



Kenya County Government Workers' Union v County Public Service Board of Machakos (Cause 62 of 2016) [2025] KEELRC 42 (KLR) (21 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 42 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 62 OF 2016
HS WASILWA, J
JANUARY 21, 2025

BETWEEN
KENYA COUNTY GOVERNMENT WORKERS' UNION CLAIMANT
AND
COUNTY PUBLIC SERVICE BOARD OF MACHAKOS RESPONDENT

JUDGMENT

1. The claimant instituted this suit through a memorandum of claim dated 21st January 2016, stating that it is a registered trade union mandated to represent the labour interests of its members across Kenya's 47 County Governments. The claim concerns Madam Dinah Mwikali Nyamai, who was employed by the Makueni County Council before being seconded to Machakos County by the Transition Authority in 2013 as an interim Human Resource/Payroll Manager. Despite the end of the transition period in 2014, the Machakos County Government retained Madam Dinah and absorbed her into its payroll after requesting and receiving her payroll details from Makueni County. Subsequently, she was appointed as Assistant Director - Human Resource Management, effectively ending her secondment.
2. The dispute arose when the Machakos County Secretary, on 11th June 2015, unilaterally released Madam Dinah back to Makueni County, an action that the claimant asserts was unlawful, malicious, and contrary to established laws, including *the Constitution* of Kenya 2010 and the *County Governments Act* of 2012. Makueni County refused to accept the release, confirming that Madam Dinah's position had been filled and that she was now a bona fide employee of Machakos County.
3. Efforts to resolve the matter included communication with both Machakos and Makueni County authorities, reporting the dispute to the Cabinet Secretary for Labour, and the subsequent appointment of a conciliator. During a conciliation meeting held on 8th December 2015, Machakos County representatives committed to reinstating Madam Dinah and addressing the outstanding issues. However, the respondent failed to honour this commitment, leading the claimant to seek legal redress.



4. The claimant seeks declarations that Madam Dinah is a legitimate employee of Machakos County and that the letter purporting to release her to Makueni was null and void. They also request orders for her unconditional reinstatement to her position without loss of benefits or seniority, payment of her withheld salaries, and compensation equivalent to six months' salary for the loss suffered during her unlawful exclusion from employment.
5. Dinah Mwikali Nyamai swore a verifying affidavit dated 14th January 2016, stating that she is an adult of sound mind and currently resides in Mumbuni Location, Central Division, Machakos County, Kenya. She affirmed the correctness of the Memorandum of Claim, which had been read and explained to her. She authorized the union to represent her in the matter and confirmed that no other suit was pending between her and the respondent regarding the same subject matter.
6. She disclosed that she was initially appointed by the Makueni County Council in 1997 as Cleaner II and was later promoted to Administrative Officer II in 2011 after completing a diploma in Business Administration. In 2012, following an advertisement by the Transition Authority for vacancies in county governments, she applied for the position of Payroll Manager. On 25th February 2013, the Public Service Commission of Kenya deployed her to Machakos County under the Transition Authority, where she reported on 27th February 2013 and was designated Interim Human Resource/ Payroll Manager.
7. She stated that on 25th April 2014, the County Secretary of Machakos wrote to the Principal Administrative Secretary, Department of Public Service Management, requesting her retention as Payroll Manager. Subsequently, on 12th June 2014, the Secretary of the County Public Service Board (CPSB) of Machakos wrote to the CPSB of Makueni requesting her payroll details to expedite her substantive appointment in Machakos. On 9th October 2014, the Machakos CPSB appointed her as Assistant Director - Human Resource Management in Job Group "P."
8. She deponed that following her appointment, her former position in Makueni was filled, and her salary from the Transition Authority ceased in October 2014. On 11th June 2015, the County Secretary of Machakos issued a letter releasing her back to Makueni County without disclosing which county organ had made the decision. When she presented the letter to Makueni County, the CPSB Secretary responded, stating that her previous position in Makueni had already been filled. On 17th September 2015, the Machakos CPSB Secretary clarified that her employment status was purely a Machakos County affair and confirmed her as a bona fide employee of the Machakos County Government.
9. She stated that the union engaged the Machakos County Secretary, demanding her reinstatement, but the County Secretary failed to respond. During a conciliation meeting on 8th December 2015, a representative of the County Government committed to reinstating her salary in December 2015 and addressing other matters administratively. However, no payments had been made as of the date of the affidavit.
10. She asserted that her rights as an employee under Section 236(a) and (b) of *the Constitution* of Kenya were violated by the Machakos County Secretary, including her right to be heard. She confirmed that the contents of her affidavit were true to the best of her knowledge, except for matters stated on information and belief, whose sources were disclosed.
11. Dinah Mwikali Nyamai further recorded a witness statement dated 11th July 2023 and chose to adopt it on the hearing date on 30th October 2024 before this court. She stated that she was appointed as a Cleaner II by the Makueni County Council in 1997 and promoted to the position of Administrative Officer II in 2011 after completing a diploma course in business administration. In 2012, following the establishment of county governments, she applied for the position of payroll manager as advertised



by the Transition Authority. She was deployed by the Public Service Commission to the Transition Authority on 25th February 2013, which then assigned her to Machakos County as an interim human resource and payroll manager.

12. On 25th April 2014, the County Secretary requested her retention in Machakos County as a payroll manager. Subsequently, on 9th October 2014, the Respondent appointed her as Assistant Director, Human Resource Management, Job Group P. After this appointment, her former position in Makueni County was filled, and her salary allowances from Makueni were stopped in October 2014. However, on 11th June 2015, the County Secretary informed her that it had been decided she be released back to Makueni County, despite the position there having been filled.
13. Dinah contended that this action amounted to unlawful dismissal, as she could not resume her duties in Makueni County. Efforts by the Makueni County Public Service Board to clarify her status and the involvement of her union in seeking her reinstatement were unsuccessful. The union reported a trade dispute, and the Ministry of Labor appointed a conciliator on 29th October 2015. During a conciliation meeting on 8th December 2015, the Respondent's representative committed to reinstating her salary, but this was not honoured.
14. Dinah prayed for a declaration affirming her employment with the County Government of Machakos and compensation for loss of earnings caused by her unlawful exclusion from employment.

Respondent's Case

15. The Respondent, in their Memorandum of Reply dated 7th March 2016, denied the claims raised in the Memorandum of Claim save for specific admissions. They admitted the description of parties as correct but stated their address of service as BM Musau & Co., Advocates. They challenged the competence of the Claimant to institute the suit, stating there was no evidence of its registration as a trade union.
16. The Respondent admitted the accurate reproduction of laws in paragraph 3 of the Claim but denied any contravention of the same. They asserted that Dinah Mwikali Nyamai, referred to as the Claimant, was seconded to Machakos County from Makueni County by the Transition Authority for a specific period. They argued that her continued employment required the involvement of the County Public Service Board (CPSB), which was not duly consulted. The Respondent stated that the secondment ended when the Claimant was released back to Makueni County, as per section 138(5) of the [County Governments Act, 2012](#).
17. The Respondent contended that the appointment of the Claimant to the position of Assistant Director, Human Resource Management, Job Group P, was null and void. They argued that the promotion was unilateral, not involving the CPSB as mandated by sections 59(1)(b), 63(1), and 70(1) of the [County Governments Act](#). The Respondent claimed the Secretary to the CPSB acted without consulting the Board and failed to ensure adherence to the principles of merit, fair competition, and representation as outlined in section 65 of the Act.
18. The Respondent alleged that the promotion from Job Group J to P within a year was unprecedented, fraudulent, and lacked the requisite qualifications, experience, and compliance with recruitment procedures. Particulars of fraud were cited, including the alleged bias of the CPSB Secretary, irregularities in the Claimant's promotion, and ongoing disciplinary proceedings regarding irregular promotions in the county.
19. The Respondent disputed the validity of conciliation proceedings initiated by the Claimant, asserting that they held no legal effect since the Claimant was no longer an employee of Machakos County. They



- also denied any binding outcome from those proceedings due to the absence of proper representation for the Respondent.
20. The Respondent referred to sections 59, 63, and 70 of the *County Governments Act*, asserting that only the CPSB, on request by the Chief Officer or on its own motion, could lawfully appoint or promote public servants. They stated that the County Secretary lacked authority under section 44 to direct or influence the CPSB's decisions.
 21. The Respondent concluded by seeking dismissal of the Claim with costs, asserting that the Claimant's appointment and promotion were void and that her secondment had ended with her lawful release back to Makueni County.
 22. James M. Kathili swore a verifying affidavit dated 7th March 2016, stating that he is the Chief Legal Officer of the Respondent and has conduct of the matter, making him competent to swear the affidavit. He deponed that Dinah Mwikali Nyamai, referred to as the Claimant, was seconded to the County Government of Machakos by the Transition Authority from Makueni County to serve until the lapse of the secondment period. Upon the lapse of this period, her employment by Machakos County would require fresh recruitment by the County Public Service Board (CPSB), as the County Secretary had no role in the employment of county staff.
 23. He stated that the Secretary to the CPSB unilaterally wrote a letter requesting the Claimant's payroll details from Makueni County without consulting the Board, and preliminary recruitment stages were not conducted. This action lacked participation by the entire CPSB and failed to comply with the recruitment processes outlined in the County Government Act, which require wide advertisement of positions. The Claimant's secondment period had not formally lapsed, as she was not regularly transferred from Makueni County to Machakos County. Therefore, the purported appointment by the CPSB Secretary was null.
 24. He cited Section 138(5) of the County Government Act, 2012, which states that secondment ceases upon the transfer of a public officer or their release back to the original county. Accordingly, the Claimant's secondment ended when she was released back to Makueni County by the Machakos County Secretary, who was exercising supervisory powers under the Act. The Claimant was entitled to absorption back into the Makueni County Public Service, and the CPSB Secretary in Makueni erred by refusing to take her back and incorrectly stating that she was an employee of Machakos County.
 25. He asserted that the Secretary to the Machakos CPSB acted with bias and that the Claimant's promotion from Job Group J to Job Group P was fraudulent and void ab initio, as it occurred without the participation of the entire CPSB and was unprecedented. The Secretary's actions were subject to ongoing disciplinary proceedings involving promotions of county staff, including the Claimant. A disciplinary letter addressed to Rosemary Mulee was exhibited in support of this claim.
 26. He further deponed that the Claimant ceased to be an employee of Machakos County when her secondment ended. Consequently, the conciliatory proceedings were of no legal effect, as the representative of Machakos County was not duly authorized, and the outcome of the conciliation was not binding on the County Government. He prayed for the dismissal of the Claimant's case, affirming that the affidavit's contents were true to the best of his knowledge and belief, except for matters based on disclosed information.
 27. A witness statement dated 6th October 2023, made by Juliana N. Mutisya, of P.O. Box 603-90100 Machakos, Kenya, was submitted in her capacity as the Acting Secretary of the Board and Acting Chief Executive Officer of the 2nd Respondent since July 2023. She provided the following account upon perusal of the employment records of Dinah Mwikali Nyamai.



28. Juliana stated that Dinah Mwikali Nyamai entered public service in 1997 as a Cleaner II with the Makueni County Council and was later promoted to Administrative Officer II on 24th March 2011. Following the establishment of county governments under the Transition Authority, Dinah was seconded to the Machakos County Government on 25th February 2013, at Job Group J, where she served as an interim Human Resource/Payroll Manager and later as a Human Resource Officer. Her most recent promotion was to the position of Senior Administrative Officer on 27th June 2019.
29. The witness highlighted a conflict that arose from Dinah's promotion from Job Group J to Job Group P by the then Secretary of the County Public Service Board, which was done contrary to the required procedure. This conflict was referred to the Labour Office for reconciliation, where it was agreed that Dinah would be restored to public service by the end of 2015, with salary arrears paid, and other issues handled administratively. While Dinah was restored to public service, the implementation of the agreement encountered challenges. The promotion to Job Group P was deemed irregular and fraudulent due to her lack of the required qualifications and experience, rendering the agreement unenforceable.
30. Juliana detailed Dinah's academic qualifications, which included a KCSE certificate, a Diploma in Business Management obtained in 2010, and a Bachelor's Degree in Business Administration (Human Resource Management Option) obtained in 2013. She also noted Dinah's membership in the Institute of Human Resource Management, which commenced on 28th September 2022. No additional academic or professional qualifications were reported. Juliana emphasized that the County Public Service Board adheres to established schemes of service, as stipulated under Section 76(2)(c) of the *Employment Act*, Sections 65 and 70 of the *County Governments Act*, 2012, and Section 31 of the Public Service *Act No. 13 of 2012*, to ensure that public service recruits possess the requisite academic qualifications and years of experience.
31. The witness refuted the existence of a valid vacancy or appointment procedure for the position to which Dinah was promoted, noting that the records were authored contrary to established procedures. Dinah's promotion lacked board involvement, as required under Section 75 of the *County Governments Act*. Furthermore, Juliana outlined the qualifications for positions at Job Group M, N, and P and asserted that Dinah did not meet the criteria for any of these positions. Specifically, Juliana cited the requirement for a Master's Degree and years of progressive experience in preceding job groups, which Dinah lacked. As such, Dinah's promotion to Job Group P contravened the principles of merit and competency enshrined in public service laws.
32. The witness elaborated on the responsibilities of positions at Job Group P, highlighting the complexity and managerial nature of such roles, which necessitate both academic qualifications and experience to ensure effective service delivery. Juliana contended that Dinah's appointment was a nullity, resulting in wasteful expenditure of public resources and jeopardizing the quality of service provided to the residents of Machakos County.
33. The County Public Service Board, in accordance with its mandate under Section 75 of the *County Governments Act*, took corrective measures to address the irregularity by reinstating Dinah to Job Group J, the standard entry level for degree holders in public service. Juliana concluded by requesting the court to set aside the labour agreement dated 8th December 2015 as void and to dismiss the case with costs. This, she argued, would ensure compliance with the law and protect public resources.

Respondent's Written Submissions

34. The Respondent filed written submissions dated 11th December 2024, opposing the Claimant's case and asserting that the actions taken against Ms. Dinah Mwikali Nyamai were justified and valid



- under the law. The Respondent maintained that it adhered to the principles outlined in section 65 of the [County Governments Act](#), which emphasizes standards, values, merit, fair competition, and representation in the recruitment and promotion of public servants. Section 70(1) of the Act further affirms that the provisions for appointments equally apply to promotions.
35. The Respondent submitted that Ms. Nyamai's alleged promotion from Job Group (JG) J to JG P was marred by irregularities, skipping intermediary job groups (K, L, M, and N) and bypassing the necessary qualifications and experience. The minimum qualifications for the position of Assistant Director of Human Resource Management (JG P), as stipulated by law, include three years of service in JG M and a master's degree in a relevant field. The Respondent demonstrated that Ms. Nyamai lacked these qualifications, and her promotion was unauthorized and executed unilaterally by the then County Secretary, contrary to the requirement that appointments and promotions involve the entire Board.
 36. The Respondent argued that the principles of merit, fair competition, and transparency were violated in the purported promotion, as required under section 76(2)(c) of the [Employment Act](#) and sections 65 and 70 of the [County Governments Act](#). It noted that there was no advertisement for the position, no application by Ms. Nyamai, and no evidence of her meeting the academic and professional qualifications. The Respondent further highlighted that the lack of these critical documents and procedural steps rendered the promotion invalid.
 37. The Respondent cited the provisions of section 75 of the [County Governments Act](#), which empowers the County Public Service Board to revoke decisions or take corrective actions upon discovering irregularities or fraud in the recruitment or promotion process. It emphasized that the decision to restore Ms. Nyamai to JG J, her original employment position, was lawful and in compliance with section 75. This corrective action also ensured that she was not unfairly punished, as required by section 76 of the Act.
 38. The Respondent relied on the case of Samuel Kipkoech Keter v County Government of Bomet & 3 others [2016] eKLR, where the court dismissed a petition for lack of evidence supporting the appointment and underscored the importance of adhering to statutory procedures in public service appointments. Drawing parallels, the Respondent argued that Ms. Nyamai's case was similarly tainted by procedural improprieties, and her promotion could not be deemed valid.
 39. The Respondent asserted that the Conciliation Agreement dated 8 December 2015 was not binding, as it was neither signed by the Respondent nor executed in its presence. It emphasized that the Respondent, as a corporate entity separate from the County Government of Machakos, could not be bound by decisions made by unauthorized third parties. Furthermore, the Respondent argued that Ms. Nyamai's expectation to receive salary arrears for a position she was not qualified for was illegitimate and against public policy.
 40. The Respondent highlighted that since the restoration of her employment, Ms. Nyamai had been subjected to the normal promotion process and was currently serving as a Senior Administrative Officer. The Claimant's failure to appeal the decision under section 77 of the [County Governments Act](#) further indicated acceptance of the corrective action. The Respondent concluded that the actions taken were lawful, justified, and consistent with statutory provisions.
 41. The Respondent further submitted that the Claimant is not entitled to the reliefs sought in the Memorandum of Claim. The Respondent argued that Ms. Nyamai remains an employee of the Respondent, rendering the declaration that she is a bona fide employee of the Government of Machakos County inconsequential and incapable of being granted by the Court. It was submitted that the Claimant's prayer for a declaration that the letter by the County Secretary was written in bad



- faith and was null and void cannot be granted. The Respondent contended that the County Secretary, who is a stranger to the matters of employment for devolved units, had no role in Ms. Nyamai's alleged removal, as the employment matters within county governments fall exclusively under the County Public Service Board, as provided under Section 63 of the *County Governments Act*.
42. The Respondent emphasized that Section 63 of the Act grants the County Public Service Board the power to make appointments, promotions, or dismissals in the county public service, with such powers exercised only upon request by the relevant county chief officer or on the Board's own motion. In furtherance of this, Section 59(1) of the Act establishes that the County Public Service Board, not the County Secretary, is responsible for appointments to the county public service. Citing *Mutua v Governor, Kitui County & 4 others; Muisyo, Acting Municipal Manager, Kitui Municipality & 3 others* [2022] KEHC 10872 (KLR), the Respondent argued that the County Secretary has no authority to make such appointments, which is a function reserved solely for the County Public Service Board.
 43. The Respondent also opposed the prayer for reinstatement to the position of Assistant Director of Human Resource Management, arguing that such an order is not merited. Referring to *Kenya Shipping Clearing Freight Logistics and Warehouse Workers Union v May Freight Ltd* [2020] eKLR, the Respondent highlighted that reinstatement of an employee is tantamount to specific performance of a contract and is only granted in exceptional circumstances. The Respondent argued that no exceptional circumstances exist in this case to warrant reinstatement, particularly because Ms. Nyamai was not qualified for the position of Assistant Director. It was submitted that Ms. Nyamai admitted during cross-examination that she did not apply for the position, was not interviewed, and merely received an appointment letter. The Respondent maintained that her appointment to a position for which she was unqualified was a nullity, undermining public resources and service delivery.
 44. The Respondent urged the Court to take judicial notice of recent Public Service Commission findings, which revealed cases of individuals securing promotions using fake qualifications. They argued that reinstating Ms. Nyamai would not only contravene the law but also exacerbate concerns about unqualified public officers. The Respondent further submitted that the Claimant's prayer for arrears of salary from the alleged unlawful release to Makueni County lacks justification, as there was no evidence of an advertisement, application, or qualification for the position. Additionally, the Respondent argued that the conciliatory agreement relied upon by the Claimant was void and incapable of implementation, and no legal basis exists for the award of arrears.
 45. On the prayer for six months' compensation for loss of earnings, the Respondent submitted that the Claimant failed to provide evidence of termination or proof of loss of employment. They relied on Section 49 of the *Employment Act*, which provides for compensation for unjustified termination, and argued that such compensation was unwarranted in this case as there was no termination of Ms. Nyamai's employment.
 46. Finally, the Respondent submitted that costs should be awarded against the Claimant under Section 12(4) of the *Employment and Labour Relations Court Act*, which gives the Court discretion in awarding costs. They referred to *Alfred Mutuku Muindi v Rift Valley Railways (Limited)* [2015] eKLR, where it was held that costs in employment claims do not automatically follow the event and are subject to the Court's discretion. The Respondent urged the Court to dismiss the claim with costs to the Respondent.
 47. I have examined all the evidence and submissions of the parties herein. It is not in contention that the claimant herein was initially an employee of the Makueni County. She was then seconded to the Machakos County Government.



48. Vide a letter of 25/2/2013 by the PSC the claimant was deployed as an interim HR Payroll Manager to the Machakos County. Vide a letter of 24/4/2014 the County Secretary wrote to the Principal Administrative Secretary seeking secondment of the claimant to Machakos County.
49. On 12/6/2014 the Secretary County Public Service Board wrote again to the Makueni County Public Service Board seeking her retention to the Machakos Public Service Board in their payroll department.
50. The claimant was therefore engaged by the respondent herein as Assistant Director Human Resource Management JG “P” vide a letter of 9/10/2014.
51. The County Secretary released her back to Makueni County on 11/6/2015. I note that this letter releasing the claimant back to the Makueni County was written by the County Secretary and Head of Public Service.
52. It is also worth noting that the claimant as at 15/10/2014 was now an employee of the county Government of Machakos when she accepted the appointment of Assistant Director HRM. The respondents could not therefore return her to Makueni County as they did vide the letter of 11/6/2015.
53. The letter of 9/10/2014 to the claimant was written by the secretary Machakos County Public Service Board on behalf of the County Public Service Board of Machakos as the letter was on the letter head of the County Public Service board.
54. The letter returning her to Makueni was however written by the County Secretary on a letter head of his office as the County Secretary.
55. The respondents contend that the claimant did not have qualifications for appointment to the HRM JG “P”. They say her appointment to the said position was illegal null and void. They also aver that only the County Public Service Board has the mandate to appoint staff but that in this case, the County Public Service Board never approved any appointment of the claimant. There was also never any advertisement for the position or promotion to the said position.
56. They contend that the claimant is only entitled to the appointment for which she was seconded for and not a higher position. The claimant has in effect been promoted to salary scale “8” in the position of Service administrative Officer w.e.f 27/6/2019.
57. Having considered these averments, I find that indeed the claimant was rightly appointed to the position of HRM JG “P” without qualification and without the authority of County Public Service Board which has the mandate to hire, promote, discipline and fire staff. Any promotion in that regard is found to be null and void.
58. The claim by the claimant to be paid salary arrears on the elevated position is also found untenable and dismissed. Given that the mistake of promoting the claimant to a higher post was not a mistake of their own doing, each party will bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JANUARY, 2025.

HELLEN WASILWA

JUDGE

ORDER



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

