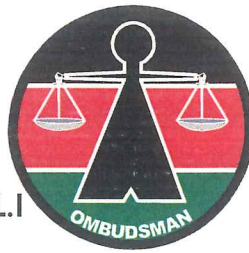


Ag. Chairperson: Dr. Regina G. Mwatha, MBS
Member: Cmmr. Saadia A. Mohamed, OGW, MBS



THE
COMMISSION ON ADMINISTRATIVE JUSTICE
"Office of the Ombudsman"

Our Ref: CAJ/AO/4/2012/VOL.I

29th August 2017

H.E. Hon. Josphat Koli Nanok
Chairman
Council of Governors
Delta Corner, 2nd Floor
Opp. PWC, Chiromo Road, off Waiyaki Way
P. O. Box 40401 – 00100

NAIROBI

Your *Excellency*

**RE: AN ADVISORY OPINION ON THE HANDLING OF EMPLOYEES OF
COUNTY GOVERNMENTS BY THE GOVERNORS**

I. INTRODUCTION

The Commission on Administrative Justice (Office of the Ombudsman) is a body established under Article 59(4) and Chapter 15 of the Constitution of Kenya, as read together with the Commission on Administrative Justice Act, Chapter 102A of the Laws of Kenya. The mandate of the Commission is to enforce administrative justice by addressing all forms of maladministration in the public sector in Kenya. In particular, the Commission is empowered to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government that would be prejudicial, constitute improper conduct, or amount to abuse of power, delay, inefficiency, discourtesy, incompetence, unfair treatment, manifest injustice or unlawful, oppressive or unresponsive official conduct. In addition, the Commission is empowered to oversee and enforce the Access to Information Act, 2016.

Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance of democratic values and principles by State organs. Section 8(h) of the Commission on Administrative Justice Act requires the Commission to issue Advisory Opinions or proposals on improvement of public administration, while section 2(1) empowers the Commission to

deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The attention of the Commission has been drawn to recent media reports of intimidation, threats, suspension and dismissals of county employees by some of the Governors. In some extreme cases, there have been reports of physical attacks or eviction of employees from offices ostensibly on the perception that they did not support the governors' political bids. The Commission, however, notes with concern that this emerging trend has created anxiety and tension within the counties' workforce and could paralyse the delivery of services by the county governments. Further, it raises the legality of such actions in the context of the Constitution and various Acts of Parliament. It is our considered view that the same has the potential of negatively impacting on public administration in Kenya. In accordance with our mandate under Article 59(2) (h),(i)&(j) of the Constitution as read with Section 8(h) of the Act, we hereby render our Advisory Opinion on the matter as hereinbelow.

II. LEGALITY OF THE ACTIONS BY THE GOVERNORS

It is not debatable that some Governors have already acted or publicly expressed their intention to take action against employees in the county governments for various reasons. The reasons given for such actions are varied; ranging from human and financial audits to addressing bloated work force and staff rationalisation among others. However, in some cases, it appears that political disloyalty is the main motivation. The Commission notes that while some of the justifications may be legitimate, others are expressly outrageous and illegal and should not be accepted in an open and democratic society. Moreover, the manner in which the actions are being taken raises concerns on their constitutionality and legality. Indeed, it defeats the very justification of staff rationalisation when a Governor who is barely one week in office decides to suspend employees before carrying out staff audits. It is more intriguing when a Governor who has been re-elected suddenly realises that his county's workforce is bloated or incompetent and embarks on suspension of employees without following the due process of the law.

We wish to point out that while county governments may have legitimate concerns regarding the workforce, any action taken should be in

conformity with the law. This not only includes the Employment Act, but also the Constitution, the County Governments Act, the Fair Administrative Action Act and the Public Officer Ethics Act among others. In particular, such actions should uphold the national values and principles of governance, the right to fair labour practices and the right to fair administrative action under Articles 10, 41 and 47 of the Constitution respectively. The relevant national values and principles of governance in this regard are good governance, the rule of law, human dignity, non-discrimination, integrity, transparency and accountability. Under Article 47(1) of the Constitution, any administrative action taken against any person should be expeditious, efficient, lawful, reasonable and procedurally fair. According to Section 4 of the Fair Administrative Action Act, that includes:

- i) adequate notice of any intended administrative action,
- ii) written reasons for such action,
- iii) according any affected person the opportunity to be heard and make representations,
- iv) fair hearing, and
- v) notice of the right to a review or appeal against any action taken.

In line with the foregoing, section 76(2) of the County Governments Act prohibits punishment of employees without the due process of the law. Specifically, it provides that that '*no public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament.*' In instances where such action is to be taken for offices within the county public service, it is the county public service board that is mandated under section 59(1) to act. The governor does not have such powers under the law. In the present cases, there is no evidence to show that the various county public service boards considered the matters or conducted disciplinary proceedings against the affected employees.

It is worthwhile to note that Governors are bound by the Constitution and other laws in Kenya. Indeed, this is manifested in their oath of office which binds them to uphold, defend and protect the Constitution and the law. This is further provided for under section 30(3)(c) and (f) of the County Governments Act which require the Governor to 'promote good governance within the county,' and 'be accountable for the management and use of the county resources.' In this regard, it would be

regrettable for a Governor to breach the very law that he has sworn to uphold, defend and protect.

In light of the above, the Commission wishes to further point out the following:

- i) The acts, if proven, would amount to abrogation of constitutionally secured rights and arbitrary removal of the current holders from office without the due process of the law. This would offend the Constitution and various laws on employment, devolution, fair administrative action, and leadership and integrity as aforementioned. Given the fact that most of the employees are substantially on permanent and pensionable terms, the acts would expressly contravene Article 236(b) of the Constitution which provides that 'a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.'
- ii) The acts would amount to abuse of power by the Governors within the meaning of Article 59(2)(h-k) and Chapter Six of the Constitution as well as the Commission on Administrative Justice Act for which action can be taken against the Governors, including their removal from office.
- iii) The acts will expose county governments to unnecessary litigation by the affected employees leading to huge legal costs to be paid out of public funds.
- iv) The acts may expose the employees of county governments to physical violence which would be a criminal offence punishable under the law.
- v) They have the potential of destabilising the delivery of services by county governments owing to the anxiety and apprehension created among the employees. Indeed, it creates the potential of instability in the delivery of services by the county governments after every five years upon the election of a Governor. This may undermine the principles of devolution and the development of

county governments as envisaged in the Constitution, the County Governments Act and other relevant laws.

- vi) The acts sets the stage for politicisation of the county public service since the employees will be expected to advance the political interests of the governor, including campaigning for him. This would entrench a culture of political patronage in the county public service thereby undermining the mandatory requirement of political neutrality of holders of appointive positions in the public service. In particular, it would offend the national values and principles of governance under Article 10, the tenets of public service under Article 232, and political neutrality of holders of appointive public offices under Article 77(2) of the Constitution as well as the sections 7, 8, 11 and 23 of the Leadership and Integrity Act, and the Public Officer Ethics Act.

- vii) Overall, the acts would entrench impunity in the management of the affairs of county governments which would be a stain not only on devolution, but also the promotion of constitutionalism in Kenya.

III. WAY FORWARD

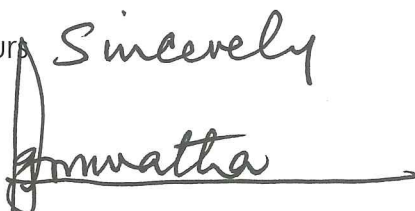
On the basis of the foregoing and the need for good governance, we advise as follows:

- i) Governors put on hold any actions that they intend to take against the employees of county governments whose positions are secured under the law. Where adverse action has already been taken, they should reverse such decisions and act in accordance with the law.

- ii) Should a county government be found liable for breaching the law in relation to termination of employment, the governors should be held personally liable for any loss or cost against the county government arising therefrom in accordance with section 9 of the Leadership and Integrity Act. This would include a surcharge where payment out of public funds has already been made.

- iii) Where it is necessary to streamline the work force of any county government, the same should be done in accordance with the Constitution and relevant laws, including undertaking human resource audits and offering fair administrative action to the employees who are likely to be affected by such action.
- iv) County governments should address human resource challenges as and when they arise in line with the law and the human resource policies, and procedures instead of waiting until after elections to take adverse administrative action against employees since such can be interpreted as motivated by other factors other than the law.
- v) Governors, being the senior most State Officers in the county governments, should uphold the Constitution and the law at all times. They should desist from making statements that may create anxiety or apprehension within the counties public service or be interpreted as amounting to threats, intimidation, victimisation or politicisation of the counties public service.
- vi) Where threats to physical violence have been made or the same meted out against any employee of a county government, reports should be filed with the National Police Service to take appropriate action against the culprits.

We thank you for your continued support and assure you of our highest regards.

Yours *Sincerely*


DR. REGINA MWATHA, Ph.D, MBS
Ag. CHAIRPERSON

Cc:

1. **Joseph K. Kinyua, CBS**
Chief of Staff and Head of Public Service
Executive Office of the President
State House
P. O. Box 40530 - 00100
NAIROBI

2. **Hon. Festus Mwangi Kiunjuri**
Cabinet Secretary
Ministry of Devolution and Planning
10th Floor, Harambee House
P. O. Box 30005 - 00100
NAIROBI

3. **Hon. Prof. Githu Muigai, FCL, Arb, SC**
Attorney-General
State Law Office
Attorney-General Chambers, Harambee Avenue
P. O. Box 40112 - 00100
NAIROBI

4. **Professor Margaret Kobia, Ph.D, CBS**
Chairperson
Public Service Commission
Commission House, Harambee Avenue
P. O. Box 30095 – 00100
NAIROBI

5. **Jeremiah M. Nyegenye, CBS**
Clerk of the Senate
Clerk's Chambers, Parliament Buildings
P. O. Box 41842 – 00100
NAIROBI

6. **Edward R. O. Ouko**
Auditor General
Kenya National Audit Office
Anniversary Towers
P. O. Box 30084 – 00100
NAIROBI

7. All Governors