



REPUBLIC OF KENYA



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**County Government of Bungoma v Wanandaba & 11 others (Civil Appeal
121 of 2018) [2023] KECA 47 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 47 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 121 OF 2018
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
FEBRUARY 3, 2023**

BETWEEN

COUNTY GOVERNMENT OF BUNGOMA APPELLANT

AND

ELIUD NYONGESA WANANDABA 1ST RESPONDENT
FOBIAS ODWOR NYONGESA 2ND RESPONDENT
JAFRED OTUNGA BARASA 3RD RESPONDENT
NELSON OBIERO WESONGA 4TH RESPONDENT
ALRED MUHUYI NYONGESA 5TH RESPONDENT
BENARD WANYONYI NAKITARI 6TH RESPONDENT
KENNEDY WANJALA SIPANGILI 7TH RESPONDENT
JUDITH NAFULA OTSIULA 8TH RESPONDENT
FRIDA MAHAEVO LISIRU 9TH RESPONDENT
MARGARET KARANI ITEKE 10TH RESPONDENT
ALBINAH WANG'AA SHIRONYO 11TH RESPONDENT
FLORENCE MANDE OMUZE 12TH RESPONDENT

*(Being an appeal from the judgment and decree of the Employment
and Labour Relations Court at Bungoma (M. N. Nduma, J.) dated
and delivered on 27th July 2018 in ELRC CIVIL CASE NO. 7 OF 2017)*



JUDGMENT

JUDGMENT OF JOEL NGUGI, JA

1. This appeal arises from the judgment of the Employment and Labour Relations Court (ELRC) (Nduma, J.) dated 27th July 2018. The judgment relates to a suit filed by the respondents herein. In the said suit before the superior court, the respondents were the plaintiffs/claimants and they sought the following orders:-
 - a. That the defendant (appellant) be and is hereby compelled and directed to unconditionally absorb the plaintiffs as Youth Polytechnic Instructors for service within Bungoma County.
 - b. General damages and compensation in payment of salary for the months lost while out of duty or in the alternative payment of benefits for unlawful termination.
 - c. Costs and interests on (b) above at normal Court rates.
 - d. Any other reliefs this Honourable Court shall deem fit to grant.
2. In their plaint dated 3rd April 2017, the respondents averred that they were Youth Polytechnic Instructors for vocational training under the Ministry of Education, Science and Technology serving within Bungoma County and that the functions of vocational training and Early Childhood Education were transferred to the County Governments vide Gazette Notice No. 116 of February 2013 and Gazette Supplement No. 116 of 9th August 2013.
3. They averred that the Transitional Authority, which had the mandate to facilitate and coordinate the transition to devolved system of government, organized an inter-governmental consultative meeting on 2nd December 2014 in which it resolved that County Governments make budgetary provisions to absorb the Youth Polytechnic Instructors under Economic Stimulus Program (ESP) in their County establishments on permanent and pensionable terms with effect from 1st July, 2015.
4. They also averred that the Transitional Authority further directed that: the National Treasury facilitates release to the County Governments, funds for capitation for Youth Polytechnic Trainees and grants for instructors employed by the Board of Governors as conditional grants to the Counties; the instructors terms of service including remuneration, allowances and pension or other benefits shall not be altered to their disadvantage; and the instructors shall not be removed from service except in accordance with the applicable terms and conditions.
5. In this regard, it was the respondents case that they were employed by the National Government prior to September 2014 when the Polytechnics/vocational training centers were taken over by the County Governments and since then, they had received no pay from the appellant and had continued to work without pay.
6. The respondents alleged that by a letter dated 27th October 2015 written by the Chairman of the Transitional Authority, Mr. Kinuthia Wamwangi, to the then Cabinet Secretary of the National Treasury, Mr. Henry Rotich and Cabinet Secretary of Education, Prof. Jacob Kaimenyi, it was directed that teachers of vocational training centers be absorbed by County Governments. However, the respondents alleged that the Appellant declined to absorb them and, instead, in 2016, the appellant advertised the positions of Youth Polytechnic Instructors for the entire Bungoma County and carried out interviews which some of the respondents attended. Nevertheless, the appellant laid the



- respondents off and employed new staff contrary to the directions of the Transitional Authority. The respondents insist that this action by the appellant amounted to unlawful termination from work.
7. The respondents also produced letters of appointment which had details of their terms and conditions of service and decried the challenges which faced the transfer process including non-payment of their salaries, detained capitation for Youth Polytechnic trainees and salaries for Board of Governors and employed staff.
 8. The appellant on its part denied the averments by the respondents through a response to claim dated 20th July 2017. The appellant averred that: the respondent's suit was bad in law, defective and ought to be struck out as it did not conform to the relevant provisions of the law; it had never employed the respondents nor dismissed them and neither did it enter into a package agreement with the Transition Authority to retain or employ them hence their claim of unlawful dismissal was untenable; if the respondents attended the interview and failed to qualify, it did not give them the right to file cases in court to force the appellant to employ them; and the respondents were not entitled to any relief sought.
 9. The appellant did not call any witnesses and neither did it provide the trial court with any material information in relation to the respondents claim but through its written submissions dated 13th March 2018, it stated that the respondents: did not prove its case on a balance of probability; did not institute their suit by way of statements of claim as provided for by Rule 4 of the *Employment and Labour Relations Rules* of 2016; did not seek any declaratory orders requiring the recognition of the agreement between the Transitional Authority and County Governments to recognize workers who initially worked with the National Government as Youth Polytechnic Instructors, thus, they could not force payment from the County Government; did not prove in their evidence that they were on the pay roll of the appellant and neither could they compute the figure they were to be paid and the amount which they claimed in form of salaries could not be computed as the same was never pleaded; and were never employed nor terminated by the appellant.
 10. In its decision, the trial court held that by the letter dated 27th October 2015 written by the Chairman of the Transitional Authority, Mr. Kinuthia Wamwangi, the appellant was under obligation to absorb the respondents and pay all their salary arrears. As a result, it allowed the orders sought by the respondents and directed that the respondents be paid within thirty (30) days of the judgment and that the appellant pay costs of the suit.
 11. Aggrieved by the decision of the trial court, the appellant filed a Notice of Appeal dated 8th August 2018 and a Memorandum of Appeal dated 22nd September 2018 in which it raised eight (8) grounds of appeal. These are that the trial court erred in law and fact by: compelling the County Government of Bungoma to employ the respondents and pay them which orders were arbitrary and oppressive as it amounts to forcing an employee to an employer which order contravenes the statute, Constitution and rules of law; heavily relying on the Transitional Authority letter dated 27th October 2015 which informed the Cabinet Secretary of the National Treasury of the activities of the Authority and its observation and did not compel County Governments to absorb and pay staff of the National Government or Local Authorities; failing to comprehend the powers and functions of the Transition Authority as per Sections 4, 7 and 8 of the *Transitional to Devolved Government Act*; failing to internalize the powers of Parliament as provided for under Schedule Six which gave Parliament powers to develop a piece of legislation to guide the devolved units on how they are supposed to discharge their functions to deal with emanating demands; directing the appellant to absorb and pay the respondents within thirty (30) days from the date of judgment which order could not be implemented within that period as the same involved restructuring the relevant departments to absorb the respondents which had to take time including sourcing for funds; failing to understand that there was no contractual relationship between the appellant and the respondents hence the County



Government of Bungoma could not be compelled to shoulder responsibilities for persons that were strangers; failing to consider the evidence and submission of the appellant which submission had largely controverted the respondents claim hence should have been dismissed; and lastly, that the trial Judge was generally biased in his judgment against the appellant.

12. Consequently, the appellant prayed that the appeal be allowed, judgment against the appellant be set aside and costs of the appeal to be provided for.
13. During the virtual hearing of the appeal, learned Counsel Ms. Nekesa was present for the respondents. There was no appearance of counsel for the appellant. Both parties had filed written submissions.
14. In its submissions dated 23rd September 2022, the appellant argued that from the wordings of the orders sought by the respondents in the trial court, the respondents were seeking to be recruited by the appellant as instructors and be paid, in which case they ought to have sought recognition rather than absorption or employment since they were employees under the National Government. The appellant asserted that this amounted to forcing an employee to an employer and relied on the case of *National Land Commission vs. Salome Mumbi & 4 Others*, Nairobi Civil Appeal No. 248 of 2020 and *Geoffrey Kamau Ndishu & Another vs. Peter Muchiri Muriungi*. It was urged that respondents cannot force themselves to work for the appellant; that there must be an employee and employer relationship by virtue of an agreement contract between them.
15. Secondly, the appellant argued that the respondents never exhibited any Gazette Notice on the transfer of functions of the Ministry of Education for Technical Training from the National Government to the County Governments and as such, the trial Judge erred in relying on a document of inquiry addressed to the then Cabinet Secretary of the National Treasury whose authority and facts were not verified by the makers and never copied to the appellant. The appellant further argued that the contents of the said letter/document seemed to be a complaint to the National Government for not having released funds to the devolved units to settle the affected persons from the Ministry of Education for Technical Training. That Section 7 of the *Transition to Devolved Government Act* spells the powers and functions of the Transition Authority which does not include powers to devolve any function other than that of coordination.
16. Lastly, the appellant argued that the trial Judge failed to understand the applicable principles on how devolved units implement legislation and the process of implementation. In this regard, it was urged that the order to pay the respondents all their arrears as computed in the 15th Schedule was abstract and incapable of being implemented as no such evidence was tendered before the trial court and neither was it pleaded.
17. In their submissions in reply and during oral highlighting, Counsel for the respondent, Ms. Nekesa, opposed the appeal and outlined two main issues for determination namely: whether the judgment against the appellant should be set aside and whether the appeal has merit.
18. On whether the judgment against the appellant should be set aside, Ms. Nekesa submitted that it is an undisputable fact that the respondents served as Youth Polytechnic Instructors within Bungoma County under the Ministry of Education, Science and Technology as the appellant did not tender any evidence to the contrary. That further, the functions were later transferred to the County Governments vide Gazette Notice No. 116 of 2013 and Gazette Supplement No. 116 of 9th August 2013 and as per the letter dated 27th October 2015. However, the appellant never adhered to the directives of the Transitional Authority and in the alternative, sought to advertise the positions of the respondents in the year 2016 and later laid them off without notice rendering them jobless. That in doing this, the appellant contravened Section 138(1) of the *County Government Act* which provides that officers



serving on such secondment from the National Government would retain their terms of service which will not be altered to their disadvantage and relied on the case of *Oire vs. The County Government of Machakos & Another*, Cause No. 379 of 2020 and *Silas Kipruto & Another vs. County Government of Baringo & Another* [2014] eKLR.

19. Ms. Nekesa further submitted that the appellant breached Article 41 of the *Constitution* and Section 45(2) of the *Employment Act*, 2007 by terminating the respondents and have failed to demonstrate why the appeal should be allowed; that since it did not give any material information before the trial court, the same rendered their defence baseless. She asserted that there was no denial that the appellant was under an obligation to absorb the respondents and pay them their salaries.
20. On whether the appeal has merit, Ms. Nekesa submitted that the entire appeal lacked merit as the appellant failed to attach any documentary evidence in the trial court and that the respondents should be allowed to reap the benefits of their judgment and relied on the case of *Richard Mogire vs. LE Palanka Restaurant* [2021] eKLR.
21. This being a first appeal, we are required to re-evaluate and re-analyze the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123) In addition, we must be cognizant of the fact that we should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane vs. Olenja* (1968) KLR 661).
22. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellant's grounds of appeal and the rival submissions of the parties, two main issues present themselves for determination on this appeal:
 - a. First, whether the respondents were legally seconded public officers and if so, whether the appellant was legally obliged to absorb them into its workforce.
 - b. Second, if the answers to (a) above are in the affirmative, whether the Learned Trial Judge granted the appropriate reliefs following the appellant's failure to absorb the respondents into its workforce.
23. Respecting the first issue, the appellant appears to make three arguments to contest the respondents' position that they were legally seconded to it as public officers. First, the appellant argues that the letter dated 27th October, 2015 written by the Chairman of the Transitional Authority, Mr. Kinuthia Wamwangi, to the then Cabinet Secretary of the National Treasury, Mr. Henry Rotich and Cabinet Secretary of Education, Prof. Jacob Kaimenyi is not sufficient proof that the respondents had been seconded because the purpose of the letter was evidently to complain that funds had not been released by the national government to the devolved units. The purpose of the letter, the appellant argues, was not to demonstrate the fact of secondment, and, therefore, it cannot be used for such demonstration. Second, the appellant appears to argue that even if the letter achieved that purpose, it was ultra vires the functions of the Transitional Authority under section 7 of the *Transition to Devolved Government Act*. Third, the appellant complains that it was fatal to the respondents' case that they did not produce the gazette notice that transferred the functions of the Ministry of Education for Technical Training from the National Government to the County Governments.



24. The first two arguments raised by the appellant are succinctly answered by section 138 of the [County Governments Act](#). It reads as follows:

- 138 (1) Any public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming to effect of this Act and is serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from national government with their terms of service as at that date and—
- a. the officer's terms of service including remuneration, allowances and pension or other benefits shall not be altered to the officer's disadvantage; and
 - b. the officer shall not be removed from the service except in accordance with the terms and conditions applicable to the officer as at the date immediately before the establishment of the county government or in accordance with the law applicable to the officer at the time of commencement of the proceedings for the removal; and
 - c. the officer's terms and conditions of service may be altered to office's advantage.
2. Every public officer holding or acting in a public office to which the Commission had appointed the officer as at the date of the establishment of the county government shall discharge those duties in relation to the relevant functions of the county government or national government, as the case may be.
 3. The body responsible for the transition to county governments shall in consultation with the Public Service Commission and relevant ministries facilitate the redeployment, transfers and secondment of staff to the national and county governments.
 4. The provision under subsection (2) shall not preclude—
 - a. the County Public Service Board or other lawful authority from promoting or appointing the officer to another public office in the county; or
 - b. re-deployment by the relevant lawful authority.
 5. The period of secondment under subsection (1) shall cease upon the transfer of a public officer from the national government to a county government or upon the release of an officer by the county government to the national government.
 6. Appointment of a public officer by the Commission includes appointment of a public officer on powers delegated by the Commission.

25. This section not only makes it clear that it was the Transition Authority that had the mandate to facilitate the secondment of public officers from the national government to county governments for those officers working in dockets which had been devolved but also that such secondment was



- statutorily provided for. In the present case, it is not contested that vocational and technical training is a devolved function under paragraph 9 of the Fourth Schedule of the Constitution. It follows, therefore, that the Transitional Authority’s letter dated 27th October, 2015 was within its mandate and was strictly within the statutory framework provided under section 138 of the [County Government Act](#).
26. The appellant’s argument that the it was fatal to the respondents’ case that they did not produce the gazette notice that transferred the functions of the Ministry of Education for Technical Training from the National Government to the County Governments does not fare any better. The respondents explicitly pleaded that the functions of vocational training and Early Childhood Education was transferred to the County Governments vide Gazette Notice No. 116 of February 2013 and Gazette Supplement No. 116 of 9th August 2013. They also alluded to the Gazette Notices in their testimony during the trial because they adopted their written statements as part of their evidence – and the written statements specifically referred to the Gazette Notices. The appellant did not traverse the pleaded averment in its defence. Neither did it produce any evidence at trial to impugn the two Gazette Notices. Additionally, the two Gazette Notices are official government publications amenable to judicial notice. In the circumstances, it is unavailing for the appellant to complain that the two Gazette Notices ought to have been specifically produced in evidence.
27. The conclusion on this first issue, then, is that the respondents were, evidently, properly seconded to the appellant; and the appellant was obliged to absorb them into its workforce on the same terms as they had in the National Service by dint of section 138 of the County Action Act. This ushers in the second issue canvassed in the appeal: was the Superior Court Trial Judge in error to give the reliefs that he did?
28. The reliefs ordered by the Learned Trial Court Judge were as follows (produced verbatim):
- a. The Respondent is compelled and directed to unconditionally absorb the claimants as youth polytechnic instructors for service within Bungoma County (sic).
 - b. The Respondent is directed to pay all arrears to pay all arrears salary (sic) as computed in schedule 15 to the Claimants (sic) within 30 days of this judgment.
 - c. The arrear salary (sic) to be paid with interests at court rates from the date of filing suit until payment in full.
 - d. The Respondent to pay costs of the suit.
29. The appellant is concerned, first, that order (a) amounts to the court forcing an employee on to an employer; an outcome it finds impermissible and untenable under our law and jurisprudence. However, going by the findings and holding the learned Judge made, which I have found to be justified in the circumstances of this case, the relief ordered – that the respondents be absorbed into the workforce of the county as ordained by section 138 of the [County Governments Act](#) – is neither impermissible nor untenable. Indeed, our jurisprudence has consistently affirmed that reinstatement for wrongfully discharged employees is, in appropriate cases, a permissible relief in employment disputes.
30. Second, the appellant is concerned about the damages awarded. It describes them as “abstract” and incapable of ascertainment. I do think that the appellant is correct on this score. The learned Judge ordered the respondent to “pay all arrears to pay all arrears salary (sic) as computed in schedule 15 to the Claimants (sic) within 30 days of this judgment.” On perusal of record of appeal, I have not been able to find the “schedule 15” that the learned Judge referred to in his judgment; and it is certainly not



attached to the Claim filed by the respondents. To this extent, the appellant is correct that the damages ordered by the learned Judge is, at best, ambiguous and incapable of ascertainment and compliance.

31. Accordingly, I am satisfied that the appeal has merit only to the limited extent that the damages awarded are not ascertainable. I would propose that the appeal be allowed only to that extent and that the case be remitted back to the same judge of the Superior Court who determined it so that the learned judge can clarify with ascertainable specificity the damages assessed. All the other aspects of the judgment and orders of the Superior Court remain undisturbed. I would also propose that there be no order as to costs in view of the partial success of the appeal.

JUDGMENT OF KIAGE, JA

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.
2. As Tuiyott, JA is also in agreement, the final orders in the appeal are as proposed by Joel Ngugi, JA.

JUDGMENT OF TUIYOTT, JA

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

JOEL NGUGI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

