



REPUBLIC OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 328 OF 2016

COUNCIL OF GOVERNORS.....PETITIONER

VERSUS

SALARIES AND REMUNERATION COMMISSION.....RESPONDENT

JUDGMENT

1. The Petitioner is the Council of Governors representing the 47 counties while the respondent Salaries and Remuneration Commission, is an independent constitutional commission established under article 230(1) of the constitution. Its duties are defined in Article 230(4) of the constitution and emphasized in the Salaries and Remuneration Commission Act, 2012.

2. The petitioner states that in a letter dated 6th August 2015, it requested the respondent to make provision for housing for deputy county governors as required by the County Government Act 2012. It states that deputy county governors had been denied house allowance for 3 years after election in 2013 that brought them into office. It is states that by letter dated 7th August 2015 the respondent declined contending that the policy did not provide housing for deputy county governors thus deputy county governors were not entitled to housing or housing allowances.

3. The petitioner pleads that the respondent's action is unlawful since it is discriminatory and contrary to Article 27(5) of the constitution which affords everybody equal protection and benefit of the law. The petitioner further pleads that Articles 47(1) and 41(2) of the constitution afford every one the right to fair administrative action and fair remuneration and working conditions. It is contended that denying deputy governors housing without reasonable explanation is a violation of their right to fair administrative action under Article 47(1) of the Constitution.

4. The petitioner has filed this petition and sought the following reliefs:-

a) A declaration that denying the office holders of County Deputy Governors the right to Housing Benefits is discriminatory, unjustifiably selective, goes against the principles of constitution and in contravention of Article 27 of the Constitution of Kenya, 2010.

b) An order of Mandamus against the Respondent to compel it to perform its duty owed to the office holders of County Deputy Governors by paying it Housing allowances.

c) A declaration that the Respondent do pay the office holders of the County Deputy Governors the entitled Housing allowances from the date of taking office until the date of this petition.

d) Costs of this petition

e) *Any other relief this court may deem fit to grant.*

Response

5. The respondent filed a replying affidavit by its CEO, **Anne Ruamba Gitau**, sworn on 30th December 2015 and filed in court on 10th January 2017. The deponent contends that the respondent is established under Article 248(2) and that Article 249(1) provides for its respondent's objects; that the petitioner has no *locus standi* in this petition and that the Article 230(4) of the constitution gives the respondent's powers and duties to set and regularly review remuneration and benefits for state officers and advise the national and county government on the remuneration and benefits of all other public officers.

6. **Ms. Gitau** deposes that the office of deputy governor is a state office and as such the respondent has mandate to set benefits for that office including housing; that the initial remuneration and benefits for deputy governors were set out in Gazette Notice No 2888 of 1st March 2013, and that gross monthly remuneration for deputy governors was set at 461,254 per year to a maximum of Kshs615, 000/-, consolidating allowances at 40% of the set gross remuneration while 60% was salary. It is contended that housing allowance was consolidated in the gross remuneration for deputy governors.

7. **Ms. Gitau** further states that job evaluation was done after which remuneration for deputy governors was increased and a house benefit would have meant that the holder of the office was provided with an official residence. According to **Ms. Gitau**, currently only the office of the governor and speaker of the county are given a housing benefit due to their level of performance.

8. She states that due to job evaluation and the work of deputy governors, they do not have a housing benefit. **Ms. Gitau** contends that the deputy governor is however enjoying house allowance in the consolidated pay and that housing benefit is not a fundamental right under the constitution. According to her, the benefits given to officers as set out at paragraph 20 and 21 of affidavit, has been given on the basis of the roles of those officers. She contends that issuance of another house in the county coupled with the attendant expenses is not fiscally sustainable for the county government.

Petitioner's Submissions

9. **Miss Dar**, learned Counsel for the petitioner, submits relying on their written submissions dated 18th April 2017 and filed in court on 20th April 2017, that the petition challenges the refusal by the respondent to give house allowances to deputy governors. Learned counsel submits that although deputy governors do what governors do in the absence of governors or such duties as governors may allocate them, they do not have housing allowance yet they are both elected.

10. Learned counsel contends that deputy governors had house allowance which was however withdrawn. Referring to paragraph 17 of the respondent's replying affidavit, learned counsel submits that the respondent agrees that deputy governors have facilities except housing allowance which is discriminatory. Counsel further points out to paragraph 20 of the same affidavit which reveals people who get housing allowance in the county but the list excludes deputy governors a clear case of discrimination.

11. In the written submissions the petitioner submits that the court has jurisdiction to grant the petition including orders of mandamus. It is argued relying on the decision of **Re the matter of Interim Independent Electoral and Boundaries Commission** [2011] eKLR, that independent constitutional offices are bound by the constitution and the rule of law since courts retain a mandatory duty to check independent Commissions against excesses of their powers.

12. Further reference is made to Article 23(1) of the constitution which gives the court jurisdiction to hear and determine applications for *redress of denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights*. Regarding denial of allowance to deputy governors, it is submitted that this was done in excess of the respondent's constitutional and legal mandate. According to the petitioner, the respondent which is established under Article 230(1) of the constitution, is charged with the responsibility of setting and reviewing remuneration and benefits of all state officers and advising national and county governments on the remuneration and benefits of public officers as well as harmonizing equity and fairness of remuneration for allocation and retention of requisite skill in the Public Sector. "It is thus required to respect, uphold and defend the constitution." The petitioner argues.

13. On whether the respondent's conduct of denying deputy governors housing allowance amounted to discrimination, it is the

petitioner's submission that it did. It contends that Article 27(1) of the constitution confers on every person the right to protection and equal benefit of the law; that it prohibits direct or indirect discrimination on any basis and that the respondent's action of denying deputy governors housing allowance is a denial of the right to equal protection and benefit of the law which amounted to discrimination. It is contended that governors' and deputy governors' domestic staff are provided with housing allowance but not deputy governors

14. The petitioner relies on section 5(2) of the Employment Act to argue that an employer should promote equal opportunities in employment and strive to eliminate discrimination in employment policy. It also relies on Article 1 of Convention Concerning Discrimination of Employment and Occupation 1958 on the definition of Discrimination.

15. It is therefore contended that Article 27(4), (5) of the constitution as read with section 5(3)(a) and (c) of the Employment Act 2017, prohibit discrimination and therefore Article 27(1)(2)(4) and (5) of the constitution entitle the petitioner to the right to equal protection and benefit of the law and obligates the respondent not to discriminate against the deputy governors on their fundamental and inalienable right to a lawful and procedurally fair administrative action.

16. The petitioner further relies on the case of *David Muhoro v Olrejeta Ranching Limited* [2014] eKLR for the submission that similarly qualified employees must be paid equally when performing the same or virtually the same work in equivalent condition. They also rely on the case of *UMV v Bank of Africa Limited* [2013] eKLR for similar submission. According to the petitioner, the work of the deputy governor is to deputize the governor as the offices are fused hence giving governors housing allowance while denying the deputy Governors is discriminatory and unconstitutional.

Respondent's submissions

17. The respondent's counsel did not attend during the hearing. They had however filed what they called list of authorities dated 12th June 2017 with brief submissions. They contend that denying deputy governors housing benefits is not discriminatory and that deputy governors though state officers have not been treated differently from other state officers and that there is no evidence of such discrimination. The respondent relies on *Black's Law Dictionary* with regard to the definition of discrimination,

18. The respondent relies on the decision of *Mohammed Mire v Ibu Albine General and Ministry of Interior and Coordination of National Government* Petition No 232 of 2015 to submit that there is need for the person who complains of unfair discrimination to show methodically the manner and foundation of such discrimination and the unfair impact of such discrimination. The respondent contends that the petitioner has not discharged this obligation.

19. The respondent again contends that orders of mandamus cannot issue to compel a public body such as the respondent to perform a duty it has not failed to perform. It contends that the power to advise the governments in housing benefits derives from the constitution and relies on the decision of *Odek, JA in Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & others* [2015] eKLR for the submission that the respondent's advice under Article 230(4) (b) of the constitution is binding. It is important however to note that the context in which *Odek JA* made that observation is not the same as that in this petition. One of the issues in the appeal was whether the ELRC could increase Teachers' salaries without advice from SRC as required by the constitution and SRC Act.

20. The respondent contends that it was merely exercising its constitutional and statutory mandate and, therefore, the court should withhold its discretion not to issue an order of mandamus. The respondent maintains that deputy governors have been receiving housing allowance and referred to paragraphs 15 and 16 of its replying affidavit. It also argues that there is no law entitling deputy governors to housing from anyone hence the court should not grant the reliefs sought.

Determination

21. I have considered this petition; the response and submissions. I have also considered the authorities relied on. The question that arises for determination in this petition is whether the respondent discriminated against deputy governors by denying them housing allowance. The petitioner contends that deputy governors have been denied housing allowance when all other county officers get the allowance and for that reason that is differential treatment accorded to deputy governors hence it is discriminatory and unconstitutional. The respondent on its part contends that there is no discrimination and that deputy governors are paid allowance.

22. The respondent is an independent constitutional commission established under Article 230(1) of the constitution. Its mandate as provided for in Article 230(4) of the constitution is to set and regularly review remuneration and benefits of all state officers and to advise the national and county governments on the remuneration and benefits of all other public officers. Article 230(5) gives considerations for which the respondent should take into account when setting and reviewing remuneration and allowances or giving advice on the same. The respondent has to ensure that the total public compensation bill is fiscally sustainable; recognize productivity and performance as well as transparency and accountability.

23. The mandate of the respondent is reinforced by sections 11 and 12 of the Salaries and Remuneration Act, 2011 which emphasize the respondent's constitutional mandate. It is clear from the reading of the constitution and statute that the respondent's mandate is to set and regularly review remuneration and benefits for *all state officers* and to advise national and county governments on the remuneration and benefits for *all other public officers*.

24. Deputy governors are state officers and Article 260 of the constitution states as much. Even if they were not, that would still not matter because the respondent has either to set and regularly review their remuneration and benefits or advice on the same. However, unlike in the case of public officers where the respondent's mandate is to advise, in the case of state officers, the respondent is required to set and regularly review their remuneration and benefits.

25. The word "*set*" is defined in the Concise Oxford English Dictionary 12th Edition to mean "*put, lay or stand in a specified place or position*", while the same Dictionary defines the word "*review*" to mean "*formal assessment of something with the intention of instituting change if necessary.*" "*Remunerate*" is defined to mean "*pay for services rendered or work done*" and "*benefit*" means "*a payment made by the state to someone entitled to receive it.*"

26. Taken in that context, therefore, remuneration means payment for services rendered or work done (salary) while benefit means the allowance paid by the state to state officers and public officers. In that regard, the constitution and the law require the respondent to fix salaries and allowances of *all state officers* and periodically assess them with a view to instituting changes if necessary. In conducting this exercise, whether of setting or reviewing remuneration and benefits, the respondent does not have to exclude deputy governors who as state officers are entitled to remuneration and benefits.

27. A literal reading of the constitution and the law does not seem to give the respondent mandate to confer a benefit to state officers because the words "*set*" and "*review*" as used in the constitution are not synonymous with grant or confer and, therefore, the respondent cannot decide that deputy governors who are state officers should for whatever reason not get housing allowance unless of course they are housed. Under the constitution and the Act the respondent's obligation is to set the level of remuneration and benefits for state officers taking into account the factors set out in Article 230(5) of the constitution and section 12 of the Act.

28. The question then is; has the respondent set and regularly reviewed housing allowance for deputy governors" The petitioner says the respondent has not while the respondent maintains that it has. But what do the respondent's pleadings says"

29. The respondent states at paragraphs 13 through 16 of the replying affidavit sworn by *Ms. Anne Ruamba Gitau* that deputy governors are paid allowances, *Ms. Gitau* deposes that deputy governors' gross remuneration was set at Kshs. 461,250 to a maximum of Kshs. 650,000. At paragraph 14 she states that remuneration is sixty percent while allowances are forty percent of the gross remuneration. At paragraph 17 it is deposed that job re-evaluation was conducted after which deputy governors' remuneration was increased to Kshs. 526,081 with the maximum placed at Kshs. 701,441. This is said to have been communicated through Circular dated 1st March 2013 which was said to be in force at the time of filing that replying affidavit.

30. However at paragraph 21 of the affidavit, it is deposed that currently a housing benefit is granted to the offices of governor and Speaker of the county assembly. At paragraph 23, *Ms. Gitau* refers to job evaluation that was done and states at paragraph 24 that the job evaluation showed distinguished responsibilities between the governor and deputy governor. She again states at paragraph 25 that Bills were prepared to increase deputy governors' responsibilities but nothing come out of them. She then states at paragraph 26 of her affidavit that "*as a result of the prevailing legislation, the job evaluation and in exercise of its constitutional mandate, the respondent did not grant the office of the Deputy Governor housing benefit.*"

31. This deposition is a complete departure from the respondent's earlier position that deputy governors get allowances. Even after going through replying affidavit particularly paragraph 16, it is not clear whether the allowance mentioned at paragraph 16(i) is inclusive of housing allowance and if so how much it is. The respondent also seems to suggest that because deputy governors have

no specific roles, they have not been given housing benefit and that the respondent is awaiting some legal reform to assign deputy governors roles before it can decide on that issue. The respondent also contends that following job evaluation deputy governors do not have much to do unlike other county officials such as Speaker of the county assembly. What can be inferred from this view is that it forms the basis for the respondent's failure to set housing allowance for deputy governors.

32. This, to my mind, this is a tacit admission that respondent has in fact not set and reviewed housing allowance for deputy governors. If this be the case and I have no doubt that it is at least from the reading of the respondent's pleadings, it amounts to differential treatment accorded to deputy governors compared not only to other state officers but also public officers.

33. Article 230(4) (a) of the constitution requires the respondent to set and regularly review remuneration and benefits for "**all state officers.**" Deputy governors as state officers are entitled to remuneration and benefits which should be regularly reviewed by the respondent. The respondent is not required to advise on their remuneration and benefits as is the case with public officers neither does it grant such benefits. The obligation is to set them and once benefits are set, they must be regularly reviewed together with remuneration which the respondent seems not to have done in the case of deputy governors. The respondent blames this on lack of clarity with regard to the role of deputy governors which, in my view, is not the fault of deputy governors and cannot therefore be used to their disadvantage.

34. The petitioner's claim that deputy governors have been subjected to direct or indirect unfair discrimination implies that their right to equality and equal protection and benefit of the law prescribed in our constitution, a fundamental right entrenched in the Bill of Rights is under assault. This is because Article 27(1) of the constitution entitles everyone to equal protection and benefit of the law while Article 27(5) proscribes discrimination of any form and on any ground. That is, people in similar positions or situations have the right to be treated equally without unfair, unreasonable or objective differentiation. In this respect, Lord Bingham did observe that "**the law should apply equally to all except to the extent that objective differences justify differentiation**". (The Rule of Law (London Penguin Press, 2010).

35. Discrimination is well defined. *Black's Law Dictionary*, 10th Edition, defines discrimination as(1)"**the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship**" (2) "**Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured**" Article 1(a) of the Convention Concerning Discrimination in Respect of Employment and Occupation(1958), defines "discrimination" as "**any distinction, exclusion or reference made on the basis of race colour sex religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.**"

36. From the above definition, discrimination is such conduct that subjects a person to unfair, unreasonable and unjustifiable differential treatment based on any of the prohibited considerations including position or class. The constitutional court of fourth Africa has laid down considerations that should be taken into account in determining whether the conduct complained of amounts to discriminations. In the case of *Mbona v Shepstone and Wylie* [2015] ZACC11 the court stated that;

"[26] The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair"

37. Applying the above test to this petition, there is no doubt that deputy governors, though state officer, have been left out in so far as housing benefit is concerned. No reasonable objective and acceptable justification for this differential treatment has been given. On this, I must also say the respondent has been less candid to the court. Although at one point the respondent states that deputy governors are getting allowance, it later changes the tone and states that deputy governors do not get housing benefit. The respondent further argues that it is waiting for legislation before it can set the housing benefit. It should however be borne in mind that housing allowance is not the same as remuneration which should be pegged on the level of performance. Housing allowance is a benefit a state officer is entitled to where the state as employer does not provide a house to the officer.

38. Furthermore, failure to assign specific duties to deputy governors coupled with lack of legislation on their duties cannot, in my respectful view, be used to the deputy governors' disadvantage. It is not their fault that the law may not have prescribed in detail

their daily duties. That notwithstanding, the law is clear though, that deputy governors are principal assistants to governors and assist governors in the running of county affairs. From the constitutional perspective, they are entitled to remuneration and benefits which should include housing allowance to be regularly reviewed by the respondent. If the respondent were to maintain that it set deputy governors' housing benefit, it has failed to demonstrate that it indeed did so and that it has regularly reviewed it as required by the constitution and the law. This is also clear from its pleadings and submissions.

39. It has been deposed and submitted on behalf of the petitioner that deputy governors have domestic staff who get house allowance to demonstrate the level of differential treatment deputy governors have been subjected to. The respondent has however not rebutted this deposition and submission. If this is true and again I have no reason to doubt it since it is not denied, there can be no more unreasonable, unjustifiable and unfair differential treatment deputy governors have been subjected to than this, a classic case of unfair discrimination that Article 27(5) of the constitution prohibits. It is a clear violation of fundamental rights in the Bill of Rights to subject deputy governors, state officers, to this form of unfair discrimination. I am therefore persuaded that the petitioner has a genuine complaint against the respondent in the manner the respondent has treated deputy governors even when compared to their own domestic staff. Denying deputy governors housing benefit cannot on its own make the national wage bill sustainable.

Reliefs to grant

40. Having come to the conclusion that the respondent is wrong for not setting a housing benefit for deputy governors, what reliefs should the court grant" The petitioner has prayed for declarations and orders of mandamus. The respondent has however argued that the court should not issue declarations or orders of mandamus where it has not failed to perform its duty. From my own review of the pleadings and submissions, it is clear that the respondent has not discharged its mandate as required of it by the constitution and statute with regard to deputy governors' housing benefit. I am satisfied that the respondent has given deputy governors a cold shoulder and disregarded their status as state officers by subjecting them to unreasonable differential treatment in violation of the constitution. To that extent, the petitioner is entitled to a declaration to that effect.

41. Where the court is satisfied that a petitioner's concerns are not an illusion, it is enjoined by Article 23(1) of the constitution to grant an appropriate relief to remedy the situation. An appropriate relief should be one that will not only protect, but also enforce the Constitution. And depending on the circumstances of the case, reliefs can range from a declaration of rights, an order of mandamus or such other relief that may be required to ensure that rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even fashion a new remedy to secure the protection and enforcement of the rights. In other words, an appropriate remedy should mean an effective remedy. (see *Fose v Minister of Safety and Security* 1997(3) SA786 (CC) (7) BCLR 851 CC)

42. The respondent has also raised the issue of the petitioner's *locus standi* in filing this petition contending that the petition is unsustainable on that ground. I do not find this argument meriting time and space in this judgment given the architectural design of our constitution on the issue of locus and taking into account section 19 of the Intergovernmental Relations Act, 2012 which establishes the petitioner. The issue is not meritorious and is rejected.

43. In the end therefore, having given due consideration to the pleadings, submissions the constitution and the law and taking into account the circumstances of this case, I am satisfied that the petition dated 28th July 2016 is merited and is allowed as follows

- a) ***A declaration is hereby issued that deputy county governors as state officers are entitled to a housing benefit.***
- b) ***A declaration is hereby issued that denying County Deputy Governors housing Benefit is discriminatory, unjustifiably selective, and is contrary to Article 27 of the Constitution.***
- c) ***An order of Mandamus is hereby issued compelling the Respondent to set and regularly review housing benefit as one of the benefits due to County Deputy Governors.***
- d) ***No order as to costs***

Dated, Signed and Delivered at Nairobi this 5th day of October, 2018

E C MWITA

JUDGE



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