



REPUBLIC OF KENYA



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**Njoka v Embu County Government (Employment and Labour Relations
Appeal E003 of 2023) [2024] KEELRC 547 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 547 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2023
ON MAKAU, J
MARCH 8, 2024**

BETWEEN

CHARLES MURIITHI NJOKA APPELLANT

AND

EMBU COUNTY GOVERNMENT RESPONDENT

*(Being an Appeal from the Judgment and decree of the Chief Magistrate's
Court (Hon. Nyakweba, SPM) dated 24th January, 2023 in Embu MELRC
No. 3 of 2020) (Before Hon. Justice Onesmus Makau on 1st March, 2024)*

JUDGMENT

1. By a Memorandum of Appeal dated 16th February 2023, the appellant seeks to dislodge the judgment rendered by Senior Principal Magistrate's Court on 24th January 2023 on the following grounds: -
 - a. That the learned trial Magistrate erred in law and in fact in dismissing the case on a technicality.
 - b. That the learned trial Magistrate erred in law and in fact in dismissing the case due to a non-joinder.
 - c. That the learned trial Magistrate erred in law and in fact in failing to assess damages he would have otherwise awarded the Appellant.
 - d. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent bears the primary responsibility and function for the establishment and staffing of its public service.
 - e. That the learned trial Magistrate erred in law and in fact in failing to find that the County Public Service Board acts on behalf of the respondent.



- f. That the learned trial Magistrate erred in law and in fact in failing to find that the County Public Service Board is part and parcel of the County Government.
- g. That the learned trial Magistrate erred in law and in fact in failing to consider the Appellant had joined issues in the reply to the Response to the Memorandum of claim.
- h. That the learned trial Magistrate erred in law and in fact in adjudicating on a point that was not raised in the pleadings by the parties.
- i. That the learned trial Magistrate erred in law and in fact in adjudicating on a point which is of a preliminary nature that was not raised by the Respondent at the appropriate time of the proceedings.
- j. That the learned trial Magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant, the submissions and the circumstances of the case and particularly that the Appellant was not appointed by the County Public Service Board.
- k. That the learned trial Magistrate erred in law and in fact in failing to deal and adjudicate on the matters in controversy in the suit between the parties but instead proceeded to strike out the suit.
- l. That the learned trial Magistrate erred in law and in fact in failing to make a finding on each and every issue raised by parties; and
- m. That the learned trial Magistrate erred in law and in fact in finding that the Respondent cannot be compelled to re-instate the Appellant since this will lead to usurping the functions of the County Public Service Board which is not the case as the County Public Service Board of the Respondent and therefore an order directed to the Respondent is properly directed to the County Public Service Board.

Background

2. The appellant was employed by Mbeere County Council and worked until 21st March 2012 when he was suspended from work until a criminal case (Chuka Criminal case No.642 of 2012) against him was heard and determined. The suspension was pursuant to Clause 30 of the Terms and Conditions of service for Local Authorities in Kenya and the appellant was not to receive any salary until the criminal case was fully determined by the court.
3. During the pendency of the criminal case, the respondent was established and the appellant was given a new personal file number 1990xxxxxx in place of his earlier personal file number xxx. The criminal case against him was dismissed on 21st December 2017 and he requested for reinstatement and deployment.
4. However, the request was not granted after serving several letters prompting the appellant to file suit in the lower court. The suit basically sought for reinstatement to work and deploy him. It also sought payment of salary for the period of suspension plus interest. It further sought compensatory damages for discrimination and breach of *the Constitution*.
5. The respondent entered appearance and filed defence denying that the appellant was employee of the defunct Mbeere County Council and contended that he was in fact employed by the Ministry of Local Government. It further averred that it had no legal obligation to reinstate or integrate any employee or former employee of Mbeere County Council or any other authority whatsoever. It also denied the allegation of discrimination against the appellant.



6. It further averred that since the appellant was a stranger, it could not call him for disciplinary hearing or take any disciplinary action against him. Therefore, it averred that the alleged constructive dismissal did not arise. Finally, it raised an objection to the suit for being statute barred and urged the court to dismiss it with costs.
7. The appellant filed a Reply to defence reiterating that he was employed by Mbeere County Council as Accountant III ss 10 and since the respondent was the successor thereof, he became its employee by dint of *the Constitution* of Kenya, 2010 and the *transition to Devolved Government Act*, 2012. He maintained that the other employees of the Mbeere County Council were integrated into the respondent public service but he was discriminated. However, he reiterated that while on suspension he was summoned to the respondent and he was given a new personal file number 1990xxxxxx in place of his old number xxx. Consequently, he maintained that the new personal file number meant that he was intergraded into the respondent. Finally, he denied that the suit was statute barred.
8. During the hearing, the appellant testified as PW1 and adopted his written statement and bundle of documents as his evidence. In brief he confirmed that, before the suspension due to the criminal case, he was employed by the defunct Mbeere County Council. His salary was Kshs.46,595.00 per month but during the suspension he was not paid any salary. He produced NSSF statement and pay slip showing that he was indeed employed by the said County Council.
9. He further produced copy of the judgment rendered on 21st December 2017 in the Chuka Criminal case number 642 of 2017 as proof that he was acquitted of the charges. He reiterated that during the time of his suspension the respondent was established and was summoned to the Headquarters where he was given a new personal file number 1990xxxxxx in place of his old personal file number xxx. He contended that he was at all material time still in employment of the respondent but on suspension pending the criminal trial.
10. The respondent never controverted the appellant's case. The appellant then filed submissions but the respondent filed none. After considering the material before the court, the learned trial magistrate (Nyakweba SPM) framed the following issues for determination;
 - a. Whether the orders sought can be reinstated with full pay.
 - b. Whether the respondent can be condemned for the failure to integrate the appellant into its establishment.
11. In the end, the learned trial magistrate concluded that the respondent cannot be compelled to reinstate the appellant. Persuaded by section 57 of the *County Government Act*, it is the County Public Service Board that can integrate the appellant into the respondent's service. In view of the trial court, compelling the respondent to reinstate the appellant would lead to usurpation of the functions of the County Public Service Board. On that ground, the suit was dismissed with costs.

Submissions in the Appeal

12. The appellant submitted that the impugned judgment should be set aside because the suit was dismissed on technicality contrary to Article 159 (2) (d) of *the Constitution* which provides that court shall be guided by substantive justice and without undue regard to procedural technicalities.
13. He further submitted that under Order 1 rule 9 of the *Civil Procedure Rules* no suit shall be defeated by reason of the misjoinder or non-joinder of parties, but the court shall deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. For emphasis he placed reliance on the case of *Duncan Mugane v County Government of Embu* (2019) eKLR, *Francis*



Ochieng Oiro v Nairobi City County Government (2020) eKLR and *Chairman B.O.M Bishop Abiero Shauri Moyo Sec. School v Phaniel Wagab Okumu* (2022) eKLR.

14. The appellant submitted that the trial court erred in finding that the respondent cannot be compelled to reinstate the appellant since this will lead to usurping the functions of the County Public Service Board. He contended that the Board acts on behalf of the County Government and therefore an order directed at the Government is properly directed against the Board.
15. He cited section 5(f) of the *County Government Act* to argue that the County Government has the primary function of establishing and staffing its Public Service under Article 235 of *the Constitution* which function is discharged through the County Board. He further argued that the Board acts on behalf of the County Government and fortified that argument by citing the case of *Kisumu County Public Service Board & another v Nashon W.O.Oguya & 5 others* (2018) eKLR.
16. The appellant submitted that the trial magistrate erred by dismissing the entire suit or his own motion, and on issues that were not pleaded or raised. In his view, the dismissal of the entire suit was a grave error that led to a miscarriage of justice. He contended that issues of non-joinder of a party is not fatal and if anything, it ought to have been raised at the inception of the suit and not during judgment.
17. For emphasis, he cited the case of *Mukisa Biscuits Manufacturing Co.Ltd v West End Distributors Ltd* (1969) EA 696. He further relied on the Supreme Court decision in *Independent Electoral & Boundaries Commission v Jane Cheperenger 2 others* (2015) eKLR that the purpose of preliminary objection should be to save judicial time and as such ought to be raised at the preliminary stage. The court further cautioned that disputes are better resolved judicially, than summarily.
18. The appellant faulted the trial court for failing to consider the evidence tendered, and his submissions which were never challenged or controverted by the respondent. He submitted that the trial court failed to make a finding on each issue raised by the parties including prolonged suspension without disciplinary process and discrimination from other employees of defunct Mbeere County Council who were absorbed into the respondent government.
19. For emphasis, he cited the case of *Francis Ochieng Oiro v Nairobi City Government* (2020) eKLR and *Donald Mumo Moses v Mid-wave Freighters Ltd* (2014) eKLR where the court was categorical that prolonged suspension amounts to unfair labour practice. On the basis of the above matters, the appellant prayed for the appeal to be allowed.
20. The respondent, on the other hand, submitted that the impugned judgment should not be interfered with since it was based on the evidence presented to the trial court and it is sound in law. The respondent submitted that the appellant did not produce any single document to support his allegations after it filed a defence denying that he was ever an employee of the defunct Mbeere County Council but Ministry of Local Government.
21. The respondent further submitted that the trial court cannot be faulted for his decision yet it is the appellant who failed to adduce to show that the respondent had obligation to integrate him or any of the employees of Mbeere County Council upon devolution. The respondent maintained that it could not have called the appellant to disciplinary hearing nor could it terminate his services since he was not its employee. The respondent prayed for the appeal to be dismissed with costs.



Issues for determination

22. This being a first appeal, the mandate of this court is to re-evaluate the evidence on record and make my own conclusions. In the case of *Kenya Ports Authority v Kushton (Kenya) Limited* (2009) 2EA 212 the court held that: -
- “On first appeal from the High court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusions though always it should bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
23. Having considered the pleadings, evidence on record and the submissions made herein, the following issues fall for determination: -
- a. Whether the appellant was an employee of the defunct County Council of Mbeere before the repeal of the Local Government Act.
 - b. Whether the respondent is the successor of the County Council of Mbeere.
 - c. Whether the respondent had any legal obligation to integrate into its public service employees of the defunct County Council of Mbeere.
 - d. If the answer to (c) above is yes, whether the failure to integrate the appellant amounted to discrimination.
 - e. Whether the appellant was entitled to reinstatement with full pay upon acquittal from criminal charges in Chuka.
 - f. Whether the appellant is entitled to the reliefs sought in his suit.

Employment by County Council of Mbeere

24. The appellant pleaded and proved that he was employed by the defunct County Council of Mbeere before the respondent was established. He produced appointment letter dated 18th July 2007 issued by County Council of Meru South and a Transfer letter dated 5th January 2012 issued by the Permanent Secretary Ministry of Local Government transferring him to County Council of Mbeere. He further produced pay slips for January and February 2012 and statement from NSSF indicating the employer as County Council of Mbeere. Also produced a suspension letter dated 21st March 2012 written by the clerk to the County Council of Mbeere Mr. Ali Onamu Apindi.
25. I have considered the said documents and saw no difficulties in finding that there is watertight evidence that the appellant was indeed an employee of the defunct County Council of Mbeere effective 16th January 2012. He was not an employee of the Ministry of Local Government as alleged by the respondent in its defence. The appointment letter shows that he was appointed by the County Council of Meru South and later he successfully requested to transfer his services to the County Council of Mbeere.
26. I have also confirmed from the proceedings of the Criminal Case No. 642 of 2012 that the prosecution witnesses confirmed that the appellant was indeed employed by the County Council of Mbeere. PW1 (Mr. Ali Onamu Apindi former clerk of the Mbeere County Council) confirmed that he knew the appellant as an Accountant of Mbeere County Council attached to the cashier of the Council. PW2



(Saverio Ngari Nguku, the County cashier) confirmed that the appellant was assigned duties to assist him in the cash office.

27. The respondent never adduced any evidence during the trial and as such the appellant's evidence was never rebutted. It follows that trial court erred by failing to make a finding that the appellant had proved by evidence that he was employed by the County Council of Mbeere before the advent of devolution.

Respondent as Successor of Mbeere County Council

28. Section 33 of the Sixth Schedule to *the Constitution*, 2010 provided that:-

“An office or institution established under the former Constitution or by any Act of Parliament in force immediately before the effective date whether known by the same name or new name.”

29. Okong'o J interpreted the above provision in *Dr.J.A.S Kumenda & another v The Clerk, Municipal Council of Kisii* (2013) eKLR where he observed that:-

“County Governments under the new Constitution took over the powers and functions of the Local Authorities as they were recognized and defined under the old Constitution and the Local Government Act. Pursuant to section 33 of the Sixth Schedule to *the Constitution* 2010, County Government are therefore the natural and presumptive legal successors to the defunct Local Authorities.”

30. The above interpretation was right and I concur with the learned Judge entirely. Consequently, I find that since Mbeere County Council fell within the area under the respondent, and its functions were indeed taken over by the respondent, it follows that the respondent is the natural and presumptive successor of the defunct County Council of Mbeere.

Integration of staff of Mbeere County Council

31. The respondent submitted that there was no legal obligation on its part to integrate the staff of the defunct County Council of Mbeere or any other at the advent of devolution. The appellant was of a different opinion and maintained that upon the advent of devolution the staff of the defunct staff became integrated into the public service of the successor of the Local Authority pursuant to the new Constitution and the *transition to Devolved Government Act*.

32. I have already made a finding of fact that the respondent was successor of County Council of Mbeere by dint of section 33 of the Sixth Schedule of *the Constitution*. It took over the functions of all the defunct Local Authorities which fell within geographical area of the respondent. Since Mbeere is geographically within the respondent's County, the functions and the staff of County Council of Mbeere were taken over by the respondent.

33. The appellant testified that while on suspension, he was called to the respondent's Headquarters and was given a new personal file Number 1990xxxxxx to signify that he was integrated to the respondent's Public Service. The said evidence was not rebutted. Consequently, I find and hold that the appellant was integrated into the respondent's Public Service by operation of the law since the respondent was the successor of the defunct County Council of Mbeere after the repeal of the Local Government Act by the *County Government Act of 2012*.



Discrimination

34. The appellant testified that while on suspension, he was called to the respondent's Headquarters and he was given a new personal file number. He submitted that other staff of the defunct Mbeere County Council were integrated into the Public Service of the respondent. I agree with the appellant's that he ought to have been treated like the other employees of Mbeere County Council. The failure to treat him like the other employees of the defunct County Council amounted to discrimination.

Reinstatement After Acquittal

35. It is not in dispute that on 21st March 2012, the appellant was suspended from work under Clause 30 (b) of the Terms and Conditions of Service for employees of Local Authorities of Kenya, pending full determination of his criminal case at Chuka Law Courts. Clause 30(b) provides that: -

“Where criminal proceedings which involve the Council's interests have been instituted against an officer, the Head of Department may, subject to the provisions of any Act or Rule for the time being in force, suspend such officer from duty without pay until the criminal proceedings have been concluded.”

36. The appellant was acquitted on 21st December 2017 but the respondent failed to reinstate him. The respondent being the successor of the County Council of Mbeere was bound by the contract of employment between the appellant and the defunct Local Authority. It was bound by Clause 30(b) above to lift the suspension of the appellant immediately after the criminal proceedings against him ended with an acquittal. It was also bound to pay him all the salary withheld during the period of suspension.

Reliefs in the Suit

37. The appellant prayed for declaration that his suspension was illegal. However, going by Clause 30 (b) of the Terms and conditions of service for Local Authorities, the suspension was justified. The employer had every right to keep the appellant on suspension until the criminal proceedings against him ended in his favour. Consequently, I decline to make the declaration that the suspension was illegal.
38. He prayed for unpaid salary arrears of 95 months from March 2012 to the date of filing the suit in the lower court equaling to Kshs.4,426,525.00. I have already made a finding of fact that the appellant was entitled to lifting of suspension and payment of his withheld salary after acquittal from the criminal charges.
39. I reiterate the said finding and award him the salary from 21st March 2012 when he was suspended till the date of filing suit equaling to 95 months. His salary was Kshs.46,595.00 per month including Kshs.1000.00 commuter allowance. Since he never attended work I will not award him the commuter allowance. Hence $Kshs.45,595 \times 95 = Kshs.4,331,525.00$. I also award him interest thereon at court rates from the date of filing the suit in the lower court.
40. I further make an order that the appellant be integrated into the respondent's Public Service with immediate effect. The Head of the respondent's County Public Service is directed to ensure that the appellant is reinstated and deployed appropriately.
41. The appellant prayed for declaration that he was discriminated against. I have already made a finding of fact that he was indeed treated different from his colleagues from the defunct County Council of Mbeere. Consequently, I grant him the declaration sought. I also award him Kshs.500,000.00 as general



damages for discrimination. The said award is reasonable considering that he has suffered without gainful employment hence to the said discrimination.

42. Since the appellant is still in employment of the respondent the prayer for salary in lieu of notice is declined. Likewise, prayer for damages for breach of Article 51 of *the Constitution* is declined because it is not well founded. The said Article deals with rights of a detained person, or held in custody or prison which is not the case herein.

Conclusion

43. I have found that the trial court erred in law and fact by dismissing the entire suit without considering the merits of the case. I have found that the respondent was the natural and presumptive successor of the County Council of Mbeere and therefore it was bound by the contract of employment between the appellant and the defunct County Council. I have further found that the respondent was bound to integrate the appellant into its public service after the repeal of the Local Government Act by the *County Government Act*. I have also found that it was bound to lift the appellant's suspension and pay all his withheld salary after he was acquitted from the criminal case that prompted the suspension. Finally, I have awarded him some of the prayers in his suit. Consequently, I allow the appeal, set aside the impugned judgment and substitute therewith the following orders: -

- a. The respondent to pay the appellant Kshs.4,331,525.00 being salary arrears from March 2012 till the date of filing suit.
- b. Payment of interest on (a) above at court rates from the date of filing suit.
- c. Declaration that the respondent discriminated against the appellant by failing to integrate him into its Public Service.
- d. The respondent to pay the appellant Kshs.500,000.00 as general damages for discrimination.
- e. The respondent to forthwith integrate the appellant into its County Public Service and deploy him appropriately.
- f. The award of damages herein is subject to statutory deductions.
- g. The appellant is awarded costs of this appeal and the suit in the court below.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF MARCH, 2024.

ONESMUS N. MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.

