



**Kenya National Union of Nutritionists and Dieticians v Nairobi City  
County Government & 2 others (Employment and Labour Relations Cause  
E972 of 2023) [2024] KEELRC 188 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 188 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E972 OF 2023  
BOM MANANI, J  
FEBRUARY 9, 2024**

**BETWEEN**

**KENYA NATIONAL UNION OF NUTRITIONISTS AND  
DIETICIANS ..... CLAIMANT**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant is a Trade Union that represents professionals working as nutritionists and dieticians within the Republic of Kenya. It has filed this cause on behalf of 35 of its members (the Grievants) who are currently in the employment of the 1<sup>st</sup> Respondent seeking for orders, inter alia, that their fixed term contracts of service be declared as having been converted into permanent and pensionable contracts of service.
2. Through a Deed of Transfer of Functions dated 25<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent transferred some of its functions to the National Government. The Deed was published under Gazette Notice No. 1609 in Kenya Gazette Volume CXXII – No. 38.
3. Through Executive Order No. 1 of 2020, the National Government established the Nairobi Metropolitan Services (NMS) to implement the transferred functions on its behalf. However, the entity did not have its own human resource to execute this mandate.



4. The task of facilitating provision of manpower to the NMS was handed to the 3<sup>rd</sup> Respondent. It is in this context that it (the 3<sup>rd</sup> Respondent) hired the Grievants on behalf of the NMS to perform the functions that were specific to their professional training.
5. The Claimant contends that on 3<sup>rd</sup> August 2021, the 3<sup>rd</sup> Respondent issued a circular to its authorized officers directing them to convert contracts of service for employees who had been appointed on fixed term basis at certificate, diploma and graduate entry levels into permanent and pensionable contracts. It is the Claimant's contention that this circular converted the contracts for the Grievants from fixed term to long term. Consequently, the Claimant contends that the Respondents are obligated to issue the Grievants with letters confirming their appointment as permanent and pensionable employees of the 1<sup>st</sup> Respondent.
6. The Claimant's case is anchored on the legal effect of section 51 of the [Public Service Superannuation Scheme Act](#) on fixed term contracts of service for persons serving in the public sector. It is the Claimant's case that the provision requires conversion of fixed term contracts for persons serving in the public sector into long term contracts. Therefore and in terms of this provision of statute, the Grievants are entitled to have their contracts converted into permanent and pensionable.
7. The Claimant contends that the 3<sup>rd</sup> Respondent's circular required its authorized officers to convert contracts for employees who had been hired into public service as from May 2019 from fixed to indefinite term. It is the Claimant's case that since the 35 Grievants were hired after May 2019, the circular applied to them.
8. As a matter of fact, the Claimant avers that on 19<sup>th</sup> January 2022 and 24<sup>th</sup> January 2022, the NMS issued internal memos to its Directorates in charge of the transferred functions requiring them to appraise staff serving on fixed term contracts with a view to having the contracts upgraded to indefinite term. In the Claimant's view, these memos serve to confirm that the Grievants were entitled by law to have their fixed term contracts upgraded to long term contracts.
9. The Claimant contends that pursuant to the Framework for the Handover of the Transferred Functions from the National Government to the Nairobi City County Government (the Handover Framework) by which the National Government handed over the transferred functions back to the 1<sup>st</sup> Respondent, the parties agreed that the 1<sup>st</sup> Respondent was to absorb all employees that were hired by NMS during its tenure based on their terms of employment. Further, it was allegedly agreed that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would facilitate the process by preparing the requisite documentation.
10. In the Claimant's view, by the time that the National Government transferred the services in question back to the 1<sup>st</sup> Respondent, the fixed term contracts of employment for its members who had been in the service of NMS had already been converted into indefinite term contracts of service by operation of law. As such, the Grievants transited to the 1<sup>st</sup> Respondent on permanent and pensionable terms.
11. The Claimant avers that based on the various correspondence alluded to above, its members had legitimate expectation that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would formalize conversion of their contracts to indefinite term. However and to their surprise, this did not happen. Instead, the 1<sup>st</sup> Respondent has gone ahead to advertise their positions.
12. The Claimant contends that the actions by the Respondents are discriminatory and violate its (the Claimant's) members' right to fair labour practice. In the Claimant's view, if the contested positions are to be offered for filling, then its members are entitled to be accorded priority in filling them.



13. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents admit that the effect of the Deed of Transfer of Functions dated 25<sup>th</sup> February 2020 was to transfer some functions from the 1<sup>st</sup> Respondent to the National Government. These functions were to be executed by the NMS on behalf of the National Government. In order to carry out this mandate, the NMS was to conduct recruitment of staff but limited to the period that it was to execute the transferred functions and during its existence.
14. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that clause 3.3(b) of the Handover Framework provided that the 1<sup>st</sup> Respondent would only absorb staff recruited by NMS if there were vacancies. Further, such absorption was to be guided by the needs of the 1<sup>st</sup> Respondent and on the same terms as those that were applicable to the employees whilst in the service of the NMS.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the Grievants were hired by the NMS on three year fixed term contracts which are due to lapse on 22<sup>nd</sup> February 2024. It is these Respondents' contention that when the mandate of NMS lapsed, the Grievants were retained in the service of the 1<sup>st</sup> Respondent on the same contractual terms in line with the Handover Framework. Therefore and in terms of the Handover Framework, the Grievants are not entitled to demand that their contracts be converted from fixed to indefinite term.
16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents admit that the Grievants were enrolled as contributors to the National Social Security Fund (NSSF) and National Health Insurance Fund (NHIF) at the time that they were employed. However, they (1<sup>st</sup> and 2<sup>nd</sup> Respondents) contend that these schemes are mandatory in law and apply to all employees irrespective of the nature of their contracts.
17. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent aver that they are distinct legal entities that are not subject to the direction of the 3<sup>rd</sup> Respondent on issues relating to recruitment of staff. Thus, the court cannot compel them to implement the impugned circular by the 3<sup>rd</sup> Respondent.
18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the continued purported recruitment of staff on their behalf by the NMS was in violation of the law. It is their case that they issued several disclaimers against this practice and are not bound to absorb any staff recruited in contravention of the law.
19. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the Grievants' contracts were fixed term and by an entity that is distinct and separate from them (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents). Therefore, there is no basis upon which the Grievants can contend that they legitimately expected that they will continue in the service of the two Respondents.
20. The 3<sup>rd</sup> Respondent acknowledges that on 25<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent transferred some of its functions, including provision of county health services, to the National Government. The 3<sup>rd</sup> Respondent avers that in order to effectively execute the transferred functions, the National Government established the NMS as a special purpose vehicle to implement the said functions. It is the 3<sup>rd</sup> Respondent's contention that the terms and mandate of the NMS were tied to the Deed of Transfer of Functions that was executed between the 1<sup>st</sup> Respondent and the National Government.
21. The 3<sup>rd</sup> Respondent contends that by virtue of clause 5.6 of the Deed of Transfer of Functions, personnel to implement the transferred functions on behalf of the NMS were to be seconded from the 1<sup>st</sup> Respondent. However, it was realized that the 1<sup>st</sup> Respondent did not have sufficient staff to be seconded to NMS. It is in this context that the 3<sup>rd</sup> Respondent was requested to hire additional staff on behalf of the NMS. As a consequence, the Grievants were hired on fixed term contracts under this latter arrangement.



22. The 3<sup>rd</sup> Respondent contends that the Grievants' contracts were fixed term with an agreed start and end date. The 3<sup>rd</sup> Respondent avers that this arrangement was informed by the reality that transfer of functions between the National and County Governments is temporary in nature. Inevitably, the transferred functions eventually revert to the rightful constitutional organ. As such, staff hired to execute such functions must necessarily be on fixed term contracts.
23. In the case of the 1<sup>st</sup> Respondent, the functions that NMS was discharging reverted back to it (the 1<sup>st</sup> Respondent) after the transition in government that happened upon conclusion of the August 2022 general elections. As such, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents resumed their constitutional mandate of managing their own human resource.
24. The 3<sup>rd</sup> Respondent's case is that since the function of hiring human resource for the 1<sup>st</sup> Respondent vests in the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent, in consultation with the 1<sup>st</sup> Respondent, has the sole discretion to decide whether to retain the Grievants once their fixed term contracts lapse. As such, to impose the Grievants on the 1<sup>st</sup> Respondent as is proposed by the Claimant in this action is to usurp the mandate of the 2<sup>nd</sup> Respondent.
25. The 3<sup>rd</sup> Respondent contends that nothing turns on the Grievants being registered as contributors to the NSSF and NHIF. According to it (3<sup>rd</sup> Respondent), these levies apply to all persons in employment irrespective of whether they are serving on fixed or indefinite term basis.
26. The 3<sup>rd</sup> Respondent denies that the circular dated 3<sup>rd</sup> August 2021 applied to individuals working under special programmes as were the Grievants. As a matter of fact, it is the 3<sup>rd</sup> Respondent's position that the said circular explicitly excluded this category of persons.
27. According to the 3<sup>rd</sup> Respondent, the purpose of the circular was to provide guidelines for implementation of the *Public Service Superannuation Scheme Act* with respect to officers serving in the National Government. Under section 5 of the Act, only those officers in the National Government serving on permanent and pensionable terms were eligible to join the scheme. As such, it became necessary for the 3<sup>rd</sup> Respondent to issue directions requiring officers who fall under it but who were serving under fixed term contracts to have their contracts upgraded to indefinite term in order to benefit from the scheme.
28. The 3<sup>rd</sup> Respondent denies that it has authorized officers attached to or serving in County Governments. As such, it denies that the impugned circular was intended for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
29. The 3<sup>rd</sup> Respondent avers that by virtue of article 234 (2) (i) of the *Constitution*, its mandate in respect of County Governments is limited to hearing appeals from the county public service. It denies that it has powers to appoint personnel for County Governments. Therefore, its involvement in the appointment of the Claimant's members to serve in the NMS must be construed strictly in the context of the Deed of Transfer of Functions between the 1<sup>st</sup> Respondent and the National Government.
30. According to the 3<sup>rd</sup> Respondent, the appointment of the Claimant's members was tied to the duration of transfer of functions between the 1<sup>st</sup> Respondent and the National Government. The 3<sup>rd</sup> Respondent contends that under the Handover Framework, officers who had been seconded to NMS from the 1<sup>st</sup> Respondent were to revert back to the 1<sup>st</sup> Respondent. And those who had been hired on fixed term contracts were to serve until the transfer of functions arrangement lapsed or as otherwise directed by the 2<sup>nd</sup> Respondent which is in charge of personnel serving the 1<sup>st</sup> Respondent.



31. The 3<sup>rd</sup> Respondent denies that it was involved in the process that oversaw the handover of functions from the National Government back to the 1<sup>st</sup> Respondent. As such, it denies involvement in making the decision on the fate of staff of NMS who were serving the 1<sup>st</sup> Respondent on contract.
32. The 3<sup>rd</sup> Respondent avers that the purported appraisal by NMS of its employees serving on fixed term contracts in a bid to convert their contracts into indefinite term was undertaken without its (the 3<sup>rd</sup> Respondent's) involvement. As such, the process had no linkage to its (the 3<sup>rd</sup> Respondent's) circular of 3<sup>rd</sup> August 2021.

### **Issues for Determination**

33. After evaluating the pleadings and evidence on record, I am of the view that the following matters fall for determination:-
  - a. Whether the Public Service Superannuation Scheme Act applies to the Grievants.
  - b. Whether the Grievants' fixed term contracts of service were converted into indefinite term contracts by virtue of section 51 of the Public Service Superannuation Scheme Act.
  - c. Whether the 3<sup>rd</sup> Respondent's circular of 3<sup>rd</sup> August 2021 applied to the Grievants.
  - d. Whether the Grievants are entitled to conversion of their fixed term contracts into indefinite term contracts of service by virtue of the doctrine of legitimate expectation.
  - e. Whether the Grievants have suffered discrimination on account of non-conversion of their contracts into indefinite term contracts.
  - f. Whether the Claimant is entitled to the reliefs that it seeks through this action.
34. I do not propose to address the aforesaid issues either distinctly or sequentially. However, as I close the analysis below, all the identified issues shall have been considered.

### **Analysis**

35. Undoubtedly, resolution of this dispute is pegged on the applicability of the Public [Service Superannuation Scheme Act](#) on employees of County Governments. The preamble to the Act states that it is an Act of Parliament meant to establish a Contributory Public Service Superannuation Scheme for purposes of providing retirement benefits to persons serving in the public service and for connected purposes.
36. From this recital, it is clear that the superannuation scheme established under the Act is intended to benefit persons serving in public service. The Act describes public service to mean employment in the service of the Government by:-
  - a. the Public Service Commission;
  - b. the Teachers Service Commission as a teacher; or
  - c. the National Police Service Commission; or
  - d. any other service that the Minister determines to be public service for the purposes of this Act.
37. The Act further indicates that public servants for purposes of the superannuation scheme established thereunder include those serving in any of the offices referred to in articles 154, 155 and 234(3)(b) of the [Constitution](#). These are persons serving in the offices of: Secretary to the Cabinet; Principal



- Secretaries; High Commissioners, Ambassadors and other diplomatic and consular representatives of the Republic of Kenya.
38. The Act defines the term “Government” to mean the National Government. To be sure, there is no reference to the term “County Government” in the Act except under sections 2 and 33 thereof in the context of transfer of services in respect of a public officer from the National Government to a County Government.
  39. Section 6 of the Act makes contributions to the scheme established thereunder mandatory. The contributions are to be deducted by the Government on monthly basis from the salary of a member of the scheme.
  40. Section 7 of the Act allows a member of the scheme to make further voluntary contributions in addition to the mandatory contribution aforesaid. Where a member makes this election, he is required to instruct the Government to make the additional deductions and remit them to the Fund.
  41. Section 8 of the Act places the obligation of deducting the monthly contributions from members’ salaries on the Government. The Government is to effect these deductions by the tenth of every succeeding month and remit them to the custodian of the Fund.
  42. Section 10 of the Act establishes the Board of Trustees for the Fund. Membership of the Board include the following:-
    - a. A Chairman appointed by the Cabinet Secretary, Finance;
    - b. The Permanent Secretary in the Ministry for the time being responsible for matters relating to finance or his representative;
    - c. The Permanent Secretary in the Ministry for the time being responsible for matters relating to the public service or his representative;
    - d. The Secretary to the Teachers Service Commission or his representative;
    - e. The Secretary to the Public Service Commission or his representative;
    - f. The Inspector General of the National Police Service or his representative;
    - g. Three other Trustees appointed by the Cabinet Secretary, Finance each of whom shall have been nominated by the Kenya National Union of Teachers, the Kenya Union of Post Primary Education Teachers and the Union of Kenya Civil Servants.
    - h. The Chief Executive Officer of the Fund.
  43. The above provisions have been intentionally set out in detail. Under sections 6 and 8 of the Act, it is noted that the responsibility of effecting deductions from members’ salaries is placed on the Government. By virtue of section 7 of the Act, a member who wishes to make voluntary contributions in addition to the mandatory one under section 6 thereof must inform the Government to effect the deductions.
  44. As noted earlier, the term “Government” denotes the National as opposed to County Government. Thus, for all purposes and intents, the Act contemplates the National Government as the organ for deducting members’ dues and remitting them to the Fund.
  45. The only sensible explanation for this arrangement is that the Act contemplated the National Government as the employer, either directly or through the agencies set out in section 2 thereof, of the



- individuals who will be contributing to the Fund. Hence, the obligation on it to effect deduction of the members' monthly contributions at source on monthly basis.
46. This reality is fortified by the qualification for membership to the scheme established under the Act. Section 5 of the Act limits membership to persons employed in "public service". As noted earlier, under section 2 of the Act "public service" means employment in the service of the Government. And "Government" means the National Government.
  47. As regards membership of the Board of Trustees for the scheme, it is evident that County Governments are not represented on it. Only institutions with employees serving in the National Government are represented.
  48. The foregoing leaves no doubt that the contributory Fund under the Public Service Superannuation Scheme Act is intended for public servants who are in the service of the National Government. There are only two exceptions to this.
  49. The first one is set out under section 33 of the Act and relates to individuals whose services are transferred from the National Government to the County Government and vice versa. Officers whose services have been transferred from the National Government to a County Government are entitled to be retained in the scheme notwithstanding such transfer of services in order to ensure continuity of their savings under the scheme. Conversely, officers who have had their services transferred from the County Government to the National Government are entitled to enter the scheme by reason of such transfer.
  50. It is instructive that the Act defines what constitutes "transfer of service". Section 2 thereof defines the term to mean 'the conferment, whether permanently or otherwise, of an office in the public service, other than that to which the person concerned was last substantively appointed, whether or not on promotion'.
  51. From the foregoing, transfer of services only arises when an individual has been serving in a position in either of the two levels of government and is transferred to a new position either within the same level of government or from one level of government to the other. By virtue of section 2 of the Act, this excludes secondment by the National Government to a County Government.
  52. The second exception is where the Cabinet Secretary, Finance has expanded the scope of persons to benefit under the scheme by virtue of the powers conferred upon him under section 2 of the Act. Under this provision, the Cabinet Secretary is entitled to expand membership to the scheme by expanding the meaning of the term "public service" so as to benefit any individual serving in the public realm including individuals serving in County Governments. However, there is no evidence tendered in court to suggest that the Cabinet Secretary has invoked this power to expand the scope of the scheme to cover individuals employed to serve in County Governments beyond the window that is contemplated under section 33 of the Act.
  53. Therefore, provisions of the Act (including section 51) only apply to public servants who are in the employment of the National Government and the agencies of the National Government as set out under section 2 of the Act. The furthest that the legislation may apply to individuals working in County Governments is with respect to officers who have been transferred by the National Government to County Governments.
  54. As the record shows, the Grievants were employed by the 3<sup>rd</sup> Respondent on behalf of the NMS to execute transferred functions from the 1<sup>st</sup> Respondent to the National Government. By virtue of



- clause 5.7 of the Deed of Transfer of Functions, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were tasked to formulate necessary instruments to facilitate the secondment and deployment of staff to the entity (NMS).
55. The 3<sup>rd</sup> Respondent avers that pursuant to this clause, it deployed employees of the 1<sup>st</sup> Respondent to NMS. However, because the staff from the 1<sup>st</sup> Respondent were not sufficient, it (the 3<sup>rd</sup> Respondent) hired additional staff, including the Grievants, to execute the transferred functions during the currency of the term of NMS on fixed term contracts.
56. There is no indication that the individuals who were engaged by the 3<sup>rd</sup> Respondent under this arrangement had been serving as employees of the National Government and were transferred by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent in terms of section 33 as read with section 2 of the Public Service Superannuation Scheme Act. On the contrary, the 3<sup>rd</sup> Respondent has indicated that these individuals, including the Grievants, were specifically engaged to serve in the Nairobi City County Government for the duration of execution of the transferred mandate.
57. Undoubtedly, the Grievants were not in the service of the National Government when the 3<sup>rd</sup> Respondent tasked them to render services to the 1<sup>st</sup> Respondent. They were specifically recruited to execute the transferred functions under the Deed of Transfer of Functions.
58. As such, their case was not one of transfer of services which would have brought them under section 33 of the *Public Service Superannuation Scheme Act*. As such, the Act does not apply to them. Consequently, they cannot invoke section 51 thereof to push for the conversion of their contracts from fixed term to permanent and pensionable.
59. As a matter of fact, section 51 of the Public Service Superannuation Scheme Act contemplates conversion of contracts of “persons in the public service” from fixed term to long-term. As noted earlier, “public service” under the Act refers to employment in the service of Government save for the exception set out under section 33 of *the Act*. And “Government” is defined to mean “the National Government”. Therefore, the conversion of contracts referred to under this section (section 51) is intended to cover contracts of persons in the service of the National Government.
60. As a matter of fact, retirement benefits for persons serving in the two levels of government are catered for under two distinct legal regimes. Whilst the benefits for those serving in National Government are catered for under the Public Service Superannuation Scheme Act, the benefits for persons serving in county public service are covered under the County Governments Retirement Scheme Act. This further demonstrates that the provisions of the Public Service Superannuation Scheme Act have no application to the Grievants.
61. The Grievants have placed heavy reliance on the circular by the 3<sup>rd</sup> Respondent dated 3<sup>rd</sup> August 2021 to assert that this Respondent had directed for conversion of their fixed term contracts into indefinite term engagements. The 3<sup>rd</sup> Respondent has denied that this was the intention of the circular. It is the 3<sup>rd</sup> Respondent’s position that the circular was intended to give directions on implementation of the Public Service Superannuation Scheme Act with respect to public officers serving in the National Government and who fall within its (the 3<sup>rd</sup> Respondent’s) mandate.
62. I have looked at the circular in question. It is evident that it applied to public servant who are affected by the Public Service Superannuation Scheme Act. As indicated earlier, the Grievants do not fall in this category of public servants as they were not hired as employees of the National Government. Indeed, the circular is specific that it did not apply to persons who are not part of the mainstream Civil Service establishment or persons on short term special programmes.



63. The context in which the 3<sup>rd</sup> Respondent issued the circular of 3<sup>rd</sup> August 2021 fortifies the above reality. It is noteworthy that the Public Service Superannuation Scheme Act was enacted in 2012. However, it was not given a commencement date until 12<sup>th</sup> August 2020 through Legal Notice No. 156. By this notice, the 1<sup>st</sup> of January 2021 was published as the date on which the Act was to come into force.
64. Following this development, the National Government took steps to sensitize public officers working under it about the operationalization of the Act and the requirements for joining the new retirement scheme. It is in this context that the Head of the Public Service in the Office of the President issued the memo dated 20<sup>th</sup> November 2020 requiring State departments to sensitize civil servants about the Act. The 3<sup>rd</sup> Respondent's circular of 3<sup>rd</sup> August 2021 was issued as part of the implementation process of the directive by the Head of the Public Service aforesaid.
65. The circular of 20<sup>th</sup> November 2020 sets out employees who are not eligible to join the scheme under the Public Service Superannuation Scheme Act. This includes:-
- a. Employees whose services are extended on Local Agreement Terms (contract) after retirement;
  - b. Employees engaged on Local Agreement Terms (contract); and
  - c. Employees aged 45 years and above as at 1<sup>st</sup> January 2021 who do not opt to join the scheme.
66. A perusal of the Grievants' contracts shows that they were hired on Local Agreement terms. This is one of the categories of persons which the circular of 20<sup>th</sup> November 2020 expressly excluded from being beneficiaries of the new scheme. Therefore, it cannot be argued that the 3<sup>rd</sup> Respondent's circular of 3<sup>rd</sup> August 2021 which was issued to fortify the circular of 20<sup>th</sup> November 2020 sought to bring on board the new scheme individuals whom the circular of 20<sup>th</sup> November 2020 had expressly excluded.
67. NMS was established to oversee execution of the functions that had been transferred by the 1<sup>st</sup> Respondent to the National Government. As asserted by the 3<sup>rd</sup> Respondent, this arrangement was of a short-term nature. Indeed, the arrangement came to an end immediately the new administration for the 1<sup>st</sup> Respondent was enthroned after the general elections of August 2022.
68. For all purposes and intents, NMS was a special programme vehicle. It is instructive that the entity was not anchored in law. It came into existence vide an Executive Order to undertake a particular task for a specified duration. Therefore, personnel who were appointed to serve under it on fixed term contracts were specifically excluded from the application of the circular by the 3<sup>rd</sup> Respondent dated 3<sup>rd</sup> August 2021.
69. As stated by the 3<sup>rd</sup> Respondent, its mandate in respect of County Governments is limited by article 234 (2) (i) of the Constitution to hearing and determining appeals from the county public service. This does not extend to hiring personnel for County Governments.
70. The only reason why the 3<sup>rd</sup> Respondent was involved in staff recruitment for NMS is because clause 5.7 of the Deed of Transfer of Functions delegated the responsibility of preparing instruments to second and deploy staff to NMS to it (the 3<sup>rd</sup> Respondent). According to the Deed of Transfer of Functions, this task was to be executed by the 3<sup>rd</sup> Respondent in consultation with the 2<sup>nd</sup> Respondent.
71. Nowhere in the Deed is it suggested that the 3<sup>rd</sup> Respondent was entitled to unilaterally impose personnel on the 1<sup>st</sup> Respondent. Nowhere in the Deed is it suggested that the 3<sup>rd</sup> Respondent could unilaterally direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to absorb staff hired for NMS and convert their contracts from fixed term to indefinite term.



72. Clause 3 of the Handover Framework provides the procedure of transition of staff who were serving under NMS to the 1<sup>st</sup> Respondent. By virtue of clause 3.3 of the framework, staff who had been seconded to NMS from either levels of government were to revert to their previous positions. Those who had been hired during the subsistence of the Deed of Transfer of Functions were to be absorbed by the 1<sup>st</sup> Respondent subject to availability of vacancies and based on the staffing needs of the 1<sup>st</sup> Respondent.
73. It is in this context that the 1<sup>st</sup> Respondent retained the Grievants after the lapse of the assignment by NMS. The 1<sup>st</sup> Respondent contends that the Grievants were retained on the same terms that they had been serving under the NMS. This means that they were retained on their fixed term contracts whose sunset is 22<sup>nd</sup> February 2024.
74. There is nothing in the Handover Framework to suggest that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were under obligation to absorb the Grievants either on fixed or permanent and pensionable terms. Indeed, retention of the Grievants was entirely subject to the staffing needs of the 1<sup>st</sup> Respondent.
75. Section 57 of the *County Governments Act* establishes the 2<sup>nd</sup> Respondent. Section 59(1)(b) of the Act exclusively vests the mandate of appointing personnel for the 1<sup>st</sup> Respondent in the 2<sup>nd</sup> Respondent. This mandate could not have been taken away by the circulars that the Claimant relies on to advance its case. Certainly, those circulars are subservient to these express provisions of statute.
76. Therefore, even if they (the circulars) were intended to direct the 2<sup>nd</sup> Respondent to absorb the Grievants on permanent and pensionable terms as the Claimant suggests, that would be contrary to the express provisions of the law which vest the power to make appointment of personnel for the 1<sup>st</sup> Respondent in the 2<sup>nd</sup> Respondent. In effect, the circulars would, in the circumstances, be null and void.
77. The Claimant has suggested that based on the impugned circulars, the Grievants had legitimate expectation that their contracts would be formalized as permanent and pensionable. This supposition is misplaced. As indicated earlier, the impugned circulars cannot change the position that by virtue of section 59 of the *County Governments Act*, the power to hire staff for the 1<sup>st</sup> Respondent vests in the 2<sup>nd</sup> Respondent. Therefore, it would be unreasonable to rely on the circulars to entertain the thought that the 3<sup>rd</sup> Respondent can unilaterally direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to convert the Grievants' contracts from fixed term to long-term.
78. Similarly, the assertion by the Claimant that the Grievants have been discriminated is not well founded. No evidence was tendered to establish this assertion. The mere fact that the 2<sup>nd</sup> Respondent has advertised the Grievants' positions in anticipation of the lapse of their contracts by effluxion of time does not constitute discrimination against them. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are entitled to undertake recruitment of staff to fill the positions that will fall vacant once the Grievants' contracts lapse.
79. Importantly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have indicated that the Grievants were free to apply for the positions in question. Therefore, it cannot be said that they have suffered discrimination.
80. Indeed, it is a constitutional imperative that positions in the public realm (including those in the county public service) be competitively and equitably filled. Thus and in the court's view, the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to advertise the impugned positions is in compliance with this constitutional edict.



**Determination**

81. The upshot is that the court finds that the Claimant’s case is devoid of merit.

82. Accordingly, it is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED ON THE 9<sup>TH</sup> DAY OF FEBRUARY, 2024**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

.....for the Claimant

.....for the Respondent

**Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

