights under the contract, thus putting the claimant/applicant in a dilemma and/or stressful psychological situation consequential to months of struggle from June 2013 to-date.

2. The cabinet reshuffle by the 2nd respondent was a very unusual afterthought decoy/shuffle consequential to failures of the respondents to use the County Assembly to remove/dismiss the claimant/applicant through Article 40(1) of the County Government Act No. 17 of 2012 and to effectively arbitrate between the claimant and his juniors in the ministry.

3. It is conspicuous from the trend of events leading to claimant's dismissal that the 2nd respondent acted in his and in the interest of his conspirators within and without the ministry of Public Works, Roads and Transport.

4. It is paradoxical that the claimant's portfolios had long been recalled by the 2nd respondent who was not the *de facto* in charge of the ministry of Public Works, Roads and Transport, and subsequent dismissal of the claimant/applicant was in vacuum and had nothing to do with his performance/non-performance in the docket.

5. The dismissal constitutes a wrongful process of law of contract as it came without any complaints, counseling, advice, warning or notice from the 2nd respondent.

6. The respondents having failed to achieve dismissal of the claimant through Article 40(1) apparently resorted to a *de facto* interpretation of Article 31(a) which, due to its draconian nature and circumstances of the going-ons in the ministry, was in no way appropriate or necessary in view of the spirit of Article 10(1)(a)(b)(c) and 10(2)(a)(b)(c) of the Constitution of Kenya 2010.

7. Further to (6) above, the dismissal is unfair, unlawful, unconstitutional, arbitrary and against the law of natural justice as the respondents have made the claimant/applicant to suffer vicarious liability of their failure to reinforce respect for chain of command within the ministry.

8. It is trite law that a person should not be condemned unheard.

The applicant contends that he applied for an advertised position of County Executive Committee Member (CECM) in charge of Public Works on 10.10.2013 with the respondents. He was nominated by the governor and subsequently approved by the County Assembly. He was appointed a County Executive Committee Member on 29.5.2013 and has discharged his mandate as required by law. He says he has however had a lot of conflict with his subordinates as captured in supporting affidavit and documents he has exhibited in support of the claim.

He avers that in September 2014, the 2nd respondent reshuffled his cabinet and left him out without any communication whatsoever. The reality dawned on him on 1.10.2014 when he got communication from the bank that his loan was not being serviced as his salary had not been remitted. He wrote a letter asking for an explanation which was not forthcoming. The respondents have in their reply to this application indicated that the applicant had been terminated under S. 31 of County Government Act 2013.

The applicant submits that any genuine termination would have been grounded under S. 40 of County Government Act and the respondents could only do so after satisfying the provisions of S. 40 of County

Government Act and if he is informed of the allegations against him and he is accorded an opportunity to respond and is subsequently given a hearing following procedure with principles of natural justice.

The applicant contends that there was no reason to terminate him and the alleged incompetence is untenable given that it seems to emanate from a complaint registered by the applicant himself about frustration he has encountered in trying to discharge his mandate. Even on other allegations levelled against him the applicant avers that no charges have been preferred against him about an alleged complaint a disagreement he had with 2 others which was reported to the police.

A motion was also instituted to impeach the applicant and the applicant avers that he has not been told the outcome of that motion. The applicant contends that to-date, he has not received any communication from the respondents as whether he has been sacked or not and is still in a state of uncertainty.

The applicant further contends that his appointment is challengeable under the ambit of the Employment Act 2007 and that the respondents should follow the law and also accord him fair administrative process as envisaged under Article 47 of the Constitution. The applicant cited case **No. 92/2014 I. C Nakuru – Joseph Kiprono Koech V Hon. Josphat Nanok & Pet No. 1/2014 of NKR – Richard Birir V Narok County Govt & 2 Others.**

The respondents opposed this application. They filed their replying affidavit sworn by one Christopher Rusana the Secretary of 1st respondent deponed to on 21.11.2014. They depone that the members of the County Executive are political appointees whose tenure and removal from office hangs on the political mandate granted to the Governor by the people. Thus, they aver that it is the prerogative of the Governor to dismiss members of the executive when he deems it appropriate.

They also aver that the process of the dismissal of a County Executive is purely political and cannot be challenged under the unfair termination law contained in the Employment Act and other labour legislations. They aver that the applicant was removed from office constitutionally and legally as provided for under S. 3(a) of County Government Act and was also subjected to removal from office on grounds of incompetence, abuse of office, gross misconduct and gross violation of the Constitution. They cited case no. 103/2014 **Tom Luusa Munyasya & Anor V Governor, Makueni County & Anor.**

Upon hearing the submissions of both parties, the issues for determination are as follows:-

1. Whether the removal of the County Executive Committee Member (CECM) is a political decision for which there is no recourse in law.

2. Whether the applicant is entitled to the prayers sought.

S. 30(2) of the County Government Act 2012 lists functions and responsibilities of the County Governor amongst them are as follows:-

Subject to the Constitution, (emphasis is mine) the governor shall:-

(d) appoint, with the approval of the County Assembly, the County Executive Committee in accordance with Article 179(2)(b) of the Constitution.”

It is thus clear that the Governor appoints County Executive Committee Members but he is still subject to the Constitution. The removal of County Executive Committee Member is provided for under S. 40(1) of County Government Act which provides that:-

“Subject to subsection(2), the Governor may remove a member of the County Executive Committee from office on any of the following grounds:-

a. incompetence

b. abuse of office

c. gross misconduct

d. failure, without reasonable excuse or written authority of the governor, to attend three consecutive meetings of the County Executive Committee

e. physical or mental incapacity, rendering the executive committee member incapable of performing the duties of that office or

f. gross violation of the Constitution or any other law.

Under S. 40(2) – this removal will be subjected to a motion within the County Assembly. S. 31 of County Government Act gives further powers of the governor and provides that:-

(a) the governor may, despite Section 40, dismiss a County Executive Committee Member at any stage, if the governor considers that it is appropriate or necessary to do so.”

This section is not couched in mandatory terms like S. 31(b) which is couched in mandatory terms depicting that the dismissal shall be by a resolution of the County Assembly provided for under S. 40 of the County Government Act.

The reading of the law therefore shows that the 2 sections must be read together and not exclusively. Further as provided for under S. 30(2) of County Government Act, the governor shall exercise his powers subject to the Constitution. It cannot be submitted that these powers are exercised at his whim without due regard to the law.

It had been submitted that the removal of County Executive Committee Member by a governor is a political decision which is his prerogative and is not subject to court's intervention. I disagree with this submission. The Constitution of Kenya is a people Constitution and all sovereign power is exercised for the people as provided for under the Constitution. Every person should obey and respect the Constitution.

In the case of **Richard Birir V Narok County Govt & 2 Others I.C NKR – Pet No. 1 of 2014, Ongaya J** in defending the law in a similar matter as this pronounced himself as this:-

“In the opinion of the court at the heart of due process are the rules of natural justice. Thus the court finds that the pleasure doctrine for removal from a State or Public office has been replaced with the doctrine of due process of law ---”

I do concur with the learned judge and any submission that the removal of County Executive Committee Member is a political decision for which there is no recourse in law is not viable as the court still has its power to consider the legality or otherwise of any State actor and consider whether the law and procedure has been adhered to.

That as it may be, can this court grant orders sought by the applicant? In this case, it appears that the applicant has not yet been removed. There is no formal communication to him in that effect. He seems to be in office as formally appointed on 4.6.2013 as per *Exh EON-2*. He got appointed after being subjected to an open recruitment process as provided for by law and was issued with an appointment letter. To term him dismissed without any dismissal or termination letter is therefore a fallacy. This court therefore grants the following orders.

1. That the applicant remains County Executive Committee Member in charge of Public Works, Roads & Transport until he is subjected to due process or until the final determination of this suit whichever comes earlier.

2. The applicant be paid all withheld salary to-date and any other salary that falls due subject

to order (1) above.

3. Costs of the application to be paid by the respondents.

HELLEN S. WASILWA

JUDGE

3/12/2014

Appearances:-

Omondi for claimant present

Mboya h/b Sagana for respondents present

CC. Wamache