



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 87 OF 2016

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION.....APPELLANT

AND

KISUMU COUNTY PUBLIC SERVICE BOARD.....1<sup>ST</sup> RESPONDENT

KISUMU COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT

*(An appeal arising from the Judgment of the Employment and Labour*

*Relations Court of Kenya at Kisumu (Maureen Onyango, J.) dated 16<sup>th</sup> day of June 2016*

*in*

**ELRC Petition No. 3 of 2015)**

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**JUDGMENT OF THE COURT**

[1] This is an appeal from the judgment and decree of the Employment and Labour Relations Court (E&LRC) at Kisumu which dismissed the appellant's petition with no orders as to costs.

[2] On 30<sup>th</sup> January, 2015 the appellant filed a Constitutional Petition on behalf of its forty unionisable members, the interested parties herein, seeking an order in essence, to compel the two respondents to reinstate the interested parties to their employment. The appellant averred in the petition, *inter alia*, that the interested parties were employees of Kisumu County Government, the 2<sup>nd</sup> respondent; that the interested parties were deemed transferred to the 2<sup>nd</sup> respondent upon the promulgation of the Constitution of Kenya 2010; that the functions of the Public Service Commission were taken over by the County Public Service Boards; that any action taken by the Public Service Commission are deemed taken by the County Public Service Boards; that the interested parties were dismissed by the Public Service Commission, the predecessor of the respondent contrary to the Employment Act, the Constitution, Collecting Bargaining Agreement, and against the rules of natural justice. The appellant further averred that the dismissal of the interested parties infringed the interested parties' constitutional rights to fair labour practices and was also discriminatory.

The petition was supported by the affidavit of **Roba Duba**, the Secretary General of the appellant in which he stated that the Kisumu Municipal Council in contravention of the law engaged in acts, which he specified, which resulted in the dismissal of the interested parties; that the Kisumu Municipal Council realized the error and set up "*the Okola Committee*" which recommended the reinstatement of the interested parties; that despite the recommendations, the respondents have continued to infringe the rights of the interested parties to fair administrative action and that the Court has power to correct the errors and infringement of the rights of the interested parties by ordering reinstatement.

[3] The 1<sup>st</sup> respondent filed a replying affidavit sworn by **Hesbon Owuor Hongo** the Secretary and Chief Executive Officer of the 2<sup>nd</sup> respondent who deponed, *inter alia*, that the interested parties had already been dismissed by the Public Service Commission by the time the 1<sup>st</sup> respondent was constituted; that the 1<sup>st</sup> respondent was neither involved in the employment of the interested parties nor termination of their employment; and that the 1<sup>st</sup> respondent did not make any decision for which it can be sued.

[4] The 2<sup>nd</sup> respondent also filed a replying affidavit sworn by **John Wamalwa Munoko**, the Human Resource Manager of the City Council of Kisumu in which he stated, among other things, that the interested parties were previous employees of Ministry of Local Government engaged by the Public Service Commission under the recommendations of the relevant municipality; that the Public Service Commission investigations revealed that the interested parties had forged their academic certificates; that the interested parties were terminated from the employment of the defunct Municipal Council of Kisumu pursuant to investigations by the Public Service Commission; and that the Municipal Council of Kisumu had no say or hand in the dismissal of the interested parties; that the respondents came into operation and existence after the last General Elections in 2013, long after the fate of the interested parties had been sealed by the Public Service Commission and that the communication on termination and dismissal of the interested parties was solely dealt with by the Public Service Commission and that the blame, if any, in respect of the dismissal of the interested parties lies with the Public Service Commission.

[5] The E&LRC considered the petition and made a finding in the relevant part thus:

**“It is not therefore possible to discern from the petition whether the process adopted before the interested parties were dismissed did not comply with any set procedure or if any of their constitutional rights were infringed. It is also not possible to tell what the mandate of the Disciplinary Committee was or if it had the power to review the decision of the Public Service Committee, and if its recommendations were binding on the respondents.**

**The respondents had submitted that they were established after the dismissal of the interested parties and are therefore non-suited as the interested parties were not in employment at the time they were established and they therefore did not inherit the interested parties from the defunct Municipal Council of Kisumu. No effort was made by the petitioners to demonstrate how the 1<sup>st</sup> and 2<sup>nd</sup> respondents became liable for the dismissal of the interested parties who were (apparently) dismissed in December 2012, before the establishment of the respondents”**

[6] There are seven grounds of appeal which were argued under three categories namely, that the judge erred in law in finding that the actions of the defunct local authorities formed under the Local Government Act does not bind the respondents; that the court ignored clear evidence; and the failure to analyse evidence, submissions and to assign reasons for the decision. Ground 5 of the appeal which constitutes the first category was argued first. In support of that ground, **Yego** for the appellant submitted that the appellant’s written submission demonstrated how the respondent owed a duty to the interested parties and how they were liable for the actions of the Kisumu Municipal Council.

In the submission filed by the appellant in the High Court the appellant had submitted, in essence, that the staff of the defunct local authorities were deemed transferred to the County Governments under the same terms and conditions of service; that the interested parties were to be absorbed into County Governments; that the Transition Authority in its guidelines to Governors made it clear that workers of the defunct local authority are part of the human resource and that the appellant are deemed to be former employees of the respondents. On the other hand, **Roba** for the respondents submitted in essence that while the County Government after the promulgation of the Constitution of Kenya, 2010 inherited the assets and liabilities of the defunct local authorities within its boundaries, the interested parties did not form part of the assets and liabilities of the respondents as per the Transition Authority Audit carried out in 2013.

[7] The Constitution of Kenya 2010, which came into effect on 27<sup>th</sup> August, 2010 in **Article 176(1)** established a County Government for each county comprising of the County Assembly and County Executive. However, **Clause 2(2)** of the Sixth Schedule to the Constitution suspended the provisions of the Constitution relating to Devolved Government including **Article 176(1)** until the date of the first election for County Assemblies and Governors held under the Constitution. By **Clause 9(1)** of the **Sixth Schedule**, those elections were to be held within sixty (60) days after the dissolution of the National Assembly at the end of its term. The first elections were in fact held in early 2013. By **Clause 18** of the **Sixth Schedule**, all the local authorities established under the Local Government Act were to continue to exist subject to any law which might be enacted.

[8] The **County Government Act No. 17 of 2012** was given Presidential assent on 24<sup>th</sup> July 2012 but the commencement date was upon the final announcement of results of the first election under the Constitution. The **County Governments Act (CGA)** established the County Governments including County Government of Kisumu and County Public Service Boards.

By **Article 235** of the Constitution, County Governments are responsible for, *inter alia*, appointment of staff and exercising disciplinary control over the staff.

By section **59** of **CGA**, the matters relating to staffing in County Governments are assigned to respective County Public Service Boards which are by **section 57(a)** corporate bodies. Section 134 of CGA repealed the Local Government Act and section 134 (2) provides 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.”**

[9] **Section 138** of **CGA** which is relevant to this dispute provides in part:-

**“(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 the 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 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 proceedings for the removal; and**

**(c) the officer's terms and conditions of service may be altered to the office's advantage**

(2) ...

**(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) ...

**(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 county government to the national government."**

[10] The **Transition to Devolved Government Act, No. 1 of 2012 (Transition Act)** which commenced on 9<sup>th</sup> March 2012, in section 4 established the Transition Authority as a body corporate. The objects of the Transition Act as stipulated in section 3 included to:

**"(d) provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of –**

**(i) assets and liabilities;**

**(ii) human resources**

**..."**

The functions of the Transition Authority as stipulated in section 7 included to:

**(i) carry out an audit of the existing human resource of the government and local authorities.**

**(j) assess the capacity needs of national and county governments;**

**(k) recommend the necessary measures required to ensure that the national and county governments have adequate capacity during the transition period to enable them undertake the assigned functions."**

By **Section 37** the Transition Authority stood dissolved three years after the first general elections under the Constitution or upon full transition to county governments whichever was earlier.

[11] Lastly, the repealed Constitution by **Clause 106(1)** established the Public Service Commission. Clause 12 provided that the Commission in the exercise of its functions under the Constitution was not subject to the direction or control of any other person or authority.

Clause 107(1) provided:

**"subject to this Constitution, the power to appoint persons to hold or act in the public service and in the service of local authorities (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall vest in The Public Service Commission."**

**Clause 107** provided exceptions to the exercise of power under **Clause 107(1)** but those exceptions do not cover persons who were in the service of Local Authorities.

[12] From the foregoing provisions of the law, the legal position as it relates to the appeal can be stated thus:

The Kisumu Municipal Council ceased to exist when the CGA came into effect in early 2013 and was succeeded by the County Government of Kisumu. The Kisumu County Public Service Board assumed the responsibility of all staffing matters, including appointment of persons to hold office and exercising disciplinary control. All public officers who were serving in Kisumu County on the date of the constitution of the County Government were deemed to be in the service of the County Government on secondment from the National Government with their full terms of service. The Transition Authority was to facilitate the redeployment, transfer and secondment of staff and upon transfer of public officers from the National Government to County Government secondment would cease, and the public officer would become an employee of County Government. All issues arising from the transition were to be resolved by the Transition Authority. The interested parties were employed by the Public Service Commission though deployed to Municipal Council of Kisumu. The documents attached to the petition show, and it was admitted in the petition, that the interested parties were dismissed by the Public Service Commission on 28<sup>th</sup> June 2012 for mainly forging academic documents. The appeals of those who appealed against dismissal were also dismissed by the Public Service Commission.

By **Clause 33** of the **Sixth Schedule** to the Constitution, an office or institution established under the Constitution is the legal successor of the corresponding office or institution established under the former Constitution whether known by the same or new name. It follows that the Public Service Commission established under Article 233 of the Constitution of Kenya 2010 is the legal successor of the Public Service Commission established under Clause 106(1) of the former Constitution. So, if any of the interested parties had filed a review against dismissal of the appeal to the defunct Public Service Commission, the review should have been handled by the new Public Service Commission under the current Constitution.

[13] **Section 138** of **CGA** specifically states that only the public officers who were serving in the County of Kisumu on the date of the constitution of the County Government of Kisumu could be deemed to be in service of the County Government on secondment. It is only the service officers who would have been transferred or redeployed by County Government of Kisumu by the Transition Authority. The Transition Authority did not transfer or redeploy the interested parties to the County Government of Kisumu. The County Government of Kisumu and its County Public Service Board which came in existence after the interested parties were dismissed by their former employer, that is, the Public Service Commission had no statutory power or duty to reinstate the interested parties or to reverse the dismissal by the Public Service Commission. It follows that the petition against the respondents was incompetent and that the E&LRC correctly dismissed the petition on this ground.

[14] The other grounds relate to the lawfulness of the decision of the Public Service Commission. In view of the decision we have reached, it is not desirable to deal with those grounds.

[15] For the foregoing reasons, the appeal has no merit and is hereby dismissed. The court below did not award costs. It is just that each party should bear its own costs of the appeal.

It is so ordered.

**Dated and delivered at Kisumu this 27<sup>th</sup> day of June, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**