



**Ombati v Governor, Nyamira County & another (Cause E001 of 2025)
[2025] KEELRC 1814 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1814 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E001 OF 2025
NZIOKI WA MAKAU, J
JUNE 23, 2025**

BETWEEN

TIMOTHY MOKUA OMBATI CLAIMANT

AND

THE GOVERNOR, NYAMIRA COUNTY 1ST RESPONDENT

COUNTY GOVERNMENT OF NYAMIRA 2ND RESPONDENT

JUDGMENT

1. The Claimant avers that he had been employed by the Respondents as the Nyamira County Government County Executive Committee Member (CECM) in charge of Health Services. The Claimant avers the Respondents issued him with an appointment letter dated 27th October 2022 after the 1st Respondent nominated the Claimant, forwarded the name of the Claimant to the Nyamira County Assembly for vetting and approval and after the Claimant was vetted and approved by the Nyamira County Assembly for appointment as the Nyamira CECM for Health Services.
2. The Claimant avers that as the As the Nyamira CECM for Health Services, he was earning a gross salary of Kshs. 440,737/- per month. The Claimant averred that he had a legitimate expectation that he would work for the Respondents for a period of 5 years. As such, the Claimant avers that he committed himself to various loans and mortgages which have become unbearable upon the abrupt termination of his employment. The Claimant thus prays for payment for the remainder of the contract period being 48 months. The Claimant avers that he is a medical doctor by profession and that prior to his appointment as the Nyamira CECM for Health Services, he was confirmed on permanent and pensionable terms as per the Nyamira County Public Service Board's letter dated 18th April 2018. It was averred that upon the Claimant's appointment as the Nyamira CECM in charge of Health Services, vide his letter dated 22nd November 2022 he requested for leave for a period of five (5) years. The Claimant averred that the Nyamira County Public Service Board vide its letter dated 24th February 2023 wrote to the Claimant informing the Claimant that the Board via minute number Min:



03/20/12/2022 in its sitting on 20th December 2022 granted the Claimant leave of absence for an initial two (2) years with effect from 24th November 2022.

3. The Claimant avers that he discharged his duties as the Nyamira CECM in charge of Health Services diligently and with utmost loyalty to the Respondents and that on 2nd August 2023, he received a Notice to Show Cause letter from the 1st Respondent alleging that on 11th July 2023, while commissioning the distribution of drugs and pharmaceuticals procured by the Department of Health Services, the Claimant as the CECM in charge of the department allegedly intentionally lied to the 1st Respondent that the entire consignment had been delivered by the supplier (MEDS) while knowing very well that some batches of the consignment had not been delivered.
4. The Claimant averred that he had written a letter to the 1st Respondent informing him that he had made contact with the supplier who confirmed that requisite logistical arrangements had been made and the whole consignment procured had been dispatched through G4S Securicor Courier Company which was to ensure that as at the date and time of the scheduled launch of the supplies on 11th July 2023, all consignments destined to various individually allocated/assigned medical facility would have received their supplies through the contracted consignor (G4S Securicor Courier) save for the availing of the list of the deliveries made and the copies of individual delivery notes confirming and acknowledging receipt of the batches of individual consignment, destined to each facility which was a routine process in the process and practice of the supplier. The Claimant averred that as at the time of the launch, the batch of supplies destined for Nyamira South Sub-County (which is the County Headquarters) where launch was undertaken, had reached and the launch undertaken. It was the Claimant's innocent belief that the deliveries and consignments were duly made and replicated across the respective sub-counties, just like the Headquarters, as promised by the supplier save for the issue of verification process which would follow in days owing to the volume involved and the number of facilities involved, that is, 129 in number. He asserted that unfortunately, when subsequent follow ups were made with the supplier and respective facilities after the launch by the 1st Respondent, the Claimant was informed by the supplier that there was interruption of the delivery network of the consignment from the supplier's warehouse in Kisumu owing to Nation-wide political demonstrations which were ongoing and part of the consignment destined to other sub counties were interrupted thereby resulting to delays and failure of timely delivery. Efforts were being made to facilitate delivery soonest, which challenges were communicated and an apology made vide the supplier's letters dated the 21st July 2023. The Claimant averred that by practice, the drugs/medical supplies are ordinarily made directly to the respective medical facilities at the grassroot sub-counties as per the allocations, thus the meaning of Last Mile (meaning the individual medical facilities at the grassroot level). He averred that as a result of the unforeseen and unavoidable above challenges, the launch was undertaken under the genuine and innocent belief that the procured goods and/or supplies were already delivered in the ordinary and usual course of transaction as ordinarily done, until this information was relayed by the supplier citing unforeseen challenges which disrupted the supply network/chain.
5. The Claimant averred that the anomaly aforesated was soon remedied and the deliveries made as confirmed by the list of deliveries, albeit, the supplier was yet to forward their list of deliveries and delivery notes as is the norm. The Claimant averred that the delivery process is done by the consignor, G4S Securicor Courier and it is independent pursuant to a bilateral contract between the Supplier and the Contractor, the process which was beyond the Claimant's control and that of his then department, and could not be intercepted, interrupted or controlled by him. The Claimant avers that his role through the department was to verify the actual delivery through the above stated mechanism which took days owing to the volume of the commodities and facilities involved. The Claimant averred that



there is no way he could have known of the failure of receipt immediately other than following the verification mechanism above cited.

6. The Claimant asserts that despite rendering the above satisfactory explanation and availing the 2 letters dated 21st July 2023 from the supplier (MEDS) apologizing for the health commodities and technologies delivery delay/interruption and indicating that the delay was as a result of political unrest (Nationwide protests referred to as Maandamano), the 1st Respondent proceeded to terminate the Claimant from employment though the delay in the delivery of the drug's was not the Claimant's fault but the supplier's fault. The Claimant asserts that as a consequence of the termination of employment, he has been greatly injured in character and reputation as a consequence whereof his reputation has been brought into grave public ridicule, scandal, odium and contempt in the eyes of right thinking members of the society as well as his family members, church mates and professional colleagues. The said individuals have to date viewed the Claimant as a thief, a person who engages in corrupt practices and as a person who is unsuitable to hold any public office.
7. The Claimant thus sought the following reliefs
 - a. A declaration that the Claimant's termination was unfair.
 - b. Kshs. 136,628.47 being gratuity for the term served.
 - c. Kshs. 440, 737/- being one month's salary in lieu of notice.
 - d. Kshs. 5,288,844/- being 12 months compensation for unfair termination.
 - e. Payment for the remainder of the contract period - Kshs. 440,737/- x48 months = Kshs. 21,155,376/-
 - f. Gratuity for the remainder of the contract period computed Kshs. 440,737/- x31%x4years = Kshs. 546,513/-
 - g. General damages for defamation of character.
 - h. Certificate of Service.
 - i. Costs of this suit and interest thereon.
8. The Respondents aver that the Claimant through the Department of Health Services, procured drugs and non-pharmaceuticals worth Kshs. 22,489,617/- from Meds which was to be distributed to 126 health facilities across Nyamira County. It was averred that on 11th July 2023 while the 1st Respondent was commissioning the same, the Claimant intentionally misled the 1st Respondent that the entire consignment had been delivered while it was well within the knowledge of the Claimant that there were more batches to be delivered on a later date. The Respondent denied the Claimant was entitled to any relief sought and averred that there was breach of trust by the Claimant as a Senior Government Official contrary to the principles of good governance, integrity, transparency and accountability. The Respondents averred that the determination of the Court in Kisumu ELRC Petition No. E024 of 2023 Dr. Timothy M Ombati v Governor Nyamira County & another renders this matter devoid and res judicata. The Respondent thus urged the dismissal of the claim with costs.
9. The Claimant testified on his own behalf maintaining that the medical supplies were all delivered and that there was no monetary or other loss. He testified that there was no public outcry nor was there any evidence of portraying the 1st Respondent in bad light. The Claimant stated that once the supply is made invoices are issued and once the deliveries are confirmed, they confirm on their end as well. He stated that he was not the one in charge of making payments.



10. The Claimant closed his testimony and the Respondents did not appear nor offer a witness. The Court directed parties to file submissions. The Claimant submitted and there was none from the Respondents.

Claimant's submissions

11. The Claimant submitted that his testimony is uncontroverted as this matter was undefended. He submitted that his case succeeds on account of the evidence laid not being challenged. The Claimant submits that this being an adversarial system, if a case is made and there is no answer, there is nothing to compare the allegations with and therefore the Claimant's case ought to be allowed. On this score alone, it was submitted, the entire of the Claimant's case ought to be allowed as prayed.
12. The Claimant submitted that it was prudent to address the issue of the jurisdiction of this Court to entertain this matter. The Claimant submitted that this Court is a specialized court established under Article 162(2) of *the Constitution* as a superior court with equal status to the High Court. Its mandate is to hear and determine disputes relating to "employment and labour relations." He posited that what amounts to "employment and labour relations" matters is detailed in section 12(1) of the Employment and *Labour Relations Act*, the constitutional statute enacted pursuant to Article 162 of *the Constitution*. The Claimant submitted that section 12 provides that the jurisdiction of the ELRC is to hear disputes "relating to employment and labour relations" including disputes relating to or arising out of employment between an employer and an employee. The Claimant submits he was employed by the 1st Respondent pursuant to the appointment letter dated 27th October 2022 issued to the Claimant by the 1st Respondent. The Claimant submits that his duties, salaries and emoluments were as spelt out in the aforementioned letter.
13. The Claimant submits that the Court of Appeal's decision in Governor, County Government of Kakamega & 4 others v Omweno & 12 others (Civil Appeal E176, E177 & E179 of 2024 (Consolidated)) [2025] KECA 190 (KLR) (7 February 2025) (Judgment) is distinguishable with respect to termination of County Executive Committee Members for the following reasons:
 - a. The termination of a County Executive Committee Member is a plain vanilla employment dispute between the Governor and County Government (Employers) and the County Executive Committee Member (Employee);
 - b. An employer-employee relationship existed between the Respondents and the Claimant;
 - c. The Procedure for appointment and removal of a County Executive Committee Member is not provided for anywhere in *the Constitution*;
 - d. Sections 31(a) and 40 of the *County Governments Act* on the dismissal and removal of a County Executive Committee Member make no reference to *the Constitution*;
 - e. There are no constitutional procedures to be adhered to and/or thresholds to be met for the removal of a County Executive Committee Member;
 - f. Sections 31(a) and 40 of the *County Governments Act* make no reference to Article 251 of *the Constitution*. They in fact make no reference to any provision in *the Constitution*; and
 - g. The Office of a County Executive Committee Member is not a Constitutional Office and neither is it a derivative of *the Constitution*.
14. The Claimant submitted that since the advent of County Governments, the Employment and Labour Relations Court as well as the Court of Appeal has handled a myriad of cases concerning the



termination of County Executive Committee Members. The Claimant submitted that the process of the Claimant's removal is not provided for anywhere in the Constitution neither is it linked by the County Governments Act to the Constitution. It is purely a statutory process provided for in sections 31 and 40 of the County Governments Act. In addition, the Claimant cited the Court of Appeal decision in the case of County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020] eKLR where the Court of Appeal held that although the employment of state officers is regulated by the Constitution and relevant statutes, the Employment Act applies to them and they are entitled to rights under the Employment Act, unless the Constitution, or the relevant statute, or their contract of service provide better terms. The Claimant thus urged the Court to return a finding that there existed and employer employee relationship between the Respondents and the Claimant as envisioned by section 12(1)(a) of the Employment and Labour Relations Act and that this Court is vested with competent jurisdiction to hear and determine this matter. The Claimant submitted that the employer-employee relationship is what prompted the 1st Respondent to issue the Claimant a Notice to Show Cause prior to the Claimant's termination.

15. The Claimant submitted that the following issues fall for determination in the present case:
 - a. Whether this matter is res judicata;
 - b. Whether the Claimant has made out a case for the reliefs he is seeking in his Statement of Claim; and
 - c. Who should bear the costs of these proceedings.
16. As to whether this matter is res judicata the Claimant submits that the answer to this issue is in the negative. It was submitted that when filing the present claim, the Claimant made a full and frank disclosure to the effect that he had previously filed Kisumu ELRC Petition No. E024 of 2023 Dr. Timothy M Ombati v the Governor Nyamira County & another. The Claimant submits the said Petition was struck out as the Petition was raising issues of performance of contractual obligations which issues the Court was of the view ought to be canvassed under civil law. The Claimant submits that in determining whether or not a matter is res judicata, the Court is enjoined to consider whether the issue in dispute between the parties was heard and determined on merit. In the present case, the Claimant's termination is an issue that was never heard neither did the Court determine it. The Claimant submits the Court in Ombati v Governor, Nyamira County & another (Petition E024 of 2023) [2024] KEELRC 1878 (KLR) (18 July 2024) (Judgment) Neutral citation: [2024] KEELRC 1878 (KLR) did not address the issues that had been framed by Parties. It formulated its own issue and proceeded to determine it. The Claimant submits the Court was of the view that the relationship between the parties therein and herein, was that of employer and employee, and which relationship arises from a contract of employment. It was submitted that under the doctrine of constitutional avoidance, it was the Court's considered opinion that its jurisdiction sitting as a constitutional court is limited to protecting and enforcing constitutional rights, and not to determine concerns of performance of contractual obligations which can be properly canvassed under civil law. The Court invoked the principle of avoidance and declined to determine the substantive issues that had been raised by the Petitioner. The Claimant submits the Petition was struck out and that a struck-out matter is distinguishable from a dismissed matter. Where a litigant's matter is struck out, they are at liberty to file a fresh claim as the Claimant has done. In support the Claimant cited the case of George Ngugi Njoroge & 3 others v Attorney General & 4 others [2020] eKLR, where it was held:

It is beyond peradventure that the previous suit at Nairobi was not heard and determined by the court on the merits. Therefore, the issue in dispute in the previous suit and in the present



suit being whether or not the employment of the claimants was unlawfully and unfairly terminated by the respondents was not determined in the previous suit.

It is not in dispute the previous suit was struck out by the court for non-prosecution and was not heard on the merits.

Accordingly, the objector has failed to meet this particular pre-requisite for the principle of *res judicata* to obtain.

Provided the present suit has been filed within the limitation period, there is no bar to the same being heard and determined on the merits.

17. The Claimant urged this Court to return a finding that the issue of the Claimant's termination has hitherto never been determined by any court of competent jurisdiction and that as such, this matter is not *res judicata*.

18. As to whether the Claimant has made out a case for the reliefs he is seeking in his Statement of Claim, he submits that the answer to this issue is in the affirmative. The Claimant submitted that it is trite law that section 45 of the *Employment Act* under subsections (1) and (2) prohibits unfair termination. The Claimant submitted the section provides as follows:

45. Unfair termination

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.

19. The Claimant submitted that the law contemplates a termination that is both substantively and procedurally fair. The Claimant submitted that the import of this is that even if the Respondent herein is able to prove one of the requirements and fails to prove the other, the Court is enjoined to return a finding that the termination of the Claimant herein was unfair. On the other hand, if the Claimant herein is able to prove either that he was terminated for an invalid reason or the process was unfair, the Court ought to find that his termination was unfair. He cited the case of *Walter Anuro v Teachers Service Commission* [2013] eKLR, where the court observed:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

20. The Claimant submitted that the same principle was restated in the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR where the court stated that dismissal or termination must meet the requirements of substantive and procedural fairness. The Claimant submitted the principle of substantive fairness is provided for in section 43 of the



Employment Act while procedural fairness is provided for in section 41 of the Act, whilst section 45 prohibits unfair termination of employment. The Claimant submitted the burden of proof is cast by law upon an employer to prove that an employee was terminated for a valid reason. In the present case, the Claimant's employer never testified. As such, the reason for terminating the Claimant was never proved by the Respondents as being a valid reason. The Claimant submitted his termination was thus unfair. He thus urged the grant of the reliefs sought together with costs.

Disposition

21. On the issue of jurisdiction, it was submitted that the Court is vested with jurisdiction to hear and determine the matter. In the case of *County Government of Garissa & another v Idriss Aden Mukhtar & 2 others* (supra) the Court of Appeal, in a decision of the Court in 2022, held that:
 - (53) With due respect to our sister bench, while we are in agreement that a state officer's terms and conditions are regulated by the Constitution and relevant statutes, we are of a different view in regard to the application of the Employment Act...
 - (54) Section 3 of the Employment Act is clear that other than the categories stated therein, the Employment Act applies to all employees employed under a contract of service and provides minimum terms and conditions of employment. Therefore, although the employment of state officers is regulated by the Constitution and relevant statutes, the Employment Act applies to them and they are entitled to rights under the Employment Act, unless the Constitution, or the relevant statute, or their contract of service provide better terms. Given the relationship between the appellants and the respondents, and the matter having been filed in the Employment & Labour Relations Court, we find nothing wrong with the learned Judge being guided by section 49(1) of the Employment Act in awarding damages.
22. The decision of the Court of Appeal in *Governor, County Government of Kakamega & 4 others v Omweno & 12 others* (supra) was in respect of appointment members of the County Public Service Board of Kakamega. That is different and distinguishable from the plain vanilla case of employment dispute between the County Executive Committee Member such as the Claimant herein. As such, the Court finds it has jurisdiction to deal with the employment dispute as between the parties in line with the decision in *County Government of Garissa & another v Idriss Aden Mukhtar & 2 others* (supra).
23. The Claimant earned a gross salary of Kshs. 440,737/- per month. The Claimant served well until the termination when a medical supply went awry. The Claimant asserts he did not contribute to the late delivery of the drugs which he attributed to Maandamano then taking place. The Respondents asserted in their defence there was a failure on the part of the Claimant to ensure probity in the delivery of the pharmaceuticals. The Respondent issued the Claimant with a show cause notice to which there was a response. The Claimant was subsequently dismissed for misconduct. The Claimant was alleged to intentionally misled the 1st Respondent on 11th July 2023 when he was commissioning the supply of drugs that the entire consignment had been delivered while it was well within the knowledge of the Claimant that there were more batches to be delivered on a later date. The Claimant did not seem to extricate himself from the accusations as even in Court he did not succeed in drawing a nexus between the alleged Maandamano and the failed deliveries. The fact that the deliveries were subsequently made and no loss suffered, there was no justification for the Claimant to assert he did not intentionally mislead the 1st Respondent. I thus find there was justification for the termination.
24. The Claimant in December 2022 obtained a leave of absence from the Respondents. As such, the Claimant is not entitled to any relief being unpaid salaries to the end of contract. He did not demonstrate non-payment of gratuity earned or salaries earned during his tenure. As the Court finds



there was substantive and procedural fairness there is no justification to hold the termination was unlawful as such the suit is dismissed, albeit with no order as to costs since the Respondents have failed to participate.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

