County Government of Bomet v Kenya County Government Workers Union & another (Civil Appeal E084 of 2024) [2025] KECA 1311 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1311 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E084 OF 2024

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

JULY 18, 2025

BETWEEN

COUNTY GOVERNMENT OF BOMET ..... APPELLANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION ..... 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF BOMET ..... 2ND RESPONDENT

(Appeal from the judgment of the Employment and Labour Relations Court of Kenya at Kericho (D. Nderitu, J.) dated 29th February, 2024 in ELRC Cause No. E016 of 2022)

RULING

1. Devolution has been hailed as:

> " the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution- matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state."

See Mutunga, CJ. in Speaker of The Senate & Ano. vs. Hon. Attorney General & Ano. & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR.

2. However, in the implementation of the devolution as a system of governance in this country fair share of woes have been encountered and one of its negative offshoots is the manner in which devolved units deal with their employees from one election cycle to the other. Quite often one comes across allegations of improper recruitment of employees by the Government in power for the moment. On the other hand, are the allegations against a new regime of the attempts to unprocedurally offload from its payroll those who, in its view, were "improperly" recruited by the former regime. It is an unending cycle which ought not to be countenanced since the public end up shouldering improperly

incurred expenses by those whose only intention is to appease their supporters, relatives and court jesters. The objects of devolution do not include rewarding supporters and campaign managers with positions by the incoming Government or offloading the serving employees in order to create room for its supporters and cheerleaders. Article 174 of *the Constitution* clearly sets out the object of devolution in the following terms:

The objects of the devolution of government are;

a. to promote democratic and accountable exercise of power;

b. to foster national unity by recognizing diversity;

c. to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

d. to recognize the right of communities to manage their own affairs and to further their development;

e. to protect and promote the interests and rights of minorities and marginalized communities;

f. to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

g. to ensure equitable sharing of national and local resources throughout Kenya;

h. to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and

i. to enhance checks and balances and the separation of powers.

3. None of the above objectives include rewards to political propellants. In our view, the spirit of the devolved system of governance in this country was meant to bring services to the people and to ensure equitable sharing of the resources by the people of the Republic of Kenya. It was meant to bring to end the hitherto existing centralised system of governance which was geared towards rewarding the cronies, supporters and court jesters. However, the drafters of *the Constitution* were well aware of the risk of the country being compartmentalized into semi-states with god fathers or war lords as the chief executives. Accordingly, proper safeguards were put into place to ensure that in spite of the devolved system of governance the country remained a one unitary State and was not transformed into a confederacy. Election to an office in the County Government does not therefore give one a fiat to hire and fire at whim. Any process of recruitment and termination must strictly be in accordance with the law. Unless this restriction and limitation on the powers of the devolved units is observed, there is a risk of some counties being deemed as a preserve of a certain extraction deemed to be supportive of reigning regime. In other words, devolution is not a tool for political patronage or fiefdom. While the circumstances of the present case do not necessarily arise from our discourse above, there are instances when allegations have been made of the above malpractice taking root in the counties and we must call it out.

4. A brief account of the litigation before the Employment and Labour Relations Court (ELRC) in Kericho which culminated in the Judgment dated 29th February 2024, the subject of this appeal is necessary so as to contextualize and appreciate the arguments presented by the parties herein in support of their respective positions.

5. Briefly, the 1st respondent, a trade union acting for and on behalf of its listed grievants sued the appellant and the 2nd respondent at the Kericho ELRC by a memorandum of claim dated 24th October 2022 challenging notice dated 30th September 2022 pursuant to which the appellant and the 2nd respondent

unilaterally purported to vary the grievants' engagement terms from permanent and pensionable to fixed term contracts which were to run for three months with effect from 1st October 2022 yet the grievants had as at the time of the issuance of the notices worked for the 1st respondent for over seven years. Their grievance was that even though they were originally contracted for a fixed term of two years with effect from 1st October 2015 after their contracts lapsed, they continued working for the 1st respondent with full salary, benefits and with the consent and approval of the 2nd respondent.

6. The 1st respondent prayed for:

   (a) a declaration that the appellant and the 2nd respondent had violated their rights and freedom under Articles 41, 47, and 50 of *the Constitution*;

   (b) a declaration that the notice of termination together with the letters of unilateral conversion of their employment terms are unlawful, null and void ab initio;

   (c) an order quashing the decision as contained in the said notices and the letters unilaterally converting their employment terms;

   (d) an order restraining the respondents or its agents from unlawfully reviewing the grievants' salary/terms and conditions downwards;

   (e) an order prohibiting the appellant and the 2nd respondent from interviewing, recruiting and/or employing other employees in the same positions held by the grievants;

   (f) an order unconditionally reinstating the claimants to their positions without any loss of benefits;

   (h) an order directing the appellant and the 2nd respondent to pay the grievants all pending salaries, benefits and emoluments;

   (i) in the alternative to prayer (h) above, the appellant and the 2nd respondent be ordered to fully compensate the grievants for the unlawful and unfair termination being twelve months gross salary as at the time of their termination and that the claimants be paid pecuniary loss suffered since the date of termination, including salary and allowances as would have been earned and all other accruing allowances, from their respective dates of appointment to date;

   (k) the respondent be ordered to issue the grievants with certificates of service;

   (l) costs of this claim; and

   (m) any other relief that the court may deem just to grant.

7. The statement of claim was accompanied by a notice of motion dated 24th October 2022 in which the 1st respondent prayed for inter alia orders that the appellant and the 2nd respondent be restrained from interviewing or recruiting employees in the same positions or to perform the same work as the grievants pending hearing and determination of the application and their suit.

8. By a ruling delivered on 22nd March 2023, the ELRC issued an interlocutory injunction restraining the appellant and the 2nd respondent from reviewing or interfering with the salaries, allowances or any other payment due and payable to the grievants, or their terms and conditions of employment. It also issued an interlocutory injunction restraining the appellant and the 2nd respondent from advertising, interviewing, recruiting, or employing persons to replace or occupy the vacancies and or positions occupied by the grievants or in any manner whatsoever replacing them and for avoidance of doubt, the status quo subsisting and obtaining prior to the issuance of the impugned notices.

9. Hearing of the claim proceeded by way of written submissions as directed by the trial court. Pursuant to the said directions, the appellant and the 2nd respondent were required to file and serve their responses and witness statements within 14 days from the date of the ruling delivered on 22nd March 2023. Pursuant to the said directions, the appellant entered an appearance on 7th November 2022. However, it did not file any response to the claim. The 2nd respondent neither entered an appearance nor did it file a defence. Mr. Oketch, learned counsel for 1st respondent filed their written submissions on 2nd May 2023, Mr. Matwere learned counsel for the appellant filed their submissions on 2nd April 2023. The law firm of Gordon Ogola, Kipkoech & Co. Advocates though not on record for the appellant filed supplementary submissions on 16th May 2023, while Mr. Bii, the 2nd respondent's executive officer filed submissions on 8th May 2023.

10. After considering the pleadings and submissions on record, in the impugned Judgment delivered on 29th February 2024, the trial judge isolated four issues for determination, namely: (i) is this cause properly before court; (ii) what is the nature of the employment relationship between the grievants and the 1st respondent; (iii) whether the grievants' deserved the reliefs sought; and (iv) costs. The learned Judge began by determining a preliminary issue, that is, whether the claim was defended. The trial Judge noted that the appellant and the 2nd respondent only filed a replying affidavit in response to earlier mentioned application and they never filed an appearance and a defence to the claim, therefore, the cause was undefended and he proceeded to determine the case as such.

11. Regarding the argument that the 1st respondent never referred the dispute to the County Public Service Board, therefore the suit violated the doctrine of exhaustion, the trial Judge held that the cause was properly before the court and he would proceed to determine it on merits since the trial court had exclusive original and appellate jurisdiction as provided under the law and its jurisdiction could not be ousted by exhaustion clauses and nothing stopped a party from approaching the court for injunction or conservatory orders pending exhaustion of an alternative mechanism.

12. Regarding the nature of the employment relationship between the grievants and the appellant, the learned Judge held that it was not in dispute that the grievants had been working for the appellant for a cumulative period of over seven years and there is no evidence that the appellant and/or the 2nd respondent ever challenged the said engagement and or the said letters of appointment.

13. Regarding the reliefs available to the grievants, the learned Judge declared that the three months notices issued by the appellant on 30th September 2022 disguised as extension of contracts, or indeed any other notices for whatever period of time are null and void since the grievants could not be terminated in any other manner other than in accordance with the law, and that it was grossly unfair, unjust and unlawful for the appellant and the 2nd respondent to enjoy the grievants services for over seven years and turn around and decide to send them home for "overstaying" their contract. Consequently, the appellant was required to comply with sections 35, 40 (in case of redundancy) 41, 43, 44, 45 and 46 of the *Employment Act* among other provisions of the law. The learned Judge also declared that the grievants' fundamental rights and freedoms under Article 41, 47, and 50 of *the Constitution* had been violated by the appellant and the 2nd respondent by the issuance of the impugned notices without any consultations or involvement of the grievants which in effect amounted to unilaterally changing and altering their terms of service and or termination of their employment.

14. Aggrieved by the above verdict, the appellants filed a notice of appeal dated 5th March 2024 and a memorandum of appeal dated 5th June 2024 citing 9 grounds of appeal, namely: (a) the decision was not supported by sufficient evidence and a well- reasoned approach to the law; (b) the court failed to take into consideration the fact that the 1st respondent's members were not employees of the appellant

since they were not employed by the 2nd respondent as required by law; (c) the trial Judge failed to adhere to the principles of natural justice because the appellant was not given a fair hearing; (d) the trial Judge erred in expunging the appellant's pleadings and evidence on grounds that their advocates were not properly on record while there was a duly filed and served notice of appointment of advocates; (e) the learned Judge erred by issuing the judgment without any notice whatsoever to the appellant despite having duly appointed advocates and with a known address of service; (f) the learned Judge erred in law by arrogating to himself the powers of Bomet County Public Service Board by confirming the 1st respondent's members as employees of the appellant without concrete evidence that they were indeed employed by the Bomet County Public Service Board, which is legally mandated to employ on behalf and for the appellant; (g) the trial Judge paralyzed the appellant's constitutional mandate and took up the role of Bomet County Assembly to appropriate funds; (h) the trial Judge erred by failing to take judicial notice of a decision rendered by this Court confirming that it is only the County Public Service Board that has the constitutional mandate of employing staff at the County Government levels; and (i) the impugned findings are escapist and insatiable in law and unsupported by the evidence. Consequently, the appellant prays that this appeal be allowed and the impugned judgment be set aside and the claim before the ELRC at Kericho be dismissed with costs. Lastly, the appellant prays for costs of this appeal.

15. During the virtual hearing of this appeal on 26th March 2025, learned counsel Mr. Benard Kipkoech appeared for the appellant, learned counsel Mr. James Oketch appeared for the 1st respondent while learned counsel Ms. Milka Kirui appeared for the 2nd respondent.

16. In support of the appeal, Mr. Kipkoech orally highlighted his written submissions dated 27th August 2024. He maintained that the learned Judge failed to adhere to the principles of natural justice and Article 50 of *the Constitution* by erroneously holding that the appellant did not enter appearance, that the cause was undefended, yet the appellant filed a notice of appointment and duly complied with the court's directions issued on 22nd March 2023 by filing and serving their responses. Therefore, the trial Judge erred by

expunging their documents and treating the claim as uncontroverted.

17. Regarding the complaint that the judgment was delivered without notice to the parties, Mr. Kipkoech cited the case of Ngoso General Contractors Ltd vs. Jacob Gichunge Civil Appeal No. 248 of 2001 where the court held that a judgment which is not delivered ex tempore must be delivered only upon notice being given to all parties or their advocate. He submitted that the court on 12th October 2023 indicated that it would deliver the judgment on notice. However, no notice was issued to the appellant in accordance with Order 21 of the Civil Procedure Rules before the judgment dated 29th February 2024 was delivered.

18. Regarding the question whether the grievants were the appellant's employees, Mr. Kipkoech maintained that they were not recruited by the 2nd respondent because their contracts were signed by persons not authorised or having delegated authority as per section 86 of the *County Governments Act*. Therefore, their employment was irregular and ultra vires and nothing legal can be borne by an illegal contract.

19. Arguing that the court cannot assume authority to employ on behalf of a County Government, he cited this Court's decision in The Clerk, Nakuru County Assembly & 3 Others vs. Odongo & 7 Others (Civil Appeal E136 & E137 of 2022 (Consolidated) [2023] KECA 427(KLR) in support of the proposition that a court cannot arrogate unto itself a jurisdiction that it does not have. He also submitted that the County Government of Bomet is bound by the decision rendered in Kericho ELRC

Petition No. 8 of 2025 holding that it is only the Bomet County Public Service Board that has the authority to advertise, recruit, employ and promote officers of the County Government.

20. In conclusion, Mr. Kipkoech maintained that once the grievants contract lapsed, and they continued working for the appellant, they became periodic employees on a monthly basis, therefore they were only entitled to one month's notice in lieu of termination.

21. Learned counsel for the 2nd respondent Ms. Kirui supported the appeal. In her written submissions dated 13th September 2024 which she briefly highlighted in Court, she maintained that the 2nd respondent never appointed the grievants and its position was communicated in the replying affidavit by its Chief Executive Officer and in its submissions filed before the trial court which were expunged in violation of the due process. Counsel cited the Supreme Court decision in Lamanken Aramat vs. Harun Maitamei Lempaka SC Pet No 5 of 2014 that a court may under Article 159 of *the Constitution* excuse procedural failings of a technical character as long as it does not impinge on a fair hearing or trial.

22. Regarding the existence or otherwise of an enforceable contract, Ms. Kirui maintained that since the 2nd respondent never engaged the grievants, their appointments were void ab initio because it is only the 2nd respondent who is mandated to make appointments under sections 59 (1) and 63(1) of the *County Governments Act*, 2012 and Article 234 of *the Constitution*. Counsel cited this Court's decision in Kenya Airways Limited vs. Satwant Singh Flora [2013] eKLR that no right can accrue from an illegal contract. She also cited this Court's decision in Heptulla vs. Noormahamed, [1984] KLR 58 where it was held that no court should enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.

23. In opposition to the appeal, the 1st respondent's counsel relied on its written submissions dated 17th September 2025 which were highlighted by its learned counsel Mr. Oketch. On the question whether there existed an employer-employee relationship between the appellant and the grievants, counsel submitted that it is trite law that by operation of the law, a casual employee is converted into a permanent and pensionable employee by dint of section 37 of the *Employment Act*. Mr. Oketch submitted that legitimate expectation arose in favour of the grievants who had been employed by the appellant and had worked for an uninterrupted period of over ten years. In support of the said submission, counsel cited Royal Media Services Limited & 2 others vs. Attorney General & 8 Others [2014] eKLR in which this Court delineated the circumstances under which the right to legitimate expectation arises.

24. Counsel also cited this Court's decision in Keen Kleeners Limited vs. Kenya Plantation and Agricultural workers' Union (Civil Appeal 101 of 2019) [2021] KECA 352 (KLR) (17 December 2021) (Judgment) upholding the trial Court' decision that casual employees are converted to permanent employees by operation of the law after working continuously just like the 1st respondent's members had done.

25. Regarding proof of employment, counsel submitted that the grievants were paid monthly salaries plus benefits, and the appellant never raised any objection to their appointment, therefore, the appellant and the 2nd respondent ratified their recruitment. Accordingly, the appellant and the 2nd respondent are estopped from denying the existence of an employment relationship with the grievants. He cited this Court's holding in Dhanjal Investments Limited vs. Shabaha Investments Limited (Civil Appeal 80 of 2019) [2022] KECA 366 (KLR) (18 February 2022) (Judgment) that a party waives the legal right to terminate a contract if it affirms the terms of the contract either through writing or by actions.

26. On whether the appellant was afforded a fair hearing, counsel cited the Supreme Court holding in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission &

7 Others [2014] eKLR that failure to file a fundamental document such as a memorandum of appearance or a response to the memorandum of claim and instead filing a replying affidavit renders the filed documents irregular and a candidate for striking out. He also submitted that the appellant admitted issuing extension of contract letters unilaterally yet the grievants were already permanent and pensionable, consequently the appellant's pleadings were considered.

27. Mr. Oketch maintained that the appellant and their officers have been found in contempt of court orders on numerous occasions including but not limited to findings made on 26th July 2016 and 14th February 2023. He cited Mohamed Shally Sese (Shah Sese) vs. Fulson Company Ltd & Ano. [2006] eKLR, where this Court following John Njue Nyaga vs. Nicholas Njiru Nyaga & Ano. [2013] eKLR held that he who seeks equity must come with clean hands and any secrecy and underhand dealings are frowned upon. Counsel asserted that disobedience of court orders threatens the very foundations of the administration of justice and the contemnors should be punished by denial of the orders sought.

28. This being a first appeal, our duty is to re-assess the evidence on record and arrive at our own independent conclusions. (See Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212). This Court will not lightly differ from the findings of fact of a trial judge who, unlike us, had the benefit of seeing and hearing the witnesses. We will only interfere with such findings if they are based on no evidence, or the judge is demonstrably shown to have acted on wrong principles in arriving at the findings. (See Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278). As Hancox, JA. in Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja [1986] KLR 661; [1986-1989] EA 183 stated:

> " The Appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

29. We have considered the impugned judgment, the entire record and submissions by counsel. In our view, two issues will effectively determine this appeal, namely: (a) whether the appellant's right to be heard was violated by the learned Judge; and, (b) whether there existed an employer employee relationship between the grievants and the appellants.

30. We will now address the first issue. While determining the question whether the 1st respondent suits was undefended, the trial Judge cited Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and held as follows at pages 19 and 21 of the judgment:

> " 49. This being a cause, the respondent ought to have entered appearance and filed defence or a response to the claim. From the record both the respondents did not file any response or defence to the claim and essentially, therefore, the cause is undefended and the court shall proceed to determine the matter as such.

50. The import of the foregoing paragraph is that the facts as pleaded by the claimants are uncontroverted, undefended and undisputed by the respondents. However, the foregoing notwithstanding, upon entering appearance and or filing notice of appointment, the 1st respondent acquired a right of audience with the court and as such it had the right to address the court and file the written submissions on matters of law only and not facts.

50. Contrary to the submissions by the respondents, replying affidavit to an application are not and cannot amount to a response to the claim or defence as envisaged in rule cited above. At the risk of sounding monotonous, this is a cause not a petition..."

31. The appellant's counsel deployed a lot of energy arguing that the trial Judge expunged the appellant's pleadings. Consequently, the appellant's right to natural justice and a fair trial as provided under Article 50 of *the Constitution* was violated. The 2nd respondent's counsel supported this argument and went further to argue that the trial court ought to have considered the replying affidavit. We have carefully scrutinized the entire record. The complaint that the trial court struck out the appellant's pleadings is not supported by the proceedings. No order was made by the trial Judge to that effect. Striking out pleadings refers to the court's power to remove all or part of a party's formal pleadings from the record. This action is taken when the court determines that the pleadings are defective or inappropriate, often because they fail to disclose a valid cause of action or defense, or are frivolous or vexatious, or may prejudice, embarrass, or delay the fair trial of the action. The correct position is that the appellant never filed a response or a defence to the memorandum of claim. Instead, it only filed a replying affidavit in response to the application which had been filed and served together with the statement of claim. Therefore, the use of the term "striking out" in the circumstances of this case is a misnomer.

32. The appellant's and the 2nd respondent's argument flies on the face of Rule 13 of the Employment and labour relations Court (Procedure) Rules, 2016 which stipulates:

> " 13.
>
> (1) If a party served with a statement of claim intends to respond, the party shall, within twenty-one days from the date of service, enter appearance and file and serve a response to the suit.
>
> 2. A respondent's statement of response shall contain;
>
> a. the respondent's name and address for purpose of service;
>
> b. a reply on the issues raised in the statement of claim;
>
> c. any admission of any statement of facts set out in the statement of claim as the respondent admits, and a denial of any statements made in the suit that the respondent does not admit;
>
> d. any additional statements of fact which the respondent may wish to make in support of its reply;
>
> e. any defence or grounds upon which the respondent may wish to rely;
>
> f. any principle, policy, convention, law, industrial relations or management practice to be relied upon;
>
> g. a counterclaim; or
>
> h. any relief that might be sought by the respondent against the claimant.

33. Rules of procedure are not meant to be mere technicalities but rather safeguards that facilitate access to justice and protect the rights of all parties involved. Clearly, the above rule grants a respondent 21 days to enter an appearance and file response to the statement of claim from the date of service of the pleadings. As it stands the appellant and the 2nd respondent did not comply with the above rule. The appellant in its wisdom only filed a replying affidavit to the application which sought interim orders and in total disregard of the above rule failed to file a response to the memorandum of claim. The rules provide a framework for how cases are initiated, responses are filed, the evidence is presented thereby ensuring all parties are treated equitably and the process is conducted with integrity.

A trial is not a contest between lawyers but a presentation of facts to which the law may be applied to resolve the issues between the parties and to determine their rights. It is also not a sport; it is an inquiry into the truth, in which the general public has an interest. This inquiry is only conducted by evaluating the facts and the evidence presented by the parties and by applying the law to the facts.

34. The requirement of the above rule is to enable each party to come to trial prepared to meet the case of the other, and to enable the court to isolate the issues it is to adjudicate upon. Therefore, the rules governing court proceedings are crucial for ensuring a fair, efficient, and transparent justice system. Failure to comply with the rules and the courts' directions can lead to sanctions, including the dismissal of a suit, striking out of pleadings or the case proceeding as undefended. Pleadings hold immense significance before the courts as they are the foundation of the case and help the courts understand the case and delineate the issues for determination.

35. It would be useful to also refer to the objectives in framing rules for conducting civil proceedings. The Halsbury's Law of England, 15th Edition states the following overriding objectives of the rules of procedure: (i) ensuring that the parties are on equal footing; (ii) saving expense; (iii) dealing with the case in ways which are proportionate to inter alia the complexity of the case; (iv) ensuring that it is dealt with expeditiously and fairly; and (v) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (vi) enforcing compliance with rules, practice directions and orders. The parties are required to help the court to further the overriding objective.

36. Mr. Kipkoech invoked Article 159 (2) (d) which requires courts to administer justice without undue regard to procedural technicalities and faulted the learned Judge for striking its pleadings. We have already held that no pleadings were struck out. We will only address the attempt to invoke *the Constitution* under the circumstances explained above. In all fairness, a litigant cannot fail to file a defence to civil suit and once the cause is determined as undefended, purport to invoke the constitutional right to be heard or seek refuge in Article 159 (2) (d). The moment the appellant opted on its own volition or mistake to comply with Rule 13, it effectively closed the door to the sanctum of justice and invited the consequences. It left the 1st respondent's averments on matters of fact uncontested. It cannot now turn around and blame the trial court for its omissions. Certainly, the blame lies on its own failure or mis- judgment. The appellant cannot now seek refuge in Article 159 (2) (d). This Article is not and it was not meant to be a panacea for all the deficiencies in observance of laid down procedures, nor was it meant to throw out through the window the rules of procedure. It cannot be used as a shortcut or a cover for ineptness or dereliction of duty. Simply put, it cannot aid the appellant in this case. As the Supreme Court stated in Raila Qdinga & 2 Others vs. Independent Electoral Commission & 3 Others [2013] eKLR , "the essence of this provision is that a court of law should not allow the prescription of procedure and form to trump the primary object of dispensing

justice to the parties." Similarly, in Toppias & 4 Others vs. Bomet County Government & Ano. [2025] KECA 841 (KLR) this Court held:

> " ... We reiterate that a party who is evidently in default should not seek refuge under Article 159 (2) (d). This article was not meant to cover lapses by parties who fail to comply with clear rules of procedure either owing to their own negligence or lack of diligence. The Supreme Court in Karan vs. Ochieng & 2 Others [2018] eKLR had this to say about Article 159 (2) (d) and particularly the phrase "undue regard" deployed in the said Article:70."Article 159 (2) of *the Constitution* provides that in exercising judicial authority, the courts and tribunals should be guided by the principle inter alia that: (d) Justice shall be administered without undue regard to procedural technicalities.
>
> 71. It is noteworthy that the phrase "procedural technicalities" in article 159 (2) (d) is qualified by the preceding phrase "undue regard". The word, "undue" is defined in the Concise Oxford Dictionary, 9th Edition. The first meaning is "excessive, disproportionate." Thus, article 159 (2) (d) cannot be interpreted to mean that all procedural stipulations are to be disregarded in the administration of justice. Certainly, the procedural requirements which facilitate the courts functioning as courts of justice, in a particular case, are not targeted. The courts have a duty to determine objectively in every case where the question of undue procedural technicality arises, whether the stipulation falls in the class of undue procedural technicalities, and if so, whether it should be disregarded in favour of substantive justice."

37. Our conclusion is that, the trial Judge afforded the appellant a right to be heard by directing them to file their responses, witness statements and documents to the claim within 14 days of the ruling delivered on 22nd March 2023. Instead, the appellant squandered that opportunity and, in the end, its evidence could not be considered by the learned judge on matters of fact. We are unable see how the trial Judge was expected to arrive at a different decision other than the one he did.

38. We now turn to the gravamen of this appeal, that is, the question whether there existed an employer employee relationship between the grievants and the appellants. The point of divergence is whether the grievants were the appellant's employees within the meaning of the *Employment Act* 2007. As we seek to resolve this issue, we bear in mind that the issues of facts before the trial court remained uncontroverted and that the appellant herein was only entitled to respond to matters of law.

39. While determining the issue at hand, the trial court stated:

> " 63. It is not in dispute that the grievants were engaged by the 1st respondent to hold various stated positions, vide letters of appointment of diverse dates of September, 2015. The appointments were effective 1st October 2015 for an initial contract of two years. For avoidance of doubt, the said letters were signed for and on behalf of the county secretary/ head of public service.
>
> 64. Contrary to the allegations made by the respondents, albeit from the bar, there is no evidence that the said contracts were at any point revoked or cancelled for alleged irregularities or illegalities and there is also no evidence of any action taken by the 2nd respondent towards investigating the alleged irregularities or illegalities in the engagement and appointment of the grievants . While the court agrees that 2nd respondent is the only legally and lawfully mandated

authority to recruit employees to work for the 1st respondent, it should equally take the necessary action in nullifying any recruitment or appointments made without due process. It is therefore ridiculously unfortunate and an afterthought for the 2nd respondent to expect the claimant to prove that the grievants were lawfully engaged by the 1st respondent yet the grievants have been working for the last seven years without the 2nd respondent raising a finger and taking any action to rectify the alleged anomalies.

64. The claimants availed duly signed letters of appointment for all the named grievants and it is not in dispute that they have been working for the 1st respondent for a cumulative period of over the proverbial seven years. There is no evidence that the respondents or the any of them, and more so the 2nd respondent ever challenged the said engagement and or said letters of appointment.

65. Moreover, the grievants have continuously worked for the 1st respondent from the date of appointment, commencing 1st October 2015 to this very day. It must therefore have come as a surprise to the grievants when they received notices dated 30th September 2022 purporting to offer them extension of alleged contracts and effectively terminating them by 30th December 2022, and hence out of work by 1st January 2023. The said notices, ironically are signed for and on behalf of the county secretary /head of county public service

66. What appears to be the case and that is the evidence before the court is that after expiry of the initial two year contract the grievants continued working for the 1st respondent without any hindrance or interruption. It is that continued employment and engagement that the court is now requested to interpret and give a name to it in determining the second issue ”

64. ...it is the view of the court that upon expiry of the initial contract the grievants gained the status of permanent and pensionable employees after the respondents failed to renew their contracts yet allowing the grievants to continue working and earning their salaries and emoluments. How else and in what capacity has the 1st respondent retained and engaged the grievants for over seven years? even if the grievants were to be terminated, and only in accordance with the law, they shall be entitled to gratuity or service pay and other accrued benefits in accordance with the law.

65. It shall be grossly unfair , unjust and unlawful for the 1st and 2nd respondents, after enjoying the services of the grievants for over seven years , to now turn around and decide that they have to go home for having “overstayed” their contracts. ”

40. Mr. Kipkoech was adamant that the grievants are not the appellant’s employees since they were not recruited by the 2nd respondent in accordance with sections 59 and 63 (1) of the *County Governments Act*, 2012 and Article 235 of *the Constitution* and that a glimpse of the grievants contract demonstrates that they were signed by unauthorized persons, therefore, their appointment was ultra vires, therefore void ab initio. In answer to the question why the grievants continued to be engaged by the appellant and they continued to be paid their salaries and emoluments for a period exceeding three months notwithstanding the absence of a written contract between the appellant and the grievants, Mr.

Kipkoech maintained that the grievants after the lapse of their fixed contract were engaged as human resource staff, their engagement was on a month to month basis, therefore, they were only entitled to payment of one months' salary in lieu of notice. However, Kipkoech's submission that the grievants had been engaged on a month-to-month basis amounted to a statement from the bar, because, as correctly held by the trial Judge, the appellant never filed a response to the claim, which means that the facts as presented by the 1st respondent remained uncontroverted. In any event, submissions basically contain matters of law and not facts. A party should not adduce evidence from the bar or through submissions.

41. Section 2 of the *Employment Act*, 2007 defines an "employee" as: "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner. The same provision defines an employer as follows: "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. This Court in The German School Society & Ano. vs. Ohany & Ano. [2023] KECA 894 (KLR) held:

> "The employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law. The existence of an employment relationship is the condition that determines the application of the labour law provisions. It is the key point of reference for determining the nature and extent of employers' rights and obligations towards their workers..."

42. Similarly, this Court Judicial Service Commission vs. Shollei & Ano. [2014] KECA 334 (KLR) stated:

> "It is axiomatic that whether the relation between the parties to a contract is that of an employer and employee or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of employer and employee, "it is irrelevant that one of the parties has declared it to be something else" (see Ready Mixed Concrete (South East) Ltd. vs Minister of Pensions and National Insurance [1968] 2 QBD 497; see also Mersey Docks & Harbour Board [1946] 62 TLR 427; Yewens [1880] 6 QBD 530."

43. This Court in County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board & 6 Others [2015] KECA 397 (KLR) held:

> "53. As Nduma J correctly observed in Nick Githinji Ndichu v. Clerk Kiambu County Assembly & Another, a decision followed by Sitati J. in Peter Kingoina v. County Assembly of Nyamira employer/employee relationship exists when there is a "contract of service" as defined by Section 2 of the *Employment Act*, 2007. We concur with the learned Judge that the law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service "whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary." On this additional criterion, we once again concur with the learned Judge that there exists a contract of service between a Speaker of a County Assembly and the County Assembly concerned."

44. It is a generally accepted principle of law that if a fixed-term employment contract expires and the employee continues working with the employer's consent, the contract is typically deemed to be of indefinite duration, effectively making the employee a permanent employee. This is based on the principle that the employer's conduct in allowing the employee to continue working implies an acceptance of continued employment under the same or similar terms, but without a fixed end date. However, we must hasten to clarify that the mere fact that an employee continues to work in the same position for the same employer after his fixed-term contract had come to an end does not automatically mean that his fixed-term contract had now morphed into permanent employment, or into employment of indefinite duration. It may still be on a fixed-term basis, albeit tacitly. Ultimately, it depends on the facts, or the inferences that may be reasonably be drawn from the facts. (See Gauteng Provincial Legislature vs. Commission for Conciliation, Mediation and Arbitration & Others (JA87/2020) [2021] ZALAC 57; (2022) 43 ILJ 616 (LAC) (25 November 2021)).

45. Different and conflicting tests have been applied for inferring a tacit contract. One test, referred as the "preponderance of probabilities" test, requires a party to not only allege, but to prove unequivocal conduct that establishes on a preponderance of probabilities, usually by a reasonable inference drawn from the relevant admitted facts, that the parties intended to and did in fact contract on the terms alleged. The other test which is referred to as the traditional or "no other reasonable interpretation" test, requires a party to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. (See Gauteng Provincial Legislature vs. Commission for Conciliation, Mediation and Arbitration and Others, supra).

46. Because of the difference of emphasis in these two, a synthesis of the two has been accepted and applied to infer the existence (and terms) of a tacit contract. This test incorporates the best of the two tests. In Christie's The Law of Contract in South Africa, 8th Edition, published on 8th June 2022, a leading text for in-depth analysis of contract law, the synthesis has been summarized as follows:

> "In order to establish a tacit contract, it is necessary to prove, on a preponderance of probabilities, conduct and circumstances that are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the preponderance of probabilities that the parties reached agreement in that manner, it may find that tacit contract established."

47. The synthesis, essentially, requires the Court to embark on a three-stage as opposed to a two-stage process. The first stage would be to decide on a balance of probabilities what facts have been established. It is common ground that the grievants were engaged by the appellant to hold various stated positions vide letters of appointment of diverse dates in September 2015. The appointments were effective 1st October 2015 for an initial contract of two years. After the lapse of the two-year contracts, the grievants continued working for the appellant and they were duly remunerated, only for the appellant in conjunction with the 2nd respondent to issue them with notices dated 30th September 2022 unilaterally purporting to offer them extension of contracts which were to run for three months with effect from 1st October, 2022. The said notices also communicated to the grievants that their positions would be advertised and they were encouraged to apply for the positions once advertised.

48. The second stage is to decide, also on a balance of probabilities, what conclusion, consistent with those established facts, is correct. Faced with the above uncontested facts, we are satisfied that by continuing to retain the grievants on the same jobs and continuing to pay them their salaries and benefits for over 7 years, the appellant and the 2nd respondent accepted them as permanent employees, tacitly.

49. The third stage is interposed between those two in terms of which the Court has to decide how the proved facts, that is including the conduct of each party and the relevant circumstances was probably interpreted by each of the parties. It is said that at the third stage the Court is essentially looking at the matter "through the eyes of the parties – at their conduct and the circumstances" and unless the conduct in those circumstances was so clear, so unequivocal, so unambiguous that the parties must have regarded themselves to be in agreement, there is no contract. In our considered view, the circumstances as presented above were very clear that an employment relationship had come into existence which has all the characteristics of the definition of who is an "employer" and an "employee" under the *Employment Act*.

50. Ironically, the appellant urges that the grievants were not its employees and if at all they were its employees, then their employment was illegal and/or ultra vires. This argument is rather shallow and unconvincing. The initial fixed term contract is not disputed. It is not disputed that after its expiry, the grievants continued working for the appellant for over 7 years. Notably, vide notices dated 30th September 2022, the appellant purported to offer the grievants an extension of their contracts. One wonders why they were offering to "extend" illegal contracts. Further, the notice dated 30th September 2022 confirms that the positions the grievants were holding would be advertised and they were encouraged to re-apply for the same positions. Again, one wonders why an employer would invite "illegal" employees to apply for jobs. The appellant's evidently oscillating and contradictory arguments as highlighted above can best be termed as incongruity, and an oxymoron. It is our conclusion that the notice dated 30th September 2022 was a trojan horse, since on its face, it was meant to hoodwink the grievants into believing that the appellant had their best interests at heart, but in reality, it was a termination letter. Therefore, we are in consonance with the trial Judge's finding that any termination of the grievants has to be in accordance with the law. Thus, the appellant cannot be heard to say that the learned Judge arrogated himself powers of the Bomet County Public Service Board by confirming the grievants as its employees without concrete evidence that they were indeed employed by the 2nd respondent who bears the legal authority to employ on its behalf.

51. A litigant cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Scrutton, LJ in Verschures Creameries Ltd. Vs. Hull and Netherlands Steamship Company Ltd. [(1921) 2 KB 608], stated:

> " A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument: Ker v. Wauchope [(1819) 1 Bli 1,
>
> 21]: Douglas-Menzies v. Umphelby [(1908) AC 224, 232]. The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction".

52. Similarly, the Supreme Court of India in R.N. Gosain vs Yashpal Dhir [R.N. Gosain vs. Yashpal Dhir, (1992) 4 SCC 683 at pp. 687-88, para 10 stated:

> " 10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could

only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."

53. Section 9 (1) of the *Employment Act*, 2007 requires the employer to draw up a written contract under certain circumstances. It reads:

> " 1A contract of service;
>
> a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
>
> b. provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months shall be in writing."

54. It is undisputed that the grievants contracts lapsed, but they were not renewed. It is also undisputed that the grievants continued to work, rendering their services to the appellant for over 7 years (the law only provides for a period of over three months), and the appellant continued to pay them their salaries and benefits. Therefore, the appellant was under a statutory obligation to draw a written contract setting out the rules of engagement as set out in section 10 (1) and (2) of the *Employment Act*. Such particulars include: the date of commencement of the employment; the form and duration of the contract; the intervals at which remuneration is paid; the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment; where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end.

55. Having found that the appellant and/or the 2nd respondent never issued the grievants with written contracts despite having retained them in employment for periods in excess the three months provided under the law, the letters issued on 30th September 2022 had no legal effect since the appellant and the 2nd respondent cannot extend contracts they never issued in the first place. Therefore, the appellant and the 2nd respondent having failed to discharge the burden placed upon them under section 10 (7) of the *Employment Act* which requires them to produce written contract or written particulars as prescribed under section 10 (1) of the *Employment Act*, we cannot fault the learned Judge for holding that the grievants shall continue working for the appellant on their current or last known terms unless terminated in accordance with the law.

56. We have said enough to demonstrate this appeal is devoid of merit. Accordingly, we hereby dismiss this appeal with costs to the 1st respondent.

DATED AND DELIVERED AT NAKURU THIS 18TH DAY OF JULY, 2025.

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.