



**Clerk County Council of Lugari v Wekesa (Civil Appeal
120 of 2019) [2024] KECA 402 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 402 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 120 OF 2019
JM NGUGI, M NGUGI & F TUIYOTT, JJA
APRIL 26, 2024**

BETWEEN

CLERK COUNTY COUNCIL OF LUGARI APPELLANT

AND

JOSEPHAT MULONGO WEKESA RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Bungoma (Nduma, J.) dated 1st December, 2017 in ELRC Cause No. 1 of 2017 Formerly Kisumu ELRC Cause No. 3 of 2017)

JUDGMENT

Judgment of Joel Ngugi, JA

1. The origin of the present appeal was a suit filed by the respondent herein against the appellant herein in 2008. The suit was formerly Webuye Senior Resident Magistrate’s Court Civil Suit no 104 of 2008 and later, Butali Principal Magistrate’s Court Civil Suit no 58 of 2010. It was a claim for breach of contract in which the respondent sought the following prayers:
 - a. The immediate confirmation of the plaintiff’s appointment as per paragraph 8 of the plaint.
 - b. Costs of the suit.
 - c. Interest.
 - d. Any other relief the Honourable Court deems fit and just to grant.
2. In his amended plaint dated 29th September, 2008, the respondent averred that after successful application for the post of Clerical Officer of the rank SS. 14, he received an appointment letter from the appellant on 7th September, 2007 to take up the said position. However, despite reporting to the work station on 1st October, 2007 as directed in the appointment letter, the appellant did not confirm



- the position. The respondent averred that he subsequently made several attempts and/or visits to the appellant's offices to have his position confirmed, but they were all in vain as the appellant became evasive and, eventually, even ordered that he (respondent) be barred from visiting the appellant's offices.
3. The respondent further averred that despite having all the valid documents confirming his appointment with the Lugari County Council, he was yet to take up the said position of Clerical Officer SS. 14, as the appellant refused to confirm him. Consequently, he prayed for general damages for breach of contract as the appellant's actions caused him great inconvenience, mental anguish and financial loss. He also sought to be confirmed to the position.
 4. On its part, the appellant, in its defence dated 24th November, 2008, denied the existence of the said post of Clerical Officer SS. 14, or its falling vacant and necessitating appointment. It also denied that the respondent reported to any working station as claimed or at all; or of preventing him from visiting its offices.
 5. The suit went to trial. At the conclusion of the trial, the learned magistrate found that the respondent did not prove that there was an advertisement for applicants with relevant qualifications to apply. She also found that there was no provision for a Clerical Officer which was vacant. Opining that advertisements formed a very important part in the procedure for recruitment, the learned magistrate found that the failure by the respondent to prove that there was a proper advertisement was fatal to his claim. For this reason, she found that the respondent did not prove his case on a balance of probability; and dismissed the case with costs to the appellant.
 6. The respondent was aggrieved by that decision and lodged an appeal in Bungoma Employment and Labour Relations Court, Cause no 1 of 2017 (Formerly Kisumu Cause no 3 of 2017). The grounds of his appeal was that the learned trial magistrate erred in law and fact when she held that: he did not prove his case on a balance of probability; failure to prove that there was an advertisement rendered the whole process of employment fatal; he was not entitled to the prayers sought in the plaint; and he failed to prove that there was an advertisement. In addition, the respondent claimed that the learned trial magistrate totally overlooked his evidence.
 7. Upon analyzing and considering the appeal, the evidence adduced before the lower court and submissions by the parties, the learned judge came to the following conclusions:
 - a. The defendant in its statement of defence did not challenge the recruitment of the plaintiff on the basis that the procedure followed to recruit the plaintiff was wrong, in that the vacant position of Clerical Officer SS. 14 was not advertised.
 - b. The learned magistrate therefore erred in introducing a defence that had not been pleaded at all by the respondent.
 - c. The learned magistrate also clearly erred in law and fact by finding that the appellant had not proved his case on a balance of probabilities, on (sic) the face of direct evidence by the plaintiff (PW1) who was called to an interview on 4th September, 2007 and 8th September, 2007; he was given a letter of appointment dated 7th September, 2007, signed by the Clerk of County Council of Lugari Mr. JJ Ochumbo which letter was produced before court.
 - d. There was also unchallenged evidence by the plaintiff under cross examination that the position had been advertised on the notice board of the Council among other jobs that had been advertised. The learned magistrate also erred in making a finding of fact that the position had not been advertised, contrary to the evidence adduced before her.



8. In reaching these conclusions, the learned judge analyzed the evidence of PW2, PW3 and DW1 during the trial, as follows:
 - a. PW2, Ibrahim Rombola Kayasa, (the then chairman of Lugari County) testified under oath that he received a complaint from the plaintiff that he had been appointed as a clerk by the Council during the tenure of Mr. Ochumbo who was the then County Clerk. However, a new County Clerk, Mr. Godwin Ole Sarun, was thereafter appointed and he refused to recognize the appointment of the plaintiff. PW2 also corroborated the evidence by the plaintiff that the Council had advertised for the said position of Clerical Officer SS. 14; and confirmed that the advertisements were done on the notice board then between 2005 – 2007.
 - b. PW3, Joseph Juma Ochumbo, (the then Ag. Clerk of Lugari County Council) testified that the Council made an advert on the notice board for the position of Clerical Officer SS. 14 in the Treasury Department. After which various candidates applied and the plaintiff was appointed. Further, the budget for the position was approved by the Minister for Local Government. PW3 also testified that he confirmed the plaintiff's appointment through the letter of appointment dated 7th September, 2007, in his capacity as the acting Clerk.
 - c. DW1, Caleb Mutali Okumu, (the then Administrative Officer of the Council), contradicted the evidence of PW1, PW2 and PW3 that the Council had advertised and approved the recruitment of a Clerical Officer in the Treasury. He also testified that: no copy of the advertisement was produced by the plaintiff and the budget for the position had not been approved. However, DW1 had no documents to prove the procedures he testified about and he admitted under cross examination that the Council could also advertise for positions on the notice board. DW1 admitted that: the Clerk was the CEO of the County Council and was his supervisor; and, the appointment letter was done by the then Clerk, Mr. Ochumbo, who was still in office at the time of signing the said letter.
9. Following these findings, the learned judge noted that the learned magistrate did not explain why she disregarded overwhelming evidence by PW1, PW2, PW3 and partly corroborated by DW1, that it was sufficient and procedurally proper to advertise for positions on the public notice board. For this reason, he found that the findings by the learned magistrate was against overwhelming evidence that the plaintiff had applied for the position of Clerical Officer SS. 14; he was called for an interview with others; he was appointed to the position and produced a letter of appointment to that effect. In this regard, he held that the learned magistrate clearly misdirected herself in law and fact in finding that the plaintiff did not discharge the burden of proof on a balance of probabilities. He further held that the learned magistrate reached a decision that was contrary to the preponderance of evidence. He opined that the plaintiff proved all material particulars of his case. Thus, he was entitled to judgment in his favour.
10. In the end, he allowed the appeal and made the following orders:
 - a. The appeal is allowed with costs in this and the lower court and the judgment of the lower court is set aside.
 - b. The court directs the respondent and its successor in law, Kakamega County Government to immediately confirm the appointment of the plaintiff to the position of Clerical Officer. SS 14 or its equivalent position in the Kakamega County Government with effect from the date of judgment by the lower court on 27th December, 2012.



11. Aggrieved by the decision of the Employment and Labour Relations Court, the appellant filed a Notice of Appeal dated 8th December, 2017, and a Memorandum of Appeal dated 27th June, 2019, in which it raised three (3) grounds of appeal. These are that the learned judge:
 - a. Misdirected himself in law by holding that Kakamega County Government is the successor in law to the defunct County Council of Lugari, the appellant herein, contrary to the clear constitutional and relevant statutory provisions to the effect that County Governments are not legal successors of defunct local authorities.
 - b. By directing the County Government of Kakamega to implement its decree of 1st December, 2017, he misapprehended the law and failed to appreciate that under the Constitution and the relevant statutes on devolution, accrued rights, obligations and causes of action continue to subsist the defunct local authorities and that those cannot be transferred by any state organ, public entity or local authority without due consideration.
 - c. Erred in law and in fact by arriving at the impugned decision contrary to facts, circumstances in and the principles applicable to the case when analyzed in their entirety.
12. Consequently, the appellant prayed that: the appeal be allowed, the judgment and decree of the Employment and Labour Relations Court against the appellant and the consequential orders therefrom be set aside, and the appellant be granted costs of the appeal and costs in the superior court.
13. During the virtual hearing of the appeal, learned counsel Mr. Ashitiva Mandale and Ms. Viviane Otukho appeared for the appellant; whereas learned counsel Mr. Kassim Sifuma appeared for the respondent. Both parties filed written submissions and relied entirely on them.
14. The appellant's anchor argument on appeal is a straightforward one: it is that the consequential part of the learned Judge's judgment breached constitutional provisions. What the appellant has in mind is section 15 and 17 of the Sixth Schedule of the *Constitution*. These provisions, the appellant argues, clearly state that county governments are not automatically the legal successors of the defunct local authorities. Rather, the appellant argues, the functions, assets and liabilities that were under the said local authorities can be allocated to any of the two levels of government, that is, the national government and county government, depending on the legislation put in place to ensure the transition to them. For this proposition, the appellant relied on the decision in *(Interim) County Secretary, County Government of Kakamega v Republic Ex parte Ali Adam & Another* [2017] eKLR, wherein the Court (Murgor, JA.) held that since offices or institutions as defined by the Constitution are limited to those within the national or county governments or the public service, it clearly was not intended that county governments were to be construed to be the offices or institutions contemplated by section 33 of the Sixth Schedule. To the contrary, county governments were established under Article 176 of the *Constitution* as a newly created tier of self-government, with a different structure and orientation from the defunct local authorities. Without any express provision to designate them as legal successors of the defunct local authorities, it cannot be inferred that County Governments should be included within the definition of legal successors as provided for by section 33. The absence of an express provision on the successorship of county governments was, the appellant argues, deliberate on the part of the framers of the Constitution and was intended to take in to account the situations where not all defunct local authorities, as previously existed, were directly assumed and subsumed by county governments within the geographical areas in which they exist today.
15. The appellant further argued that the *Transition to Devolved Government Act*, no 1 of 2012, was created and it in turn established the Transition Authority; which was tasked with, *inter alia*, providing an audit of the liabilities, assets, as well as human resource of the existing local authorities, to



thereafter provide mechanisms for the transfer of those to either level of government, depending on the suitability. The appellant posited that the Transitional Authority was to complete its said tasks within three years after the first election and any residual work that was yet to be done by then was to be transferred to the Intergovernmental Technical Relations Committee which was established under the *Intergovernmental Relations Act*, no 2 of 2012.

16. To this end, the appellant contended that by the time of the transition to the devolved governments, the respondent was not an employee of the defunct County Council of Lugari. Therefore, he was neither a part of the human resource that would have been audited by the Transition Authority, nor part of the transfer, if any, to the County Government of Kakamega. Consequently, the County Government of Kakamega could not confirm the respondent's appointment as its employee without the said proper transitioning procedure, since the respondent does not fall within section 138 of the *County Governments Act*, 2012. The appellant also cited section 33(2) of the *Transition to Devolved Government Act* which, the appellant argues, criminalizes the allocation of assets and/or liabilities/ responsibilities without the approval of the requisite authority, thereby making it an offence for the County Government of Kakamega to confirm the respondent as its employee without following the correct transitioning procedure.
17. The appellant argued that in any event, the period for the Transition Authority to audit human resource belonging to the defunct local authorities expired on or about March 2016. Therefore, it was its submission that the only recourse for the respondent would be to apply for court order directed at the Intergovernmental Technical Relations Committee to determine who between the national government and county government should confirm his employment, if at all the same is still viable at this point.
18. Second, the appellant argued that prior to the new Constitution, all public officers, including those in the service of the local authorities, were employees of the Public Service. In this regard, the promulgation of the Constitution required those employees to be appointed, seconded or otherwise be redeployed to the relevant offices under the new Constitution and the law. For this proposition, it cited section 57 of the *Urban Areas and Cities Act*, 2011, which provides as follows:

“Every person who, immediately before the commencement of this Act was an officer, agent or member of staff appointed, seconded or otherwise employed by a local authority shall, on the commencement of this Act be seconded or otherwise deployed as may be provided by law.”
19. In this regard, the appellant submitted that even if the respondent would have been confirmed as an employee in the Public Service before the promulgation of the new Constitution, he would still need to go through the process of appointment, secondment or otherwise redeployment before he is confirmed as an employee of the County Government of Kakamega. Thus, the appellant contended that the County Government of Kakamega has no power to confirm the respondent's employment and urged this Court to so hold.
20. Third, and eminently secondarily, the appellant impugned the learned Judge's judgment on the facts, arguing that the learned trial magistrate was correct in her finding that there was no proper advertisement for the position; and that, therefore, the respondent was not properly hired. It was, thus, an error for the learned Judge to reverse the finding of the learned magistrate on this point since the respondent had failed to produce a copy of the alleged advertisement.
21. Opposing the appeal, the respondent addressed each ground separately as follows:
 - a. Whether county governments are legal successors of defunct local authorities.



- b. Whether the County Government of Kakamega should implement the decree of 1st December, 2017.
- c. Whether the learned judge erred by arriving at the decision contrary to the facts, circumstance and principles applicable to this case.
22. On the first ground, the respondent cited section 33 of the Sixth Schedule of the Constitution and section 59 of the Urban Areas and Cities Act; and contended that the county government is the body established by law as the natural successor of the defunct local authorities. Thus, the rights accrued by the respondent against the defunct office of the Clerk, County Council of Lugari, shall continue to be sustained against the successor, that is, the County Government of Kakamega.
23. On the second ground, the respondent submitted that section 134(1) of the County Government Act repealed the Local Government Act which established local authorities. He also submitted that section 134(2) of the said Act stipulates that all issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition. To this end, the respondent argued that the body intended by the said section was the Transition to Devolved Government Authority which was established under section 4 of the Transition to Devolved Government Act. Further, pursuant to section 37(1) of the Act, the Transition Authority was dissolved before completing its functions which were handed over to the Intergovernmental Relations Technical Committee, whose purpose was to identify, verify and validate the liabilities of defunct local authorities, and then transfer them to either the national government or county government for liquidation.
24. The respondent also argued that section 35 of the Transition to Devolved Government Act put a moratorium on transfer of assets and liabilities during the transition period. To buttress this point, the respondent purported to rely on an authority he cited as Misc. Application no 10 of 2014. He says that in that case the High Court of Bungoma held that section 35 of the Transition to Devolved Government Act, does not amount to suspension of settlement of claims by the devolved units; but only bars such units from transferring assets and liabilities to third parties, so that no devolved unit shortchanges the central government on shared assets and liabilities. Further, the framers of the Transition to Devolved Government Act and Intergovernmental Relations Act, could not have intended that decree holders be kept in abeyance until the process of verification and validation are completed for them to enforce their claims, as this would be contrary to Article 159(2) and 48 of the Constitution on access to justice. I have, however, been unable to find that decision reported anywhere; and the respondent's counsel did not provide a copy of it as required by the rules of this Court.
25. The respondent also relied on the case of Republic v Town Clerk of Webuye County Council & Another [2014] eKLR, wherein, the respondent says, it was held that courts should adopt an interpretation that favours enforcement of accrued rights without delay. He argued that the Constitution and devolution statutes were intended to establish mechanisms that facilitate settlement of any existing obligations of defunct local authorities to their creditors. Thus, the intention of the drafters could not have been to obstruct the settlement of those obligations.
26. Further, the respondent submitted that section 23(3)(e) of the Interpretation and General Provisions Act provides that where a written law repeals whole or part of another written law, then, unless a contrary intention appears, the repeal shall not affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation, liability, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if repealing written law had not been made. In



this regard, the respondent argued that Parliament could not have intended that there be a vacuum in settlement of debts or fulfilment of decrees from the local authorities.

27. Additionally, the respondent submitted that court cases do not fall under the scope of liabilities that are covered under the *Intergovernmental Relations Act*, hence they are not subject to the process of identification, verification and validation. For this proposition, he relied on the case of *Republic v Kisii County Government Exparte Peter Kaunda Nyamosi, David Nyamweya Sagero and Kennedy Bosire Moindi*, wherein the court held that a judgment debt is not subject to a process of identification, verification and validation of assets and liabilities of defunct local authorities provided under the *Transition to Devolved Government Act* and *Intergovernmental Relations Act*. Instead, court cases are clearly provided for in section 59 of *Urban Areas and Cities Act*, and are therefore excluded from provisions of identification, verification and liabilities. The respondent also relied on the case of *Wachira Nderitu Ngugi & Company Advocates v The Town Clerk, City Council of Nairobi*, Misc. Application no 354 of 2012 [2015] eKLR, wherein the court held that there was no need for verifying the liabilities once judgment has been passed; as doing that would be an affront to the independence of the Judiciary and the doctrine of separation of powers.
28. On the third ground, the respondent defined the word “successor” as stated in the 9th Edition of the Black’s Law Dictionary as “a person who succeeds to the office, rights, responsibilities, or place of another, one who replaces or follows a predecessor”. In this regard, he contended that it follows that the responsibility of the office of the Clerk of the defunct Council of Lugari, of confirming the respondent’s employment now falls on the County Government of Kakamega. Therefore, it should, through the County Public Service Board, confirm the appointment of the respondent as directed by the judgment of the High Court, pursuant to Article 235(1)(b) of the *Constitution*, which provides that a county government is responsible for appointing persons to hold or act in those offices and confirming appointments. Ultimately, the respondent urged this Court to uphold the judgment of the Employment and Labour Relations Court.
29. Having exhaustively considered the record of appeal, the judgment of the Employment and Labour Relations Court, the appellant’s grounds of appeal and the rival submissions of the parties, two issues present themselves for determination in this appeal:
 - a. First, whether the learned judge correctly found that the respondent was appointed as a Clerical Officer SS. 14 by the defunct County Council of Lugari.
 - b. Second, whether in the circumstances of the case, the learned judge correctly ordered that the appellant (the County Government of Kakamega) was the successor of the defunct County Council of Lugari and was, therefore, liable to confirm the appointment of the respondent to the position of Clerical Officer SS. 14 or its equivalent, in the County Government of Kakamega with effect from the date of judgment by the lower court on 27th December, 2012.
30. Turning to the first issue, it is almost plain that the learned Judge was correct to reverse the findings of the trial court that the respondent’s claim failed on the ground that he had not proved that the position for which he was appointed was properly advertised. The record is clear that three witnesses testified that the advertisement for the position was done on the Public Notice Board at the offices of the appellant. The respondent himself categorically so testified. So did, PW2, who was the Chair of the County Council at the time of the alleged advertisement and appointment. Finally, PW3, who was the Town Clerk who signed the appointment letter, equally testified to this fact. The positions taken by each of these witnesses – that the advertisement was done on the Public Notice Board; and that it was customary to do so – was not challenged at all by the respondent on cross-examination. Conversely,



- DW1, the appellant's witness admitted in cross-examination that it was customary for the appellant to advertise for job positions on notice boards; and that it would not have been un-procedural to do so.
31. In the face of the unchallenged evidence that emerged at the trial, it was, plainly, a reversible error for the learned trial magistrate to hold that the respondent's claim failed on the ground that he had not discharged his onus of proof that the position was procedurally advertised. On this score, therefore, we find no error on the part of the learned Judge in reversing the trial magistrate's findings.
 32. The legal implication of this finding is that the respondent had properly established his claim that he was appointed to the position of Clerical Officer of the rank SS 14 by the defunct County Council of Lugari by the appointment letter dated 7th September, 2007.
 33. The second issue raises more troubling questions for the respondent. While the parties have taken rival positions on the correct interpretation to the different statutory provisions as read together with constitutional provisions, the obvious position is that these arguments were neither raised nor adjudicated upon by either of the two courts below. They are being raised for the first time before this Court for argument and determination. The reason for this anomaly is that it is the learned Judge of the ELRC who, *suo moto*, at the judgment stage made an order that the County Government of Kakamega was the successor in law of the defunct County Council of Lugari and, therefore, liable to confirm the appointment of the respondent to the position of Clerical Officer SS. 14, or its equivalent, in the County Government of Kakamega with effect from the date of judgment by the lower court on 27th December, 2012. The issue of the County Government of Kakamega being a successor in law of the defunct County Council of Lugari was never pleaded nor argued, both at the trial court and the first appellate court.
 34. In my view, the position taken by the learned Judge on this point is erroneous because he, *suo sponte*, determined a question that was not before him and without the benefit of legal arguments. It would be un-procedural for the Court of Appeal to take up the matter as a second appeal and render a decision on that legal question when the matter was not properly presented and preserved for appeal before this Court. I would reverse the judgment of the learned Judge only that narrow ground. In doing so, I would not speculate on where that would leave the parties in terms of what would be left of the decision in favour of the respondent. I would only say that would be a matter of execution and leave it to the legal strategies of the rival parties to pursue it before the appropriate court.
 35. The upshot is that, in my view, the appeal partially succeeds. The judgment of the learned Judge of the Employment and Labour Relations Court dated 1st December, 2017 is affirmed in all aspects except to the extent that it directs the County Government of Kakamega "to immediately confirm the appointment of the plaintiff to the position of Clerical Officer. SS 14 or its equivalent position in the Kakamega County Government with effect from the date of judgment by the lower court on 27th December, 2012." I propose that the direction that the County Government of Kakamega to assume the responsibility of the defunct County Council of Lugari be reversed. Finally, since the appeal was partially successful, I would order that each party bears its own costs.

Judgment of Mumbi Ngugi, JA

36. I have had the benefit of reading in draft the judgment of my brother, Joel Ngugi, JA. with which I entirely agree. As Tuiyott JA. is also in agreement, the appeal is partially allowed in the terms proposed by Joel Ngugi JA.



Judgment of F. Tuiyott, JA

37. I have had the benefit of reading, in draft, the opinion of Joel Ngugi, JA. I am in full agreement with the reasoning and the conclusion arrived at by the learned judge.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

