



REPUBLIC OF KENYA



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**Karugutiang v County Assembly Service Board West Pokot County & 2 others
(Petition E001 of 2022) [2023] KEELRC 38 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 38 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E001 OF 2022
NJ ABUODHA, J
JANUARY 20, 2023**

BETWEEN

DAVID PKIACH KARUGUTIANG PETITIONER

AND

**COUNTY ASSEMBLY SERVICE BOARD WEST POKOT
COUNTY 1ST RESPONDENT**

**SPEAKER COUNTY ASSEMBLY OF WEST POKOT COUNTY 2ND
RESPONDENT**

WEST POKOT COUNTY ASSEMBLY SERVICE BOARD 3RD RESPONDENT

JUDGMENT

1. By a petition dated January 11, 2022 the petitioner sought orders *inter alia*:
 - a. A declaration that the petitioner's rights under article 10,41,47 and 236 of the [Constitution](#) have been breached by the respondents decision to remove him from office as the clerk of West Pokot County Assembly *vide* a letter dated January 4, 2022 on contractual terms contrary to his initial employment terms (permanent and pensionable).
 - b. An order of judicial service review in the nature of *certiorari* do issue to bring into the honourable court for purposes of quashing the decision of the respondents contained in the letter dated January 4, 2022 removing the petitioner from office as the substantive clerk of West Pokot County Assembly.
 - c. An offer of *mandamus* be and is hereby issued compelling the respondents to reinstate the petitioner to the position of substantive clerk, West Pokot County Assembly forthwith all the entitlements payable in full.



- d. An order of permanent injunction be issued restraining the respondents from removing the petitioner from his substantive position as the clerk West Pokot County on contractual terms.
 - e. An order of damages for breach of the petitioners constitutional rights.
 - f. Compensation for unlawful and illegal removal from office as the clerk of West Pokot County Assembly.
 - g. Cost of the petition
2. The petition was supported by the affidavit of the petitioner in which he deponed among others that:
- a. That I was offered the position of clerk, West Pokot County Assembly on June 28, 2018 for a probationary period of 3 months. The offer letter further informed me that upon the expiry of the probationary period, the respondents will engage me on permanent and pensionable terms.
 - b. That I accepted the offer and commenced my role on probationary terms for a period of 3 months *vide* a letter dated July 4, 2018. My appointment was confirmed through the publication of the Gazette Notice No 6839 dated July 13, 2018.
 - c. That upon completing the probationary period, I was confirmed into permanent and pensionable terms as the substantive clerk of West Pokot County Assembly on November 2, 2018.
 - d. That sometimes in 2020, I was suspended but on January 18, 2021, West Pokot County Assembly Service Board reinstated me to my duties and responsibilities as the clerk of the County Assembly and the Accounting responsibilities as the clerk of the County Assembly and the Accounting officer.
 - e. That later, in September, 2021, the 2nd respondent was impeached as the speaker of the county assembly of West Pokot. As a result, the 2nd respondent filed Kapenguria Constitution Petition No E002 OF 2021: Hon Catherine Chepkemoi Mukenyang versus Hon Evanson Lomaduny & Another where she obtained interim conservatory orders on September 8, 2021 staying execution of the decision to impeach her arising from the case, the 2nd respondent filed an application seeking to cite me and other staff of disobeying the court order reinstating her as the speaker pending the determination of the case. I am aware that the application was compromised and the matter is pending judgment on March,1.
 - f. That in a surprising turn of events, on January 4, 2022, I received a letter signed by the 2nd respondent purporting to remove me from office on basis that my contract had expired. The letter communicated that as purported that I was employed on a contractual term of 3 years as opposed to permanent and pensionable terms contrary to my letters of confirmation and reinstatement dated November 2, 2018 and January 18, 2021 respectively.
 - g. That the respondents asked me to hand over on January 6, 2022 and I am appreciable apprehensive that following my illegal removal from office on January 4, 2022 as the substantive clerk of West Pokot county assembly, they are likely to commence the process of replacing me which process shall further prejudice me.
 - h. That it appears the 2nd respondent has a personal vendetta against me for performing my public duties by participating in her impeachment a matter currently pending at the High Court. Therefore, I am being victim victimized for discharging my duties.



3. The respondent filed a response to the petitioner through one Honourable Catherine Mukenyang who deponed among others that:
- a. That I am the speaker and the chairperson of the 3rd respondent in the petition dated January 11, 2022 and have full knowledge and information concerning this matter and in my capacity aforesaid, I am competent and duly authorized to swear this affidavit on behalf of the respondents herein.
 - b. That in response to the averments of the petitioner in paragraph 4 and 5 of the petition, I wish to state that the petitioner was the clerk to West Pokot County Assembly, having been appointed on contract basis on July 4, 2018 in accordance with section 13 of the County Government's Act and section 18 of County Assembly Service Act.
 - c. That further to paragraph 3 above, I wish to state that the petitioner was never confirmed as permanent employee on pensionable terms as alleged and it was always been the position of the respondents herein that the documents he has attached as proof of his appointment as a permanent employee have been falsified an issue which was pleaded in Judicial Review Application No 3 of 2020 filed at Eldoret by the petitioner and was never controverted by the petitioner.
 - d. That further and without prejudice to the above, I wish to point out that the petitioner has forged documentation which he purports indicates his confirmation to permanent and pensionable terms and I wish to further elaborate this as follows:
 - i. The petitioner's annexure marked "DPK-2(a)" is forged and the highlighted bits indicate the editing which was done to support the petitioner's allegations of his confirmation permanent terms
 - e. That I wish to reiterate that and as already stated above, pursuant to the letter of officer dated July 6, 2018, the terms of offering employment to the petitioner herein was that he was to be initially under a 3-month probationary period which would then be converted into permanent and pensionable terms or contractual terms or any other terms stated by section B16 of the County Assembly Human Resource Manual.
 - f. That in response to the averments of the petitioner at paragraph 3 of the petitioner's supporting affidavit, I wish to state that I have been advised by the respondents advocates whose advise I verily believe to be true that it would have been illegal to have employed the petitioner herein under permanent and pensionable terms at the lapse of the 3 month probationary period as this would have contravened the provisions of section B15 and B16 of the County Human Resources Manual, 2015 which provides that the petitioner has to have undergone 6 months of the probationary period before which confirmation or termination can be considered.
 - g. That further, I wish to state that in between the period of the alleged meetings of the 3rd respondent, the petitioner herein through a letter dated October 15, 2008 admitted at paragraph 3 as follows "... I would like to heartily thank the County Assembly Service Board for the opportunity they granted me to serve as the clerk of County Assembly on a 3-year contract of service..."
 - h. That further I wish to state that the Petitioner herein used to be paid as a contractual staff and at no point was he ever paid as a permanent and pensionable employee.



4. The petitioner filed a further affidavit in which he further deponed that:
 - a. That *vide* its letter dated June 28, 2018, the respondents offered me the position of clerk of County Assembly on a three months' probationary basis.
 - b. That the letter of offer above indicated that after completion of the probationary period, I could be engaged by the County Assembly Services Board on either a permanent and pensionable basis or contractual terms.
 - c. That I indicated acceptance of the offer in writing, within 7 days of receipt of the offer and I was duly appointed as clerk of the County Assembly Service Board in line with the County Assembly Human Resource Manual, 2015.
 - d. That on October 30, 2018 the respondents held a meeting and among the agenda was 'Consideration of the terms of service for the clerk of County Assembly'
 - e. That in the meeting, the board resolved to confirm my employment on a permanent and pensionable basis and stated as follows, "The board...resolved unanimously to confirm the clerk of County Assembly Mr David Kurugutiang, on permanent and pensionable terms of service."
 - f. That this decision by the County Assembly Board was officially communicated to me *vide* the letter dated November 2, 2018 in which the respondents confirmed my appointment.
 - g. That *vide* the letter of confirmation of appointment, the respondents categorically stated that my employment status was permanent and pensionable. The letter stated "in this regard you are therefore admitted to permanent and pensionable establishment with effect from November 1, 2018."
5. In support of the petitioner, counsel for the petitioner Ms Chebet submitted among others that the petitioner was offered the position of Clerk, West Pokot County Assembly via a letter dated June 28, 2018. *Vide* a letter dated July 4, 2018 the petitioner was appointed on probationary terms for 3 months and appointment gazetted via Gazette Notice No 6839 dated July 13, 2018. Upon completion of the probationary period the petitioner was confirmed on appointment through a letter dated November 2, 2018 on permanent and pensionable terms. The confirmation was preceded by a meeting of the County Assembly Public Service Board held on October 30, 2018 which unanimously agreed to appoint the petitioner to the said position on permanent and pensionable terms.
6. Ms Chebet further submitted that whereas the respondent alleged that the confirmation letter was edited thus purporting it was a forgery. The respondent did not produce a forensic report before the court to support the allegation. Neither had the respondent disowned the minutes of the meeting of the 3rd respondent on October 26, 2018 that gave rise to the employment letter dated November 2, 2018 on permanent and pensionable terms. According to counsel the letter dated November 2, 2018 spoke for itself and as such the terms of employment for the petitioner had not lapsed as alleged by the respondents in the letter dated January 4, 2022 since the petitioner had not been employed on a fixed term contract. Counsel wondered why if it was true that the petitioner was on fixed term contract the respondent allowed him to work beyond the expiry of his contract until January 4, 2022 when the respondent purported to dismiss the petitioner. The allegation that the petitioner was employed on three year fixed term contract ending on July 3, 2021 was a false narrative and an afterthought concocted by the respondent to justify dismissal of the petitioner without affording him an opportunity to be heard.



7. According to counsel, the decision by the respondent affronts the petitioner right to fair labour practice under article 41 of the constitution and fair administrative action under article 47, section 4 of the Fair Administrative Action Act, section 22 and 23 of the County Assembly Service Act among others. To support the foregoing submissions counsel relied on the case of Walter Ogal Aworo v TSC [2013] eKLR, Silas Kipruto & Anor v County Government of Baringo & Another [2014] eKLR
8. On the issue whether the petitioner was unlawfully terminated by the respondents, counsel submitted that the impugned letter of January 4, 2022 signed by the 2nd respondent was malicious and meant to settle a score against the petitioner who had participated in the impeachment proceedings of the 3rd respondent in his capacity as the clerk of West Pokot County Assembly. According to counsel, a party to an employment contract cannot unilaterally alter the terms of the contract as such the purported termination was unlawful and malicious.
9. On the issue whether the petitioner is entitled to reinstatement, counsel submitted that it was without doubt that the fundamental rights of the petitioner as protected by the constitution have been violated by the purported removal from office as communicated by the letter dated January 4, 2022. The petitioner was employed on permanent and pensionable terms with effect from November 1, 2018 hence his removal was unlawful, unfair and amounted to breach of petitioner's constitutional rights.
10. Counsel further submitted that since the respondent breached the petitioner's constitutional rights he ought to be granted damages for unlawful and illegal removal from office amounting to Ksh 5, 000,000/= . To this end counsel relied on the case of Jumlik Muchangi Miano v The Attorney General [2017] eKLR
11. Counsel for the respondent Mr Lagat on his part submitted that the petitioner was appointed on July, 2018 to serve for a period of 3 years and his contract ended in July, 2021. The respondent in support of this position attached documents among them a letter from the petitioner marked as CCM-4 dated October 15, 2018 in which the petitioner admitted to having been employed to serve as clerk for fixed term of 3 years.
12. Counsel further submitted that in bid to mislead the court the petitioner attached forged documents and unauthorized letters to make it appear that he was approved for permanent employment a fact which was pleaded in Judicial Review No 3 of 2020 and the same was never controverted by the petitioner.
13. Mr Lagat was emphatic that the petitioner's contract was for a period of 3 years and was never confirmed for permanent employment and further that there had been no such approval for confirmation of permanent employment by the County Assembly. Counsel further submitted that the petitioner never signed a new contract upon the expiry of the old contract hence the respondent was within its legal right to issue a notice to the petitioner to vacate office.
14. According to Mr Lagat, section 13 of the County Government Act provided that there shall be a clerk of the County Assembly appointed by the County Assembly Service Board with the approval of the County Assembly. It should then follow that the County Assembly should have approved the confirmation of appointment on permanent and pensionable terms.
15. On the issue whether the petitioner has met the threshold for grant of the orders sought in the petition, counsel submitted that the petitioner had not set out the alleged infringement of his rights with a reasonable degree of precision as set out in the Anarita Karimi's case. The petitioner's allegation that there was ill will against him because he allegedly participated in the impeachment of the 2nd respondent was without basis. No evidence was adduced to prove this allegation.



16. The court after reviewing and considering the pleadings, evidence and submissions in the matter considers the main issue to be whether the petitioner was hired on permanent and pensionable terms and not 3 years fixed term contract as contended by the respondent.
17. As a corollary, whether if so hired on permanent pensionable terms the respondent was justified in terminating the petitioners contract via a letter dated January 4, 2022.
18. It was common ground that the petitioner was appointed as clerk of the respondent's County Assembly via letter dated July 4, 2018. This letter stated in the first paragraph as follows:

“pursuant to section 18 of the County Assembly Service Act, 2017 read together with section 13 of the County Government Act, 2012, I am pleased to convey the decision of the County Assembly Service Board meeting held on June 27, 2018 that you should be appointed to the post of clerk of County Assembly on a 3-year contract of service with effect from July 1, 2018.”
19. The petitioner acknowledged receipt of this letter through a letter dated June 29, 2018 but pleaded in the said letter that the respondent considers him for appointment on permanent and pensionable terms.
20. To this extent it would be right to conclude that the petitioner acknowledged that his appointment was for 3 years effective July 1, 2018. He however was desirous that his appointment be changed from fixed term contract of 3 years to permanent and pensionable terms. This is evident in his letter dated July 29, 2018 referred to above and his subsequent letter dated October 15, 2018 addressed to the Chairperson County Assembly Service Board.
21. The question therefore at this point would be whether the initial appointment for 3 years could effectively be modified by alleged subsequent resolutions of the County Assembly Service Board contained in the minutes dated October 10, 2018 and October 30, 2018 and subsequent letter of confirmation dated November 2, 2018? It should be noted that the respondent has disputed the authenticity of these minutes.
22. Section 13(1) of the County Government Act provides that there shall be a clerk of the County Assembly, appointed by the County Assembly Service Board with the approval of the County Assembly. The alleged alteration of the petitioners terms of service from 3 year fixed term contract to permanent and pensionable was a fundamental change and required to be aligned with section 13 of the County Government Act which provided that the appointment of the clerk to the County Assembly shall be approved by the County Assembly. The purported change of terms had financial implications hence the County Assembly in exercise of its oversight mandate under section 8 (1)(c) of the County Government Act required to approve the same.
23. In this regard assuming the County Assembly Service Board purported to change the petitioners terms of appointment from 3 years fixed term contract to permanent and pensionable, such change could not have taken effect unless with the approval of the County Assembly. No such approval or evidence thereof was provided by the Petitioner.
24. From the foregoing the court would not be wrong to conclude that the petitioners appointment was on fixed term contract for three years and that any alleged or attempts to change the same became unauthorized or void for lack of approval by the County Assembly as required by section 13(1) of the County Government Act. This ground of the petition therefore fails and is hereby rejected.



25. The petitioner alleged that the letter dated January 4, 2022 terminating his service was void because he was not on a fixed term contract as alleged in the letter but in permanent and pensionable terms. The court having found and held that the petitioner's appointment was on a 3 year fixed term contract, the respondent was justified in issuing the letter dated October 4, 2022 notifying the petitioner of the expiry of his contract.
26. The claimant was appointed on July 4, 2018 for 3 years meaning his contract unless renewed was to end on June 30, 2021. The petitioner however continued to discharge his duties until January 4, 2022 when he was notified of the expiry of his contract. This was some six months later. The letter to the petitioner was dated January 4, 2022 and required the petitioner to appear before the board on January 6, 2022 to hand over. It is not clear when the letter was delivered to the petitioner but it is evidently clear that this was a very short notice considering that the petitioner continued to discharge the functions of the office of the clerk to County Assembly for six months after expiry of his contract. The court frowns upon the respondent's handling of the matter because they created in the petitioner, reasonable expectation that he would continue to be the respondent's employee in the same capacity. The court is however aware that this matter and related issues had been a subject of litigation before this court and the High Court at Kapenguria for some time and this could perhaps have delayed the respondent's decision to deal with the matter.
27. The law concerning employees serving on fixed term contracts is now more or less settled by this court. Such employees have no guarantee that their contracts would be renewed unless the contract states so. The matter of renewal is usually at the discretion of the employer subject to employee's performance among other considerations.
28. Finally, this dispute was presented as a constitutional petition however having reviewed and considered the same the court deems it as an ordinary employment dispute which ought to have been commenced as an ordinary claim. The court once again notes the growing trend by advocates in presenting many disputes to court as constitutional petitions while in actual fact the disputes are by and large ordinary ones which could have been resolved within the existing statutory framework without invoking the *constitution*.
29. In conclusion the court finds the petition in its entirety without merit and the same is hereby dismissed with costs.
30. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF JANUARY, 2023

ABUODHA NELSON JORUM

JUDGE ELRC

