



**Kenya County Government Workers Union v County Government  
of Bomet & another (Employment and Labour Relations Cause  
E016 of 2022) [2024] KEELRC 430 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 430 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E016 OF 2022  
DN NDERITU, J  
FEBRUARY 29, 2024**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF BOMET ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD OF BOMET ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. Vide a Memorandum of claim dated 24<sup>th</sup> October, 2022 filed through James Oketch & Co Advocates the claimant, a trade union acting for and on behalf of its listed members (grievants), commenced this cause praying for judgment in the following terms –
  1. A declaration that the Claimant’s members’ Fundamental Rights and Freedoms under Articles 41, 47, and 50 of *the Constitution* have been violated by the Respondents.
  2. A declaration that the notice of termination letters/extension of contract letters together with the letters of unilateral conversion of employment terms in relation to the Claimant’s members are irregular, unlawful and contrary to the law hence null and void ab initio.
  3. An order do issue quashing the decisions as contained in the notice of termination letters/extension of contract letters together with the letters of unilateral conversion of employment term is in relation to the Claimant’s members; against the Respondents, its agents, officers or persons acting under their instructions.



4. An order do issue against the Respondents, its agents, officers or persons acting under their instructions from arbitrarily, subjectively, and unlawfully reviewing the Claimant's members' salary/terms and conditions downwards.
  5. An order do issue against the Respondents, its agents, officers or persons acting under their instruction prohibiting them from interviewing, recruiting and/or employing replacement labour and/or employees in the same position, and to perform the same or similar work as the Claimant's members.
  6. An order do issue unconditionally reinstating the Claimant's members to their former position without any loss of benefits and without any conditionality and in terms and conditions in accordance with the *Employment Act*.
  7. An order do issue to the Respondents to pay all pending salaries, benefits and emoluments that are due and owing to the Claimant's members.
  8. In the alternative to prayer (6) the Respondents be ordered to fully compensate the Claimant's members for the unlawful and unfair termination being twelve (12) months gross salary as at the time of their termination and that the Claimant's members be paid actual pecuniary loss suffered since the date of termination, including salary and allowances as would have been earned, and all other accruing allowances, from their respective dates of appointment to date.
  9. In the alternative to prayer (6) the Respondent be ordered to the Respondents issue the Claimant members with a Certificate of Service.
  10. Costs of this Claim.
  11. Any other relief that this Honourable court may deem just to grant.
2. Alongside the memorandum of claim the claimant filed a verifying affidavit, witness statements, list of documents and bundles and copies of the said documents.
  3. Contemporaneously, the claimant filed a notice of motion (the application) of even date under a certificate of urgency seeking the following orders –
    1. The Application be certified as urgent and service be dispensed in the first instance.
    2. An interlocutory injunction of stay do issue against the Respondents, it agents, officers or persons acting under their instructions from implementation the decisions as contained in the notice of termination letters/extension of contract letters together with the letters of unilateral conversion of employment terms in relation to the Claimant's members pending the hearing and determination of this Application and Claim.
    3. A temporary injunction do issue against the Respondents, its agents, officers or persons acting under their instruction from arbitrarily, subjectively and unlawfully reviewing the Claimant's members salary/terms and conditions downwards pending the hearing and determination of this application and Claim.
    4. A temporary injunction do issue against the Respondents, its agents, officers or persons acting under their instruction prohibiting them from interviewing, recruiting and/or employing replacement labour and/or employees in the same position, and to perform the same or similar work as the Claimant's members pending hearing and determination of the Application and Claim.



5. The costs of and occasioned by this Application be awarded to the Claimant/Applicant.
4. In a ruling delivered on 22<sup>nd</sup> March, 2023 the court issued the following orders –
    - a. That the interim orders given by this court on 27<sup>th</sup> October, 2022, as expressed in the formal court order issued on 28<sup>th</sup> October, 2022 and as extended from time to time be and are hereby confirmed to subsist and maintain pending the hearing and determination of the main cause. For clarity the said orders shall now read as follows –
      - i. That pending the hearing and determination of main cause an interlocutory order of injunction be and is hereby issued against the Respondents, their agents, officers, or persons acting on their behalf, instructions, or behest, or others howsoever from implementing the decisions as contained in the notices of termination, letters and or extension of contract letters together with the unilateral letters of the Respondents purporting to interfere with the terms and conditions of employment for the affected members of the Claimant.
      - ii. That pending the hearing and determination of the main cause an interlocutory order of injunction be and is hereby issued against the Respondents, their agents, servants, officers, or others howsoever from reviewing or interfering with the salaries, allowances, or any other payments due and payable to the affected members of the Claimant, or any other terms and conditions of employment for the affected members.
      - iii. That pending the hearing and determination of the main cause an interlocutory order of injunction be and is hereby issued restraining the Respondents by themselves, agents, officers, or others howsoever from advertising, interviewing, recruiting, or employing persons to replace or occupy the vacancies and or positions occupied by the affected members of the Claimant, or in any other manner whatsoever replacing the affected members of the Claimant with persons to perform the same or similar work or duties as that of the affected members of the Claimant.
      - iv. The costs of the application shall be in the cause.
    - b. That for avoidance of doubt the status quo to be maintained is that subsisting and obtaining prior to the issuance of the letters, notices, contracts, or any other documents, correspondences, or instruments purporting to change or alter the terms and conditions of service of the affected members of the Claimant.
    - c. That for ends of justice this court shall now proceed to hear and determine the main cause on priority basis and preferably the hearing shall proceed by way of written submissions.
    - d. That to achieve (c) above the Respondents are directed to file and serve all their responses, witnesses' statements and documents to the claim within 14 days of this ruling.
    - e. That the Claimant is granted leave to file and serve any responses to (d) within 14 days of service.
    - f. That The Claimant shall file and serve written submissions within the period stated in (e) above.
    - g. That the Respondents shall file and serve their written submissions within 14 days of service by the Claimant as directed above.
    - h. That Mention on 3<sup>rd</sup> May, 2023 to confirm compliance and take a date for judgment.



5. Following the foregoing orders, counsel for the parties addressed the court by way of written submissions in regard to the main cause. Mr. Oketch for the claimant filed his submissions on 2<sup>nd</sup> May, 2023 and Mr. Matwere for the 1<sup>st</sup> respondent filed on 2<sup>nd</sup> April, 2023. Supplementary submissions for the 1<sup>st</sup> respondent was filed by the law-firm of Gordon Ogola, Kipkoech & Co. Advocates, though not on record, on 16<sup>th</sup> May, 2023. The 2<sup>nd</sup> respondent filed submissions through Mr. Bii, the executive officer, on 8<sup>th</sup> May, 2023. Mr. Oketch for the claimant filed a rejoinder to the respondents' submissions on 29<sup>th</sup> May, 2023.
6. In the circumstances, as far as the court is seized of the matter, the obtaining status is as per the interim orders of 22<sup>nd</sup> March, 2023, which were granted and issued pending the hearing and the determination of the main cause. In any event, the said orders were in force since 27<sup>th</sup> October, 2022, and were extended from time to time pending the above ruling.

## **II. The Claimant's Case**

7. The claimant's case is contained in the memorandum of claim as explained and exemplified in the submissions by its counsel. The claimant is a duly registered trade union and has filed this cause for and on behalf of its over 595 members as grievants. A list of the names of the grievants is attached to the claim. It is pleaded that the unfair, unjust, and unlawful actions by the respondents, as alluded to hereunder, affect over 3,000 employees.
8. It is pleaded that at all the material times to this cause the grievants were permanent and pensionable employees of the 1<sup>st</sup> respondent, occupying various positions as per their exhibited individual letters of appointment.
9. Vide notices dated 30<sup>th</sup> September, 2022, by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent purported to convert the engagement of the grievants from permanent and pensionable terms to fixed-term contracts which were to run for three months with effect from 1<sup>st</sup> October, 2022. Copies of the said notices were exhibited and filed with the claim. It is pleaded that as at the time of issuance of the said notices, the grievants had served the 1<sup>st</sup> respondent for over seven years each.
10. As stated above, letters of the initial appointment for all the grievants were filed with the claim confirming that they were originally contracted for a fixed term of two years with effect from 1<sup>st</sup> October, 2015. However, it is imperative that upon expiry of the said initial contracts the grievants continued to work for the 1<sup>st</sup> respondent with full salary and benefits and, of course, with the full knowledge, consent, and approval of the respondents. The claimant has filed and exhibited monthly pay-slips in confirmation that indeed the grievants continued working and receiving their monthly salaries and allowances after the expiry of the said initial contracts.
11. It is pleaded that the action of the respondents amount to unilateral variation of the terms and conditions of employment of the grievants which is unfair, unjust, unlawful, and against the legitimate expectation of the grievants. It is pleaded that the said notices have the effect of terminating the grievants without due process.
12. The submissions by counsel for the claimant shall be considered hereunder alongside those by counsel for the respondents.

## **III. Respondents' Case**

13. It is important to point out that these proceedings were initiated by way of a memorandum of claim, or what is loosely referred to as an ordinary cause, and not by way of a petition. Legally and



procedurally, therefore, the respondents were expected to respond by way of entering appearance and filing a response or defence to the claim.

14. The 1<sup>st</sup> respondent entered appearance on 7<sup>th</sup> November, 2022, but filed no response or defence to the claim. The 2<sup>nd</sup> respondent neither entered appearance nor filed defence.
15. The legal consequences of the contents of the foregoing two paragraphs are discussed in a succeeding part of this judgment.

#### **IV. Submissions by Counsel for Claimant**

16. Counsel for the claimant identified three main issues for determination – Whether the respondents’ action to unilaterally alter the terms of employment of the concerned members of the claimant was unlawful/illegal; Whether the claimant’s concerned members had legitimate expectations regarding employment terms and conditions; and, Whether the claimant should be granted the orders sought in the claim.
17. On the first issue, it is submitted that the respondents neither informed nor consulted the grievants of their intention to vary or change the terms and conditions of employment that they had enjoyed for over seven years preceding the impugned notices. Counsel has cited sections 10, 26(2), & 41 of the *Employment Act* (the Act), section 4 of the *Fair Administrative Action Act*, section 54 of the *Labour Relations Act*, and Article 41 of *the Constitution* in condemning the unilateral actions of the respondents and in illustrating the unlawfulness and illegality of the said action. It is submitted that the unilateral action by the respondents amounted to unfair labour practice that is unjust and unlawful both at common law and under the statutory and constitutional provisions cited above.
18. Counsel has cited numerous decisions that have declared unilateral decisions that changed the terms and conditions of employment to be unfair, unjust, and unlawful, including *Sofia Wanjiru Muchiri V Laikipia University* (2022) eKLR, *Joseph Kareko Gikonyo V County Government of Lamu & 2 Others* (2022) eKLR, and *Elizabeth Kwamboka vBOG Cardinal Otunga High School Mosochi & 2 Others* (2014) eKLR, amongst many others. This court agrees and associates with the reasoning in those decisions.
19. It is submitted that the issue of employer/employee relationship between the respondents and the grievants is not in doubt. The letters of the initial contracts are not disputed and it is not contested that as at the time of issuance of the impugned notices the grievants were still lawfully and fully engaged employees of the 1<sup>st</sup> respondent. It is therefore submitted that the unilateral action by the respondents to terminate the grievants, through the disguised notices of extension of contracts, is illegal, unlawful, null, and void. It is submitted that the alleged extension of contracts amounted to unlawful termination in disguise.
20. It is further submitted that the respondents have in their submissions disowned the person who signed the impugned notices, Mr. Simon Sang, and as such this confirms the irregularity, illegality, and unlawfulness of the said notices.
21. On the second issue, it is submitted that the grievants held legitimate expectation, and reasonably so, to hold their jobs and earn a living unless lawfully terminated or until retirement. It is submitted that the action by the respondents of issuing the impugned notices is antithesis to that genuine and lawful expectation and as such the court is urged to quash the said notices. Counsel has cited the Supreme Court in *Communications Commission of Kenya V Royal Media Services & 5 Others* (2014) eKLR, *Republic V Kenya Revenue Authority – Proto Energy Limited (exparte)* (2022) eKLR, and *H. R. W. Wade & C. F. Forsyth – Administrative Law*, Oxford University Press, 2000 – Pages 449-450.



22. On reliefs, counsel has cited Articles 22 & 162(2)(a) of *the Constitution* and section 12(3) of the *Employment and Labour Relations Court Act* in pointing out the nature and the extent of the orders and reliefs that this court may grant, urging the court to be constrained to remedy the claimant as pleaded.

#### **V. Submissions for/by the Respondents**

23. Counsel for the 1<sup>st</sup> respondent identified several issues for determination – Whether the process of employment of the affected/concerned members of the petitioner by the 1<sup>st</sup> respondent was in accordance with the applicable law; Whether the employment contracts of the concerned/affected (125) members were fixed term contracts which expired by effluxion of time; Whether the 1<sup>st</sup> respondent’s decision to extend contracts of employment vide letters dated 30<sup>th</sup> September, 2022 is akin to alteration, reviewing and or termination of employment; Whether the constitutional rights of the petitioners were breached; Whether the claimant is entitled to the reliefs sought; and, Who should meet the costs.
24. On the first issue, it is submitted that the grievants were not procedurally and lawfully employed by the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent as required in law, specifically Articles 176(1), 232 & 235 of *the Constitution*, and section 59 of the *County Governments Act*. It is submitted that the initial contracts of three years and even the subsequent last one of three months were irregular because they were induced and executed at the behest of the 1<sup>st</sup> respondent without any involvement of the 2<sup>nd</sup> respondent, yet the 2<sup>nd</sup> respondent is the legitimate body that should recruit.
25. Further, it is submitted that the initial contracts of two years lapsed sometimes in 2017 by effluxion of time.
26. It is submitted that this court should not rewrite or impose terms of contracts between an employer and an employee.
27. On the third issue it is submitted that the impugned notices that gave each of the grievants a three months contract did not amount to termination. It is submitted that at no point were the grievants offered permanent and pensionable employment by the respondents. It is submitted that in issuing the impugned notices the respondents were not bound to consult or involve the grievants in taking that decision.
28. On reliefs, it is submitted that this is an ordinary or regular cause and that no evidence has been tendered for breach of constitutional rights of the grievants. It is insisted that upon expiry of the initial two-year contracts the respondents owed nothing to the grievants.
29. Counsel has cited, among other decisions, *Anne Theuri V Kadet Limited* (2013) eKLR, *Josphat Njuguna V Highrise Self-help Group* (2014) eKLR, and *Transparency International – Kenya V Teresa Carlo Omondi* (2023) eKLR in supporting various aspects of his submissions and urged that this claim be dismissed with costs.
30. The court has seen supplementary submissions filed by Gordon Ogola, Kipkoech & Co Advocates allegedly for the 1<sup>st</sup> respondent dated 16<sup>th</sup> May, 2023, yet no notice of appointment from that law-firm has been traced in our record; Mr. Andrew Matwere has all along acted for the 1<sup>st</sup> respondent. Those submissions are improperly on record and are hereby expunged from the court record.
31. However, just in case a notice of change or appointment may have been filed and misplaced along the way, and without prejudice, Mr. Kipkoech, in addition to what is submitted by Mr. Matwere, as summarized above, submitted that the Court of Appeal in *The Clerk, Nakuru County Assembly & 3*



Others V Odongo & Others held that where there is no contract of employment this court (ELRC) lacks the jurisdiction to hear and determine a matter. It is submitted that once the initial contract of two years expired and the extended contract of three months expired in December, 2022, the employment relationship was no more.

32. Further, it is submitted that the grievants were not employed through the 2<sup>nd</sup> respondent as required under section 86 of the *County Governments Act* and as such they were not employees and there never was created an employment relationship between them and the 1<sup>st</sup> respondent. It is submitted that this court should not aid the grievants in enforcing illegal contracts.
33. The 2<sup>nd</sup> respondent's submissions were authored by Mr. Peter Kiprono Bii, the chief executive officer, wherein three issues were identified for determination – Whether the claimant's members had legal contracts in the employ of the 2<sup>nd</sup> respondent; Whether there exists an employer-employee relationship between the claimants and the 2<sup>nd</sup> respondents; and; Whether this honourable court is vested with the requisite jurisdiction to hear and determine this cause.
34. As noted above, the 2<sup>nd</sup> respondent neither entered appearance nor filed a response or defence to the claim and as such it has no right of audience in this cause. The said submissions are hereby expunged from the court record.
35. However, as stated elsewhere, just in case the appearance was lost along the way in the filing system, the court shall, on without prejudice basis, consider the said submissions as hereunder.
36. On the first issue, it is submitted that the grievants were not lawfully employed as it is only the 2<sup>nd</sup> respondent who should hire on behalf of the 1<sup>st</sup> respondent. It is submitted that there is no evidence that the 2<sup>nd</sup> respondent delegated its said duty to any other person or body and as such the appointments of the grievants are termed illegal and unlawful. The decision in *Johnstone Chebusit V Governor Bomet County & Others (2017) eKLR* and *Robert Kipkirui Ng'etich & Others V Public Service Board of Bomet & Others (2017) eKLR* are cited in affirming this submission.
37. It is submitted that this court should not enforce an illegality and the court is urged to follow the reasoning in *Kenya Airways Limited V Satwant Singh Flora (2013) eKLR* in that regard.
38. On the second issue it is submitted that in view of the alleged illegality in the hiring of the grievants no employment relationship was ever created between them and the respondents.
39. On the third issue, besides the argument that there is no established employment relationship between the grievants and the respondents due to the alleged flawed recruitment process that was not undertaken by the 2<sup>nd</sup> respondent or a duly authorized agent or delegate, it is submitted that the grievants ought to have filed their complaints with the PSC under section 77 of the *County Governments Act*. It is submitted that section 87 thereof ousts the jurisdiction of the court in this matter. The decision in *Kenya County Government Workers Union V Nyeri County Government & Another (2019) eKLR* is cited in that regard.
40. Further, citing *Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd (1989) KLR 1* and *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others (2012) eKLR* the court is urged to drop its tools and not take any more step in the matter.

## **VI. Rejoinder by the Claimant's Counsel**

41. In a rejoinder counsel for the claimant submitted that the letters/notices dated 30<sup>th</sup> September, 2022, purporting to extend contracts for the grievants did not clarify or specify which contracts were to be extended. It is further submitted that the grievants were neither involved nor consulted before issuance



of the impugned notices which in effect altered and changed their terms and conditions of service. It is further submitted that the same officer that the respondents are now disowning, S. Sang, signed the said notices and logically and legally the said notices were therefore of no legal effect.

42. On the issue of employment relationship, it is submitted that the grievants worked for the 1<sup>st</sup> respondent from 2015 on full pay and as such that aspect is a non-issue. It is submitted that the undisputed pay-slips for the grievants is clear testimony of the employment relationship.
43. It is submitted that the facts, evidence, and circumstances of this cause are distinguishable from those that obtained in *The Clerk, Nakuru County Assembly & Others V Kenneth Odongo & Others* (supra) as in this decision the Court of Appeal clearly indicated that there was no employer-employee relationship.
44. It is submitted that the grievants were inherited from the defunct local authorities following the promulgation of the new Constitution in 2010 and they continued to serve the 1<sup>st</sup> respondent in the interim as casuals until they were absorbed and issued with the initial two years contracts in 2015. It is submitted that ideally the grievants ought to have been on permanent and pensionable terms as from 2010 when the local authorities were abolished and employees absorbed by county governments under the Transition to Devolved *County Governments Act* No. 1 of 2012.
45. It is submitted that even if the respondents retained the grievants as casuals, section 37 of the Employment allows conversion of such employment to permanent and pensionable terms and the court is urged to find and hold as such. The decisions in *Kenyatta University V Esther Njeri Maina* (2022) eKLR and *Rashid Odhiambo Allogoh & Others V Hacco Industries Limited* (2015) eKLR and, *Nanyuki Water & Sewerage Company V Benson Mwiti Ntiritu & Others* (2018) eKLR among others are cited to buttress that position.
46. It is urged that the supplementary submissions filed by Gordon Ogola, Kipkoech & Co. Advocates should be expunged under Order 9 Rule 7 of the Civil Procedure Rules as the said law-firm is not on record for the respondents or either of them.
47. In response to submissions by the 2<sup>nd</sup> respondent, counsel for the claimant reiterates the contents of his submissions urging that for all intents and purposes the grievants are employees of the 1<sup>st</sup> respondent on permanent and pensionable terms and that this court has the requisite jurisdiction to hear and determine this matter.

## VII. Issues for Determination

48. Rule 13 of the Employment and Labour Relations Court (Procedure) Rules – 2016 provides as follows –
  1. If a party served with a statement of claim intends to respond, the party shall within twenty one days from the date of service, enter appearance and file and serve a response to the suit.
  2. A respondent’s statement of response shall contain -
    - a. the respondent’s name and address for purpose of service;
    - b. a reply on the issues raised in the statement of claim;
    - c. any admission of any statement of facts set out in the statement of claim as the respondent admits, and a denial of any statements made in the suit that the respondent does not admit;



- d. any additional statements of fact which the respondent may wish to make in support of its reply;
  - e. any defence or grounds upon which the respondent may wish to rely;
  - f. any principle, policy, convention, law, industrial relations or management practice to be relied upon;
  - g. a counterclaim; or
  - h. any relief that might be sought by the respondent against the claimant.
3. A party served with a response to any pleading under paragraph (1) may file and serve a reply within seven days of service of the response.
  4. The pleadings in a suit shall close fourteen days after the service of a reply under paragraph (3) or, where a reply is not filed, fourteen days after service of a response to pleadings under paragraph (1).
  5. The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading.
49. This being a cause, the respondents ought to have entered appearance and filed defence or response to the claim. From the record, both the respondents did not file any response or defence to the claim and essentially, therefore, the cause is undefended and the court shall proceed to determine the matter as such.
50. The import of the foregoing paragraph is that the facts as pleaded by the claimant are uncontroverted, undefended, and undisputed by the respondents. However, the foregoing notwithstanding, upon entering appearance and or filing notice appointment, the 1<sup>st</sup> respondent acquired a right of audience with the court and as such it had the right to address the court and file the written submissions on matters of law only and not facts.
51. Contrary to the submissions by the respondents, replying affidavits to an application are not and cannot amount to a response to the claim or defence as envisaged in rule cited above. At the risk of sounding monotonous, this is a cause not a petition.
52. From the record, the 1<sup>st</sup> respondent entered appearance on 7<sup>th</sup> November, 2022, through Andrew N. Matwere, Advocate. A notice of preliminary objection to a notice of motion dated 19<sup>th</sup> October, 2022, and a replying affidavit were filed. However, no response was filed to the main cause by way of a response or a defence as required by the law. In the circumstances the submissions by Mr. Matwere shall only be considered in regard to issues of law.
53. The 2<sup>nd</sup> respondent neither entered appearance nor filed a response or defence to the claim and as such has no audience whatsoever with the court and the court shall proceed as such.
54. That said, I have read and understood the various positions taken and postulated by the parties in this cause. From the foregoing summary of the pleadings filed, the evidence placed before the court, and the submissions by respective counsel for the parties, the following issues commend themselves to the court for determination –
- i. Is this cause properly before the court?
  - ii. What is the nature of the employment relationship between the grievants and the 1<sup>st</sup> respondent?



- iii. Is the claimant, for and on behalf of the grievants, deserving of the reliefs prayed for?
- iv. Costs

### VIII. The Cause

- 55. The respondents have accused the claimant of violating the doctrine of exhaustion allegedly for not referring the matter to the PSC before approaching the court.
- 56. This cause was triggered by the notices issued by the 1<sup>st</sup> respondent on 30<sup>th</sup> September, 2022 purporting to place the grievants on short-term contracts of three months which were to expire by 30<sup>th</sup> December, 2022, effectively bringing the employment of the grievants to an end as from 1<sup>st</sup> January, 2023. However, as stated in the introductory part of this judgment, the notices were stayed by the court pending the hearing and determination of the cause. That, as far as the court can ascertain, is the status quo obtaining.
- 57. On the doctrine of exhaustion, the respondents have taken the view that the claimant ought to have filed the dispute with the PSC before filing the matter in court. The remedies that the petitioner is seeking are reproduced verbatim in the introductory part of this judgment. In the considered view of the court those are not remedies that the PSC can issue under the *Public Service Commission Act*. This cause is not only about the unfair and unlawful notices purporting to effectively terminate the grievants' employment, but the claimant, for and on behalf of the grievants, is seeking various other remedies based on constitutional and statutory breaches and violations.
- 58. Moreover, the current jurisprudence is to the effect that where the out of court dispute resolution mechanism as provided for in the law is unlikely to yield and adequately remedy a situation, and hence it is likely to delay justice or result in injustice, a party should access a court of law for an appropriate remedy. In *Abidha Nicholus V The Attorney General & Others – Petition No. E007 of 2023* the Supreme Court held, inter alia, that – “where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law” [emphasis added].
- 59. In the above decision that concerned a matter arising from the Environment and Land court (ELC), the Supreme Court delineated the jurisdiction of that court and held that the jurisdiction of a court of law is not ousted by the doctrine of exhaustion and more so where the remedies sought are not capable of being legally granted by the alternative or primary mechanism. Good examples of remedies that may not be granted or availed in most primary mechanisms are injunctions, prohibitory or conservatory orders, remedies against violation, breach, or threat to constitutional or statutory rights, among others.
- 60. This court (ELRC) is created under Article 162(2)(a) of *the Constitution* and established under the *Employment and Labour Relations Court Act* (ELRC Act). The jurisdiction of the court and the remedies that it can give are provided for under Section 12 thereof. This law provides that “The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law that extends jurisdiction to the court”.
- 61. My understanding of the foregoing provision, and that is what the Supreme Court held in the decision cited above, is that the exclusive original and appellate jurisdiction of this court in the matters specifically provided for in the law, shall not be ousted by exhaustion clauses. To put it in some other context, for example, nothing should stop a party from approaching the court for an injunction or a conservatory order pending exhaustion of an alternative mechanism. The bottom-line in my view is that the constitutional and statutory, original and appellate jurisdiction of the court shall not be



ousted by the exhaustion clauses unless such clauses are anchored in law and specifically provide for exclusion of courts from handling the same. And, such law shall be clear on what remedies the out-of-court mechanism shall provide such that where a party has no remedy in the mechanism it shall not waste time and suffer prejudice or injustice while it should simply have approached the court for the clear and unambiguous remedies provided for in the law. In case of ELRC that applicable law is as cited above as read with the [Employment Act](#) and other applicable and express statutes.

62. In the circumstances, it is the considered view of the court, and it is so held, that this cause is properly before it and the court shall proceed to determine the same on merits.

## **IX. Employment**

63. It is not in dispute that the grievants were engaged by the 1<sup>st</sup> respondent, to hold various stated positions, vide letters of appointment of diverse dates of September, 2015. The appointments were effective 1<sup>st</sup> October, 2015 for an initial contract period of two (2) years. For avoidance of doubt, the said letters were signed for and on behalf of the county secretary/head of public service.
64. Contrary to the allegations made by the respondents, albeit from the bar, there is no evidence that the said contracts were at any point in time revoked and or cancelled for alleged irregularities or illegalities. There is also no evidence of any action taken by the 2<sup>nd</sup> respondent towards investigating the alleged irregularities or illegalities in the engagement and appointment of the grievants. While the court agrees that 2<sup>nd</sup> respondent is the only legally and lawfully mandated authority to recruit employees to work for the 1<sup>st</sup> respondent, it should equally take the necessary action in nullifying any recruitment or appointments made without due process. It is therefore ridiculously unfortunate and an afterthought for the 2<sup>nd</sup> respondent to expect the claimant to prove that the grievants were lawfully engaged by the 1<sup>st</sup> respondent yet the grievants have been working for the last seven years without the 2<sup>nd</sup> respondent raising a finger and or taking any action to rectify the alleged anomalies.
65. The claimant availed duly signed letters of appointment for all the named grievants and it is not in dispute that they have been working for the 1<sup>st</sup> respondent for a cumulative period of over the proverbial seven years. There is no evidence that the respondents, or any of them, and more so the 2<sup>nd</sup> respondent, ever challenged the said engagement and or the said letters of appointment.
66. Moreover, the grievants have continuously worked for the 1<sup>st</sup> respondent from the said date of appointment, commencing 1<sup>st</sup> October, 2015, to this very day. It must therefore have come as a surprise to the grievants when they received notices dated 30<sup>th</sup> September, 2022 purporting to offer them extension of their alleged contracts and effectively terminating them by 30<sup>th</sup> December, 2022, and hence out of work by 1<sup>st</sup> January, 2023. The said notices, ironically, are signed for an on behalf of the county secretary/head of county public service.
67. What appears to be the case, and that is the evidence before the court, is that after the expiry of the initial two-year contracts the grievants continued working for the 1<sup>st</sup> respondent without any hinderance or interruption. It is that continued employment and engagement that the court is now requested to interpret and give a name to it in determining the second issue.
68. Justice is about fairness and this court's duty and indeed obligation is to do justice to all and sundry that come before it. The grievants did their initial two years contract but then continued to serve and work for the 1<sup>st</sup> respondent in the same capacities earning their salaries and wages as and when the same fell due and payable. It is the view of the court that upon expiry of the initial two-year contracts the grievants gained the status of permanent and pensionable employees after the respondents failed to renew the contracts yet allowing the grievants to continue working and earning their salaries and



- emoluments. How else and in what capacity has the 1<sup>st</sup> respondent retained and engaged the grievants for over seven years? Even if the grievants were to be terminated, and only in accordance with the law, they shall be entitled to gratuity or service pay and other accrued benefits in accordance with the law.
69. It shall be grossly unfair, unjust, and unlawful for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, after enjoying the services of the grievants for over seven years, to now turn around and decide that they have to go home for having “overstayed” their contracts. Section 12(3)(viii) of the ELRC Act allows this court to make such orders as it may deem appropriate to meet the ends of justice in any given cause or circumstances.
70. It is therefore the finding and holding of the court that the grievants cannot be terminated in any other manner other than in accordance with the law. For that to lawfully happen, the 1<sup>st</sup> respondent shall have to comply with Sections 35, 40 (in case of redundancy), 41, 43, 44, 45, & 46 of the Act among other provisions of the law.
71. Counsel for the claimant has posed this rhetorical question in his submissions, and which question finds no answer from the respondents – If the respondents allege that the impugned notices were intended to extend the contracts of the grievants, what or which contracts were those that were to be extended? The court asks the same rhetorical question – was the 1<sup>st</sup> respondent, through the impugned notices/letters extending the contracts of 2015 which had long expired in 2017?
72. The county governments and indeed our public institutions ought to disabuse themselves of the notion that each administration that takes the reins of power has to come with its own workforce and in the process terminate, by all means, the subsisting workforce. It is no surprise that the purge on the grievants herein closely followed the 2022 general elections whereby new county government took over the reins of power in the 1<sup>st</sup> respondent. For the sake of delivery of services to the citizens and development, all and sundry must rise above this retrogressive notion may it be at the national or county governments, or in private or public institutions.
73. For the foregoing reasons, the court agrees with counsel for the claimant that the three-month notices issued by the 1<sup>st</sup> respondent on 30<sup>th</sup> September, 2022, disguised as extension of contracts, or indeed any other notices for whatever period of time, are null and void and are hereby so declared. Consequently, the grievants shall continue working for the 1<sup>st</sup> respondent on their current or last known terms unless terminated in accordance with the law. It is so held and declared.

## **X. Reliefs**

74. Having found and held that the three-month notices, disguised as extension of contracts, or indeed any other notice, issued by the 1<sup>st</sup> respondent on 30<sup>th</sup> September, 2022, or at any other time, are bad in law, misconceived, null and void, the court shall now deal with each of the remedies sought.
75. It is illustrative that in *Joel Kiprono Rop V County Government of Bomet & 2 Others (2020) eKLR* Nduma J advised the 1<sup>st</sup> respondent to confirm those employees already on contract before recruiting others. This advice does not appear to have been heeded to and no wonder a similar issue is recurring in this cause whereby the 1<sup>st</sup> respondent purports to terminate the grievants who have served for over seven years each, only to shortly thereafter recruit new persons to perform the same work, as ridiculous and ludicrous as that sounds.
76. As noted above, this cause brings to the fore the sorry state of public service in many a county government. At the risk of repeating, it seems that there is a misconceived and misguided notion that each administration that comes to power comes with its own new public service and workforce and that all employees who served in the previous administration should be sent home by all means. This thinking and approach is not only dangerous but also retrogressive. Public or Civil Service is what



keeps (and should keep) a county or the country going in delivery of public services and goods even during political turmoil. During electioneering period, for example, it is the public service that keeps the country going. This philosophy and practice should obtain both at national and county levels of governance. It is in the interest of all and sundry that public service be strengthened, affirmed, and stabilized at all levels of governance to bolster delivery of public goods and services for development. The respondents need to fully understand and appreciate this reality if the 1<sup>st</sup> respondent is to move its citizenry to the next level of development and civilization.

77. For avoidance of doubt, the court issued conservatory orders as early as 27<sup>th</sup> October, 2022, that the grievants remain in employment of the 1<sup>st</sup> respondent pending the hearing and determination of the cause. As far as this court is concerned, that is the obtaining status and the court shall proceed to evaluate the remedies sought on that basis. Any other status, other than the afore-stated, is null and void.
78. Prayer 1 seeks this court to declare that the fundamental rights and freedoms of the grievants under Articles 41, 47, and 50 of *the Constitution* have been violated by the respondents. The court agrees with the claimant's counsel that the conduct of the respondents in issuing the impugned notices/letters without any consultation or involvement of the grievants, which in effect amounted to unilaterally changing and altering of their terms of service and or termination of their employment, amounted to unfair labour practices and denied the grievants the right to fair hearing.
79. In regard to prayer 2 the court has said enough in the foregoing paragraphs in demonstrating that the letters/notices of extension of contracts to the grievants, which were in effect, and for all intents and purposes, notices of termination were illegal, null and void and it is hereby so declared.
80. Consequently, prayers 3 and 4 are granted and all the impugned notices issued to the grievants and the decision to issue the same are hereby quashed. The terms and conditions of service of the grievants shall remain as they were prior to issuance of the impugned notices/letters only subject to such increment as may apply over the time.
81. Of course, prayer 5 is allowed and the respondents are prohibited by themselves, agents, servants, delegates, and or others howsoever, from interviewing, recruiting and or employing replacements for the grievants in the positions that they hold or in similar positions to do same or similar work.
82. The grievants have been and were always employees of the 1<sup>st</sup> respondent at all the material times and as such the issue of reinstatement does not arise. Prayer 7 is allowed and the respondents ordered to pay the grievants, within 30 days hereof, all pending salaries, benefits, and emoluments that is due, payable, and owing to them up to and including as at the time of this judgment.

## **XI. Costs**

83. Costs follow the event and the claimant is awarded costs of the cause as against both the respondents, jointly and severally.

## **XII Orders**

84. Flowing from the foregoing, the court issues the following orders in disposal of this cause –
  - i. A declaratory order be and is hereby issued that the fundamental rights and freedoms of the grievants under Articles 41, 47, and 50 of *the Constitution* were violated by the unilateral decision and action of the respondents in issuance of the notices/letters of 30<sup>th</sup> September, 2022.



- ii. A declaration be and is hereby proclaimed and issued that the notices/letters of extension of contracts, which were indeed letters/notices of termination in disguise, were unjust, irregular, unfair, unlawful, null, and void.
- iii. Consequently, the impugned notices/letters be and herby quashed and nullified.
- iv. An order be and is hereby issued that the respondents shall not vary, alter, change, or interfere with the terms and conditions of employment for the grievants in any way or manner other than as provided in the law.
- v. The respondents, by themselves, agents, servants, delegates, and or others howsoever, are hereby prohibited from interviewing, recruiting, and or employing any persons to replace the grievants in their positions and or to perform the same or similar work, as performed by the members of the claimant, the grievants.
- vi. The respondents are hereby ordered to within 30 days of this judgment, pay all or any pending salaries, benefits, emoluments, and or other benefits that are due and payable to the grievants to date.
- vii. The respondents shall jointly and severally meet the costs of the cause.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

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**DAVID NDERITU**

**JUDGE**

