IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE JJ.A)

CIVIL APPEAL NO. 37 OF 2015

BETWEEN

MURANG'A COUNTY PUBLIC SERVICE BOARD…….....…….APPELLANT

AND

GRACE N. MAKORI ……..……..…….1ST RESPONDENT

ISAAC NGOTHO MAINA & 175 OTHERS……...……..…..2NDRESPONDENTS

PUBLIC SERVICE COMMISSION……...…….....3RD RESPONDENT

MINISTRY OF HEALTH…….……..4TH RESPONDENT

(Appeal from the judgment and decree of the Employment and Labour Relations Court at Nyeri (Ongaya, J.) dated 8th May, 2015

in

E.L.C. PETITION NO. 1 OF 2015)

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JUDGMENT OF THE COURT

This is a first appeal by the **Murang'a County Public Service Board** (the appellant) against the judgment and decree of the Employment and Labour Relations Court at Nyeri (**Ongaya J.**) which granted as against the appellant the prayers in a petition filed by **Grace N. Makori,** and by **Isaac Ngotho Maina & 175 others** (the two Respondents).

The two Respondents had in their petition averred that they were health workers employed by the Government of Kenya on diverse dates between 2010 and 2013 under the Economic Stimulus Programme (ESP) who were later seconded to Murang'a County upon the advent of devolution. They were employed on three -year contracts which were later to be changed to permanent and pensionable terms and in tandem with regular public service employment. Their employment fell under three phases with those whose contracts expired in 2012 already absorbed into the public service on permanent and pensionable

terms.

The two respondents averred further that following the devolution of health services, the appellant had a duty to implement any agreements under the ESP and that indeed, the Cabinet Secretary for Health by a letter dated **24th January 2014,** did advise all county governments, including the Murang'a County Government, to absorb all ESP health workers into regular public service employment on permanent and pensionable terms. Instead of so absorbing the two respondents when their contracts expired around May 2014, the appellant extended their contract for a further six months "pending a review of their terms of employment", for which they were requested to submit their academic and professional certificates and await appointment letters, which the appellant promised to issue not later than **16th December 2014**.

That date passed without any such letters and upon enquiring on **19th December 2014,** the two respondents were informed by the appellant that their ESP contracts had been extended, on subsisting terms, for a further **seven months**, ostensibly because their remuneration on regular terms had not been budgeted for in that financial year. The appellant rejected a request to absorb the two respondents into regular employment and address any resultant under-payment upon funds becoming available.

That rejection prompted the two respondents to go into a go-slow in protest at what they viewed as discrimination. They also reported the matter to the County Labour Officer, who duly convened a conciliation meeting on **9th January 2015** which they attended, but the appellant snubbed. Moreover, the appellant commenced a recruitment process to replace the two respondents and, **effective 6th January 2015,** locked them out of their work stations and also, in their contention, had some of them roughed up by "***hired goons***".

The two respondents concluded their petition by contending that having already worked for the appellant together with the Public Service Commission of Kenya (PSC) and the Ministry of Health (MOH), who were enjoined as respondents therein, they had a legitimate expectation that they would be absorbed into regular employment of the appellant as promised. They complained of a continuing discrimination in that they were paid a consolidated salary of about Ksh. 20,000, while their counterparts in regular employment were paid about Ksh. 50,000 per month.

On those premises, they sought judgment for the following prayers;

i. ***An order compelling the 1st Respondent to reinstate, without loss of benefits, all the ESP health workers on permanent and pensionable basis as directed by the Cabinet Secretary on 24th January, 2014.***

ii. ***Stop the 1st Respondent from recruiting to replace the petitioners until the matter is heard and determined.***

(iii) Stop victimization of the petitioners and/or their representatives.

(iv) Costs of this petition.

The petition was accompanied by a Motion for interim injunctive relief from being locked out of their work stations. It was supported by the affidavit of GRACE N. MAKORI sworn on 13th January 2015.

In response to the Petition and the Motion, the appellant filed a replying affidavit on 23rd February 2015. It was sworn on the same day by **Richard Kamami** the Secretary to its Public Service Board. The appellant first contested the two respondents' capacity to sue absent written authority. It also described the National Government's position that the appellant absorb the ESP workers on regular terms as a mere '***request***', absent letters of appointment on permanent and pensionable terms and forwarded funds for absorption. The appellant denied giving any undertaking to absorb the ESP workers on regular terms and

contested the alleged legitimate expectation that it would do so.

The appellant conceded having set in motion a recruitment process to replace those among the two respondents who withheld their services, stating that it was under no obligation to absorb them, not having been privy to the initial contracts anyway, and had only acted out of "good will", which the two respondents did not reciprocate. It also denied any discrimination, as the ESP workers had voluntarily signed onto the contractual terms, and their continuation was, moreover, consistent with the conduct of other counties. It argued that the two respondents' labour rights ought not to prejudice or override other persons' rights, including the county residents' right to health. It invited the Court to take judicial notice of the massive budgetary deficits county governments were reeling under, and that recruitment of the two respondents on permanent and pensionable terms before monies were available, would be oppressive. It therefore prayed that the petition itself and the accompanying notice of motion for interim injunctive relief be dismissed with costs.

The same Richard Kamami swore a Further Replying Affidavit on 1st April 2015, on behalf of the appellant in response to the Further Replying Affidavit of Grace Makori sworn on 5th March 2015. In it he averred, in part, the crux on the appellant's case as follows;

> ***"12. The Cabinet Secretary in-charge of Health has no Statutory power to direct the 1st Respondent [the appellant herein] to change the ESP's terms of employment as that is the role of CPSB [County Public Service Board]***
>
> . . . . .
>
> ***18. The letter attached as "GNS" has no statutory basis and is at best illegal. The National Government has no power to direct County Governments to employ the ESP staff on permanent and pensionable terms.***
>
> ***19. The County Public Service Board is autonomous and exercises its statutory mandate under Section 59 of the County Governments Act, 2012 without any directions or control from the National Government".***

On behalf of the PSC and the MOH, Makori Okello, the Litigation Counsel in the Office of the Attorney General and Department of Justice swore a Replying Affidavit on **24th April 2015**. He swore that the philosophy behind the ESP by the National Government was ***"Making Quality Healthcare Accessible to All Kenyans"*** and he attached a copy of the 2009/10 budget speech by the then Minister for Finance. He admitted and conceded the legitimate expectations of the ESP staff and supported their cause that they should be absorbed into permanent and pensionable terms at their expiry of the contractual terms and be not discriminated against. He asserted that the said staff were;

> ***"9. Constitutionally entitled to fair labour practices including right to fair remuneration, equality of employment opportunities, non-discrimination and to reasonable working conditions in employment"***

He termed the appellant's Further Replying Affidavit as "***misguided, unfortunate and aversive (sic) to the required constitutional co-operation***" between the appellant on the one hand, and PSC and MOH on the other, and accused the appellant of committing unfair labour practices. That affidavit concluded as follows;

> ***"THAT it is more convenient to employ the petitioners on permanent and pensionable basis rather than contractual basis for the following reasons;***
>
> i. ***Failure to do so is a direct breach of their contract of service;***
> ii. ***Inconvenience is not a legal defence to breach of contractual obligations;***

iii. ***Failure to do so is unfair and would cause undue hardship on the petitioners;***

iv. ***It is cost effective;***

v. ***It would avert frequent industrial disputes; and***

vi. ***It would ensure quality service delivery of health services in the County health facilities hence promoting effective devolution of health services."***

After a number of procedural steps and peripheral skirmishes between the main protagonists, the Petition proceeded to hearing on the basis of submissions filed and made before the learned Judge. The submissions were an elaboration, with proofs and authorities, of the respective positions of the parties as we have set out herein. We have set them out in fulfillment of our duty as a first appellate court to re-appraise and exhaustively reanalyze the entire record with a view to drawing our own fresh and independent conclusions on the matter.

After hearing the submissions by the parties, the learned Judge allowed the petition against the appellant in the following terms;

> ***"1. A declaration that the petitioners are each entitled to be retained in the employment of the 1st Respondent on regular permanent and pensionable basis with effect from the date of lapsing of their respective initial 3 years' contractual term of service.***
>
> ***2. The Respondent to provide for and to meet the resultant financial implications of order 1 by 1st August 2015 in view of the government budgetary cycle and in default interest at court rates to run from 1st August 2015 till full payment of the extra monthly payments that may be due to each of the petitioners till full payment.***
>
> ***3. The Secretary and each member of the 1st Respondent shall be responsible for implementation of orders 1 and 2 above.***
>
> ***4. The 1st Respondent is stopped by itself or by its employees or agents from victimization of the petitioners or petitioners' representatives with respect to the matters leading to or after the dispute in the present case.***
>
> ***5. The 1st Respondent to pay the petitioners' costs of the suit.***
>
> ***6. The 2nd and 3rd Respondents to bear own costs of the suit."***

That judgment did not go down well with the appellant. It filed a notice of appeal and a record of appeal. In its memorandum of appeal it raised a dozen grounds of appeal in which it stated that the learned judge erred by;

- ***Failing to appreciate sufficiently or at all that the terms of service of health workers is a devolved function under its exclusive mandate under the Constitution and the County Government Act, and the PSC has no authority or power over officers in the service of a County Government.***

- ***Ordering without jurisdiction that the two Respondents be employed under terms different from those prevailing at the date of the Constitution in contradiction of Section 138(1) of the County Governments Act.***

- ***Making orders with onerous and retrospective financial obligations without regard to the role of the County executive and County assembly in approving budget and expenditure under the County Government Act and the Constitution.***

- ***Failing to appreciate the national government's obligation to avail resources necessary for its direction for absorption of the two Respondents on permanent terms of service.***

- ***Unjustly and oppressively determining that the appellant had no role in determining the two Respondents' terms of service yet shifting to it the financial burden of their implementation.***

- ***Finding that the two Respondents were entitled to permanent employment under Section 37 of the Employment Act, 2007 yet they were fixed term contract employees, not casuals.***

- ***Failing to appreciate that counties are distinct with different financial resources and capacity thereby wrongly finding discrimination.***

- ***Failing to appreciate that Article 234(2) of the Constitution was inapplicable and not before the court for determination.***

- ***Finding without basis that a decision to absorb the two Respondents was after consultation with the Council of Governors and the appellant was bound to comply.***

- ***Finding that the two Respondents were entitled to be retained on permanent and pensionable terms for the lapse of their contracts which had not been prayed for.***

- ***Making a contradictory finding that there was an obligation to budget for financial obligations yet directing retrospective application of his order.***

At the hearing of the appeal, **Mr. Mbugua**, the appellant's learned counsel elucidated on those grounds. He submitted that the two Respondents were serving under the appellant discharging a devolved function and that their terms of service were governed by **Section 138(1)** of the County Governments Act which, read together with **Article 230(2)** of the Constitution**,** meant that those terms are regulated by the Salary and Remuneration Commission (SRC) on the appellant's recommendation. Counsel faulted the learned Judge for holding that only the National Government could determine the two Respondents' terms of service thereby trivializing the role of the appellant under **Section 15** of the County Governments Act**.** He contended that the learned Judge's finding that only the PSC and the MOH could determine whether those terms were to be permanent and pensionable was without legal basis and amounted to a re-writing of those terms which had always subsisted as contractual. In so re-writing the terms, submitted counsel, the learned Judge acted without jurisdiction. He cited in aid this Court's decision in **MUMO MATEMU –VS- TRUSTED SOCIETY OF HUMAN RIGHTS & 5 OTHERS** [2013] e KLR which had restated the late Nyarangi J.A.'s famous dictum on jurisdiction in **THE OWNERS OF MOTOR VESSEL "LILLIAN S." –VS- CALTEX OIL (K) LTD** [1989] KLR 1;

> ***"Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction"***

We found this submission rather difficult to follow since it was never contended that the learned Judge did not have jurisdiction to entertain and adjudicate on the dispute before him. Any party may be at liberty to question the manner in which the learned Judge construed or interpreted the terms of service of the two Respondents, but we apprehend that to be a wholly different matter from acting without jurisdiction. We agree that jurisdiction is everything, but are unpersuaded that the same was lacking herein.

Counsel next submitted that the learned Judge issued a declaration correcting the terms of service to regular permanent and pensionable with effect from the lapsing of [the] respective initial 3 years contractual terms of service "which was not prayed for in the petition." This effectively meant that the appellant was burdened with an obligation to comply going back to May 2014, when the contract terms were to initially lapse, which was a year before the judgment. The appellant stood embarrassed by the

retrospective nature of the order. Counsel referred to the case of **TROJAN & CO. LTD –VS- RM. N.N. NAGAPPA CHETTIAR** [1953] AIR 235, a decision of the Supreme Court of India to the effect that a case cannot be based on grounds outside the pleadings of the parties, and it is the case pleaded that has to be found, so that a court is not entitled to grant a relief not asked for.

Counsel also criticized the learned Judge for failing to appreciate that as at the time he issued his judgment, the budget cycle had run its course with the budget estimates having already been submitted to the County Assembly by **30th April**, in compliance with **Section 129(1)** of the Public Finance Management Act. He submitted that the learned Judge ought to have deferred implementation to the next budget cycle so as to avoid a situation where the appellant would be forced to divert funds meant for medicine and equipment in order to comply with the judgment. He relied on **KENYA ENGINEERING WORKERS UNION –VS- RELIANCE INDUSTRIES LTD** [2000] e KLR where the Industrial Court (Chemutut, J.) had opined that in making a retrospective award the court must take into account the impact of the financial burden or the paying capacity of the paying company (or entity). Counsel contended that by failing to take this approach, the learned Judge essentially put the appellant into debt as his orders were onerous and oppressive. He maintained that the appellant was severely constrained of resources and could only afford to maintain the two Respondents on contractual terms, and that had it the resources, it would even have hired more health workers.

Counsel next took issue with the learned Judge's application of **Section 37** of the Employment Act as a basis for conversion of the terms of employment from contractual to permanent, when the said provisions dealt with casual employees - which the two Respondents were not.

Mr. Mbugua then took issue with the learned Judge for failing to midwife a smooth transition of the transferred functions between the national and county governments and instead, compounded the problem by failing to hold that under **Article 187(2) (a)** of the Constitution, the National Government had an obligation to provide and avail the requisite funds.

Learned counsel then assailed the learned Judge for making reference to the Council of Governors and the manner in which other counties have dealt with similar situations on the basis that there was no formal agreement between the Council of Governors and the National Government on ESP workers. Moreover, he urged, there could never arise any legitimate expectation or estoppel that could override the provisions of statute, a proposition for which he cited the this Court's judgment in **HENRY MUTHEE KATHURIMA –VS- COMMISSIONER OF LANDS & ANOTHER** [2015] e KLR.

Mr. Mbugua finalized his submissions by faulting the learned Judge for misunderstanding the submissions made before him on behalf of the appellants. Those submissions were not to the effect, which the learned Judge appeared to embrace, that the two respondents would be entitled to permanent and pensionable terms of employment but for the appellant's financial constraints. Counsel argued that at no point did he or his client concede that point.

On behalf of the two Respondents, **Mr. Macharia**, their learned counsel opposed the appeal terming it misconceived, without merit and based on a misunderstanding of the transition framework for midwifing the devolution process. Starting from the question of jurisdiction, counsel submitted that the appellants were using the term in a ***loose***, as opposed to a ***technical*** sense, as the court below was possessed of jurisdiction. We have already so found and disposed of this question.

Mr. Macharia next submitted that the appellants were not reading **Section 138** of the County Government Act in a wholistic manner. He proceeded to assert that the said provision deemed the two Respondents as employees of the appellant on the terms subsisting as at the date of devolution but there was a policy, communicated by the Cabinet Secretary concerned which must be read to have been incorporated in the contracts of employment. Moreover, he submitted, the PSC had been consistent about the policy of absorption on regular permanent and pensionable terms. The Council of Governors had agreed to this, he submitted, and that position bound the appellant which, by virtue of **Section 59** of the County Government Act, is an agent of the County Government of Murang'a.

Regarding the pleadings, counsel contended that prayer 1 of the petition was crafted with reference to the letter from the Cabinet Secretary dated **24th January 2014** and had to be read with it in mind so that there was no ambiguity and the parties were never in doubt as to what the two Respondents were seeking. He asserted that the order given by the learned Judge was consistent with the prayer as regards the effective date.

Mr. Macharia was unimpressed with the appellant's complaint about the budgetary cycle which, he contended, was never placed before the learned Judge. He stated that the petition having been filed in **January 2015**, the appellant should have made a contingency provision, prepared a supplementary budget or otherwise provided for the wages, which were and remain a continuing liability.

Moreover, argued counsel, a party cannot be heard to complain about the date of compliance as it is properly within the jurisdiction of a court to determine the effective date of its orders. He also asserted that the appellant never placed before the learned Judge evidence of inability to pay, a matter about which they complained only after the judgment, notwithstanding that they were already complying with about half of what was ordered.

Counsel's comment on **Section 37(1)** of the Employment Act was that the learned Judge did not use it as a basis for finding that the two Respondents were entitled to permanent and pensionable retention but rather as a mere analogy for which the appellant could not be heard seriously to complain. He contended that the appellant had equally misunderstood the judgment on the role and powers of the PSC, of which the learned Judge merely took cognizance.

Mr. Machira argued further that under the scheme of devolution, there is a "vestiture of functions" which cannot be argued against, and that health functions are vested in County Governments. This is not a case of transfer or delegation of functions, as the appellant supposes, he contended, and as such, there is no legal basis for requiring the National Government to provide funds specifically therefor.

Counsel also submitted that under **Section 59** of the County Government Act, a resolution of the Inter Agency Forum is binding on the appellant and the appellant's argument that counties have different capacities and resources is untenable. Moreover, no evidence of any such differential was placed before the learned Judge. Nor was any on the appellant's budgetary cycle. He concluded his case by contending that the learned Judge was perfectly entitled to give the effective date of the judgment that he gave even if it was retrospective in effect, and the appellant could not be heard to say that the resultant decree had placed it "in a fix".

For the PSC and the MOH, **Mr. Makori**, learned counsel asserted that at the expiry of the 3-year contracts, the two Respondents were to be automatically absorbed into permanent and pensionable terms as per the policy formulated in 2009. He argued that the appellants did admit the existence of the policy but they were ***"contesting it".*** He faulted the appellants for not utilizing the dispute resolution mechanism of the Departmental Forum under **Sections 19** and **20**, the Inter-Governmental Relations Act, which would have resolved the dispute consistent with **Article 6** of the Constitution that requires the two levels of government to conduct their mutual relations on the basis of consultation and co-operation. He charged that whereas the letter dated **24th January, 2014** communicated the decision on the fate of the ESP workers, the appellant's reaction to it was hostile, insisting on ***autonomy***.

Mr. Makori conceded that the budgetary cycle would have been a relevant factor to be considered, but blamed the appellant for failing to place any evidence of the same before the court below so that it would be unfair to fault the learned Judge for not considering what was not before him. He then chided the appellant for blaming lack of funding for its failure to absorb the two Respondents on permanent and pensionable terms stating that the reason was not genuine as only 16 out of the country's 47 counties had failed to absorb ESP personnel as per policy. Indeed, all such personnel in the first batch of 2011 and before, had all been absorbed in all the counties, he submitted, and there is no proper or reasonable basis upon which the two Respondents, who belong to the 2nd batch, should not be similarly absorbed. He prayed that the appeal be dismissed with costs.

In his rejoinder, **Mr. Mbugua** contended that the intention to absorb the two Respondents, if at all, should have been expressly stated in their letters of appointment but was not. Further, the National Government could not merely insist on the policy in contravention of **Section 59** of the County Governments Act, as that would be tantamount to a policy overriding a statute. He defended the appellant's failure to place evidence of the financial implications by contending that the same could be discerned from the petition itself and asserted further, that it is not enough for the respondents to claim that the appellant could absorb the additional financial burden in a supplementary budget as this, too, has to be based on resources, which are unavailable. He rested by firmly pitching for autonomy for County Governments, which he contended was based on statute.

The gravamen of this appeal is the single issue of whether the learned Judge was right to declare that the two Respondents were entitled to be retained in the appellant's employment on regular permanent and pensionable basis with effect from the date of lapsing of their 3 year contracts. We take it as uncontested that the two respondents were initially employed by the National Government through the MOH under the ESP. Their employment was for three (3) year contractual terms of service with effect from **26th May 2011** or thereabouts. They fell in a second batch or group of ESP personnel. The first, employed in 2010, had been absorbed on permanent and pensionable terms by the National Government upon the expiry of their contract period in **May 2012**. Some of them were in the third and final batch hired in **July 2013**.

Before the contracts for the two respondents expired, health services were fully devolved in **March 2014** and that was the springboard for the dispute before us. Just before the function was fully devolved, the Cabinet Secretary in the Ministry of Health, James Wachira, wrote a letter to the Governor, Murang'a County Hon. Mwangi Wa Iria copied to Prof. Kobia, the chair of the PSC by which he forwarded a list of the 53 ESP staff in the County.

Given the importance of the letter, which was apparently addressed to all Governors, we reproduce it here in full;

MINISTRY OF HEALTH

OFFICE OF THE CABINET SECRETARY

Telegrapic Address: "MINHEALTH" NAIROBI AFYA HOUSE

Telephone: Nairobi 254-20-2717077 CATHEDRAL ROAD

Fax:254-20-2713234 P. O. Box 30016-00100

When replying please quote NAIROBI

Ref. No. MOH/ADM/1/1/130/VOL.1/(22) 24th January, 2014

Hon. Mwangi Wa Iria

Governor

Murang'a County

Dear Governor

ABSORPTION OF ESP CONTRACT STAFF INTO COUNTY PAYROLL

Please find attached list of health workers who are serving on contract terms of service under Economic Stimulus Programme (ESP) in your county. These officers had not been introduced into the Ministry of Health payroll as they were yet to be issued with personal staff numbers and consequently they were

being paid their salaries by voucher.

Since they are now staff performing devolved functions in your county you are requested to process their personal staff numbers and introduce them into the IPPD system to facilitate salary payment.

The National Treasury and Public Service Commission of Kenya were expected to approve their absorption once they complete their contract accordingly; they should be absorbed into the regular establishment on permanent terms. Some of them who were employed in 2011 are due for absorption this year 2014.

Attached herewith please find details of the Fifty Three (53) Economic Stimulus Programme (ESP) staff in your county for your necessary action.

Please expedite.

Yours sincerely

Signed

James W. Macharia

CABINET SECRETARY

MOH did write a sequel to that letter. It was dated **7th August 2014** under the hand of its Principal Secretary Pro. Fred H. K. Segor addressing **All County Secretaries** as follows;

MINISTRY OF HEALTH

AFYA HOUSE

Telephone: Nairobi 254-20-2717077 CATHEDRAL ROAD

Fax:254-20-2713234 P. O. Box 30016-00100

When replying please quote NAIROBI

Ref. No. MOH/ADM/1/1/130/VOL.1/(123) 7th August, 2014

ALL THE COUNTY SECRETARIES

ABSORPTION OF ECONOMIC STIMULUS PROGRAMME (ESP) STAFF INTO THE COUNTY PUBLIC SERVICE

This is in reference to our letter dated 24thJanuary, 2014 addressed to all the Governors in which we informed them that after the expiry of contract period of ESP staff, they should be absorbed into the regular establishment on Permanent and Pensionable Terms of Service.

Since they are now performing devolved functions through your respective County Public Service Boards as it used to be done by the Public Commission.

Signed

Prof. Fred H. K. Segor

PRINCIPAL SECRETARY

Yet another letter was written by MOH on **18th November 2014**. It was addressed to **All County Secretaries through the Chairperson of the Council of Governors**. It was in the following terms;

MINISTRY OF HEALTH

AFYA HOUSE

Telephone: Nairobi 254-20-2717077 Cathedral Road

Fax:254-20-2713234 P. O. Box 30016-00100

When replying please quote NAIROBI

Ref. No. MOH/ADM/1/1/130/(130) 18th November, 2014

To: All County Secretaries

Thro':

The Chairperson

Council of Governors

ABSORPTION OF ECONOMIC STIMULUS PROGRAMME (ESP) STAFF

This is in reference to the Ministry's letter Ref. No. MOH/ADM/1/1/130 Vol.1/123

of 7th August, 2014.

The Ministry takes the opportunity to thank the Counties that have absorbed the ESP staff into the regular establishment.

The Ministry would also like to request Counties that have not yet absorbed the ESP staff to do so and also change their terms of service to permanent and pensionable terms of service from the date the contract expired to reduce the anxiety.

Your continued cooperation will go a long way in the improvement of service delivery to the citizens of this country.

Signed

Dr. Khadijah Kassachoon

PRINCIPAL SECRETARY

It is apparent that the appellant did not absorb the two respondents on permanent and pensionable terms. Instead, by letters dated **6th October 2014**, it temporarily extended their contracts, which had expired, for a period of **six months** pending review of their terms of service. It also required them to formally apply to it for the said review of their terms of service. Similar letters extending the contracts by **seven months** were written on **19th December 2014**. The letters prompted the two respondents to report the matter to the Commissioner of Labour for his intervention and also triggered a go slow and eventually the suit that engendered this appeal.

That the improvement of health care is an important and critical desideratum is not in dispute. The Constitution itself lists the right to health care services as part of every person's right to the highest

attainable standard of health. It is the first of the economic and social rights listed in **Article 43** of the Constitution. The ESP is admitted by all parties as having had the improvement of health cases as one of its key objectives. As to the mechanism of the hiring and retention of the ESP health workers, the PSC in a letter to the Hon. Attorney General dated **5th February 2015,** during the pendency of the proceedings before the court below, and which was attached to Mr. Makori's replying affidavit without contest or controvert, stated that the two Respondents were hired under the ESP on contract and that "***The arrangement was that they would be paid by donors during the contract period and be absorbed by the Government on permanent and pensionable terms at the expiry of their contracts. The batch that was employed in 2011 were (sic) absorbed into permanent and pensionable terms when their contracts ended."***

The PSC went on to state that those of the two Respondents employed later than 2011 and had not completed their contracts by the onset of devolution "***were seconded to Counties with an agreement that the respective Counties will absorb them when their three year contracts lapsed"*** and that most counties had in fact done so. It also made reference to an Inter Agency meeting on **12th February 2015** comprising the Council of Governors, MOH, National Transition Authority, National Treasury, Directorate of Public Service Management and the PSC itself, in which "***it was resolved that all employees under the ESP be absorbed".***

Also attached to **Mr. Makori's** Affidavit was a letter dated **17th February 2015** from the PSC addressed to the Chairman of the Council of Governors. It referred to a meeting held on **11th February 2015** at Commission House, in which it was agreed that the Council of Governors undertakes (by way of implementation) a number of resolutions including;

> ***"2. Issue circulars to the sixteen (16) Counties that***
>
> ***had not absorbed ESP personnel to do so".***

As we have already observed, the appellant did not controvert these assertions but it took exception to the PSC's aforesaid communication which it viewed as an illegal and unacceptable attempt to encroach into matters that are expressly removed from its province and competence by the Constitution and statute. It pointed to **Article 235** of the Constitution which provides for the staffing of County Governments in the following terms;

> ***"235 (1) A County government is responsible within a framework of uniform norms and standards prescribed by an Act of Parliament for-***
>
> a. ***Establishing and abolishing officers in its public service;***
> b. ***Appointing person to hold and act in those offices, and confirming appointments;***
> c. ***Exercising disciplinary control over and removing persons holding or acting in those officers."***

The appellant thus argues that the appointment of the two Respondents falls within its exclusive mandate and the PSC could not purport to direct it on the subject. The appellant further took umbrage under **Article 234 (3) (b)** which expressly excludes officers in the service of a County government from those over which the PSC has powers and exercises functions including appointment, confirmation, discipline and removal. Those powers are instead reposed in the appellant under **Section 59** of the County Government Act. The PSC's role over County Government employees is limited to hearing and determining appeals in respect of county governments' public service by dint of **Article 234(2) (i)** and, evidently, the dispute herein is not such an appeal.

Was the PSC's communication we have referred to an intrusion and encroachment on matters outside its jurisdiction and thus an impermissible and unlawful interference with and usurpation of the functional integrity of the appellant?

We think not.

We are fully cognizant of the constitutional imperative that the national and county governments relate to each other on the basis of cooperation. It cannot be otherwise if the two levels of government are to function optimally and effectively to the benefit of Kenyans. Indeed, **Article 189(1)** of the constitution provides in mandatory terms that;

"189(1) Government at either level shall –

a. ***Perform its function, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level, and in the case of county governments, within the county level".***

The Constitution deliberately employs functional and institutional "***integrity"***

rather than *"**autonomy**'*, which is what the appellant contends has been flouted and violated by the PSC.

We think, with respect, that to proceed on the basis of autonomy as opposed to integrity of institutions and functions is misconceived and erroneous. The whole tenor of **Part 5** of **Chapter Eleven** of the Constitution which is titled **Relationship Between the National and County Governments** within the larger rubric of devolved government as a constitutional pillar of governance is one of co-operation and consultation based on equality and mutual respect. This is consistent with **Article 6** which speaks of the two levels of government as being distinct and interdependent and commands the said consultation and co-operation. Thus, for instance, **Article 189(1) (c)** requires Government at either level to;

> ***"liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity."***

Article 189(2) provides;

> ***"Government at each level, and different governments at county levels, shall co-operate in the performance of functions and exercise of power and, for that purpose, may set up joint committees and joint authorities".***

In the same spirit they are required under **clauses (3) and (4)** to make every effort to settle any inter-governmental disputes through alternative dispute resolution mechanisms including negotiation, mediation and arbitration. The Inter-Governmental Relations Act, 2012, was enacted to establish the legal framework for consultation and co-operation between the national and county governments and amongst county governments.

It is clear, then, that our constitutional architecture did not create, in the name of devolution, a wall of separation - high and impregnable - between national and county governments, with the latter being enclaves of insularity. Rather, it created a bridge - strong and vibrant - to ensure and encourage constant communication, consultation and co-operation within a diverse, devolved but united nation, between, amongst and within the levels of government.

The letters from the PSC were therefore merely communicating a pre-existing policy of the national government that predated devolution. It was in no way a dictatorial imposition upon the appellant. Moreover, it is uncontested that the PSC did consult widely with the MOH and the Council of Governors on the absorption of the ESP workers on permanent and pensionable terms at the expiry of their contracts, and this was mutually agreed upon and in fact implemented by at least two thirds of the county governments. The appellant's constitutional mandate was therefore not usurped or otherwise violated, as it argues.

This finding leads us inevitably to the conclusion that it having been national government policy accepted, adopted and implemented by itself with regard to the 1st batch of ESP workers; and by the

Council of Governors, that the ESP workers were to be absorbed into permanent and pensionable terms at the expiry of their contracts, the appellant is bound to so absorb them. This flows logically from the need to treat the two respondents in an equal, equitable and non-discriminatory manner vis-à-vis their colleagues who were in the first batch of ESP workers and who were already absorbed. Their expectation to be treated with equality is both legitimate and constitutional, and we cannot for ourselves find any logical, lawful or reasonable basis upon which they can be excluded from the benefits of that policy of absorption. Courts of law should not encourage parties to resile from their obligations freely entered into or lawfully inherited, and so, as in this case, to the detriment of innocent parties.

We find that the appellant's complaint that the learned Judge essentially re-wrote the employment contracts between itself and the two Respondents to be, with respect, devoid of substance. We think that the appellant was in the know about not only the terms of employment of the two Respondents, but also of the prevailing policy which had been in place even before they were seconded to the appellant, that they would be absorbed on permanent and pensionable terms at the expiry of their contracts.

If the appellant had been in the dark regarding that policy, which we much doubt, such darkness was dispelled by the letter from the Cabinet Secretary, MOH, dated **24th January 2014**, which was followed by reminders on **7th August and 18th November 2014**. There is on record a letter from the appellant dated **11th February 2014** by which it protested that the officers serving under contract terms were not employees of the PSC and that they were not therefore deemed to be seconded to it. We shall return to that letter but suffice to say the appellant had notice of the policy.

What is also clear is that the Council of Governors, of which agent the appellant is, was agreeable and moved to implement that policy. Thus, by the time the appellant was writing to the 1st and 2nd appellant on **6th October 2014** purporting to "***temporarily extend contracts which expired on 6th June 2014 for a period of six months pending review of your terms of service",*** it was being economical with the truth and it stands to reason that the absorption policy had already kicked in so that from the date of expiry of the contracts, the two respondents had already transited into the permanent and pensionable terms. It was not open to the appellant to purport to extend the contracts which had expired some five months previously.

Whereas the law as enunciated in the Indian case of **VICE-CHAIRMAN & MANAGING DIRECTOR –VS- R. VARAPRASAD & OTHERS,** [2003] LLR 707 (SC), is sound that it is not for courts to re-write the terms of contracts between parties, the principle is of no assistance to the appellant as the learned Judge did nothing of the sort. We dare say that to hold otherwise than he did would have amounted to an untenable re-writing of terms.

For these same reasons the appellant's complaint that the learned Judge granted what was not prayed for must fail. We do not see any real variance between the learned Judge's declaration that "***the petitioners are each entitled to be retained in employment of the 1st respondent [the appellant] on regular permanent and pensionable basis with effect from the date of lapsing of their respective initial 3 years' contractual terms of service"*** and the prayer in the petition that the appellant "***be compelled to reinstate all the ESP health workers on permanent and pensionable terms as directed by the Cabinet Secretary on 24th January 2014".***

That letter of **24th January 2014** quite simply and unequivocally provided;

> ***"The National Treasury and Public Service Commission of Kenya were expected to approve their absorption once they completed their contract accordingly; they should be absorbed into regular establishment on permanent terms. Some of them who were employed in 2011 are due for absorption this year 2014."***

We do not see therefore that the learned Judge violated the principle of not granting what is not prayed (per **TROJAN & CO. LTD –VS- RM. N.N. NAGAPPA CHETTIAR** (supra), and many Kenyan cases besides) in pegging the absorption date to the expiry of the two Respondents' initial contracts, as that was

the effective date communicated and, moreover, implemented for other ESP staff in earlier batches, and in the vast majority of counties.

This now brings us to the true nature of the two Respondents' employment and whether they were seconded to the appellant. According to the PSC and the MOH, they were employees, albeit on contract, and therefore properly seconded under **Section 138(1)** of the County Governments Act. The appellants on the other hand took the view, expressed in its letter dated **11th February 2014,** which we said we would revert to, that the ESP staff were not appointees of the PSC. Again, with respect, the appellant's position is not borne out by the evidence. There are on record unequivocal letters of appointment for all the ESP workers which start, in the standard manner;

> ***"I am pleased to inform you that the Public Service Commission of Kenya has approved your appointment as [Designation] Job Group … on three (3) year contractual terms. During the term, you will be subject to all regulations applicable to civil servants which are currently in force or which may be promulgated from time to time"*** *(Our Emphasis)*

That they were on contractual terms did not make the two Respondents any less appointees of the PSC for purposes of being deemed to be on secondment to the appellant under **Section 138(1)** of the County Governments Act. It is precisely in appreciation of the fact that public officers do serve in various terms of service that the officers on secondment were so seconded ***with their terms of service*** as at the date of constitution of the particular county governments. As we have held, the two Respondents were properly seconded on contractual terms with a policy in place that they were to be converted to permanent and pensionable terms at the expiry of their contracts.

The appellant's other grievance is that the learned Judge failed to order the national government to avail financial resources for the absorption of the two Respondents on permanent and pensionable terms. This argument appears to have proceeded on an erroneous appreciation of the constitutional location of health services. The contention is premised on **Article 187** of the Constitution which provides for the ***transfer*** of powers and functions between levels of governments in these terms;

> ***"187(1) A function or power of government at one level may be transferred to a government at the other level by agreement between the governments….***
>
> ***(2) If a function or power is transferred from a government at one level to a government at the other level –***
>
> ***(a) arrangements shall be put in place to ensure that the***
>
> ***resources necessary for the performance of the function or the***
>
> ***exercise of the power are transferred …."***.

The appellant's argument would be sound if the provision of health services, and with it the employment of health workers, were a function of the national government ***transferred by agreement,*** to the appellant. But this is not so.

The Fourth Schedule to the Constitution deals with the distribution of functions between the National Government and the County Governments. It expressly places health policy under the National Government. It then lists "***County Health Services"*** as a function of the County Governments. It appears to us to follow then that in the absence of any ***transfer agreement*** between the appellant and the National Government, health services remain ***an assigned function*** of the appellant and its criticism of the learned Judge is therefore misconceived.

Related to the complaint we have just disposed of, the appellant also faults the learned Judge for not appreciating the imperative of the budget cycle in making the orders. This is quite easily falsified from the judgment itself. Even though the appellant did not provide evidence of the extent of the

extra financial burden it would have to shoulder, the learned Judge in his judgment had it in mind and rendered himself thus;

> ***"The court finds that throughout the proceedings it was never shown that the petitioners were paid out of funds other than the funds provided by the tax payers and budgeted for in the regular government budgets. Accordingly, the court finds that the [appellant] is enjoined to budget for the resultant financial implications but in view of the extra financial implications that may come about in view of the government budgetary cycle the court orders that the 1st respondent should be allowed to comply by 1st August 2015".***

The learned Judge essentially gave the appellant about 3 months to put its house in order and comply with the order to retain the two Respondents on permanent and pensionable terms. The appellant's complaint cannot therefore be sustained. We think that a sober appreciation of the nature of disputes and a prudent caution ought to have led the appellant to make appropriate provision from as early as **January 2014** when it was notified of the obligation to absorb the ESP workers on permanent and pensionable terms. We see no reason why we should disturb the findings and directions given by the learned Judge. Those directions, in our view, are not discordant with the approach taken by the Industrial Count in **KENYA ENGINEERING WORKERS UNION –VS- RELIANCE INDUSTRIES LTD** (Supra) cited by the appellant. We so find, cognizant that the appellant has at any rate substantially complied with the resultant financial obligation as we were informed from the bar.

The totality of our consideration of this appeal is that the judgment of the learned Judge was sound in every respect and gave effect to a policy which respects and enforces the two Respondents right to full and equal enjoyment of their rights under **Articles 27** and **41** of Constitution, and in particular the right to fair labour practices and freedom from discriminatory terms of employment. In making reference to **Section 37(1)** of the Employment Act, the learned Judge was simply emphasizing the compelling case for the absorption of the two Respondents on permanent and pensionable terms by drawing from the analogy of conversion from casual to permanent. In doing so he neither erred nor misapprehended the case before him.

The upshot is that the appellants appeal lacks merit. It is accordingly dismissed with costs.

Dated and Delivered at Nyeri this 23rd day of December, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR