



REPUBLIC OF KENYA



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Muthomi v County Secretary, County Government of Meru & 2 others (Employment and Labour Relations Petition E003 of 2022) [2023] KEELRC 56 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 56 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS PETITION E003 OF 2022
ON MAKAU, J
JANUARY 20, 2023

BETWEEN

KELVIN KIMATHI MUTHOMI PETITIONER

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU ... 1ST
RESPONDENT**

MERU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

COUNTY GOVERNMENT OF MERU 3RD RESPONDENT

JUDGMENT

1. The facts of this case are that by the letter dated October 4, 2017, the petitioner was offered employment in the position of Chief Legal Advisor in the Governor's office for a term of 3 years renewable for a further term of two years. He accepted the offer on October 16, 2017 and served the whole term. *Vide* another letter dated August 1, 2020, the Governor extended the contract for a further two years until August 31, 2022 unless parties mutually agree to extend the employment period or enter into a new agreement.
2. In the meanwhile the Office of the County Attorney Act 2020 was enacted and in January 2021 the 2nd respondent advertised several vacancies under the said Act including the position of County Solicitor. The petitioner applied and he was competitively offered the new position *vide* the letter dated January 29, 2021 requiring him to sign acceptance within 14 days. The contract was for a term of six years.
3. The petitioner did not sign the acceptance within the 14 days given but did so on September 1, 2021. A new County Government was elected during the General Elections held in August 2022 and by a letter dated November 10, 2022, the 1st respondent notified the petitioner that his appointment as the Chief Legal Advisor in the Office of the Governor had lapsed effective August 31, 2022. The letter also notified him that the offer of the position of county solicitor *vide* the letter dated January 29, 2021



had also lapsed after he failed to sign and return the same within 14 days granted to him and instead continued working as the chief legal advisor in the office of the Governor.

4. The petitioner was aggrieved and after failing in his attempt to have the said letter withdrawn, he brought this petition alleging that his fundamental rights and freedoms have been violated by being removed from office for no a valid reason and without following a fair procedure. He further avers that he has been discriminated by the removal while other persons recruited with him were spared; that his right to fair administrative action and fair labour practices were violated. He also avers that the right to human dignity has been violated and has been subjected to physical and psychological torture.
5. On the basis of the foregoing matters, the petitioner seeks the following reliefs;
 1. A declaration that the 1st respondent's notice dated November 10, 2022 dismissing the petitioner from employment infringed the petitioner's fundamental rights and the same is illegal, null and void an initio for being in contravention of articles 25 (c), 28, 31, 41, 47, 48, 50, 10, 73, 232 and 236 of the Constitution of Kenya, 2010.
 2. An order for judicial review quashing and/or setting aside the decision of the 1st, 2nd and 3rd respondents to dismiss the petitioner from employment as contained in the letter dated November 10, 2022 and any other consequential subsequent actions emanating there from.
 3. An order of prohibition and injunction to issue restraining the respondents by themselves their servants, employees, agents or anyone acting on their behalf from terminating the petitioner from employment based on the same allegations contained in the letter dated November 10, 2022.
 4. An order directing the respondents to unconditionally reinstate the petitioner back to his employment as a county solicitor.
 5. General damages, punitive and exemplary damages for dismissal for breach of the petitioner's rights guaranteed under articles 25 (c), 28, 31, 41, 47, 48, and 50 of the Constitution of Kenya, 2010.
 6. Costs of the petition and any other relief that the honourable court may deem fit and just to meet the ends of justice.
6. The respondents opposed the petition by filing a replying affidavit sworn on December 1, 2022 by Mr Joseph Rufus Miriti Mwereria, the 1st respondent herein. The affiant admits that the petitioner was appointed as the Chief Legal Advisor in the office of the Governor pursuant to a contract dated October 4, 2017 for a term of 3 years. The contract was renewable for a further term of 2 years and indeed it was extended for 2 years by the letter dated August 1, 2020 until August 31, 2022.
7. The affiant further deposed that *vide* letter dated January 29, 2021, the petitioner was offered a new job as County Solicitor requiring him to accept the offer within 14 days. However the petitioner failed to sign acceptance within the said 14 days and also failed to resign from the position of the Chief legal Advisor in the offices of the Governor where he continued to work until his contract lapsed on August 31, 2022. It was therefore contended that the petitioner cannot purport to serve as County Solicitor when he failed to accept the offer within 14 days given and only did so 7 months thereafter.



8. The affiant contended that the petitioner's contract was a fixed term one and the notice dated November 10, 2022 was regularly issued. He further contended that the alleged violation of principles of natural justice and fair administrative action do not arise.
9. It was further deposed that if the petitioner served as County Solicitor without resigning from the position of Chief Legal Advisor, he breached integrity and leadership principles as provided under article 77 (1) of the Constitution and therefore he is not fit to hold a public office. Finally it was contended that the petition is without merits and is only intended to sanitize an illegality and an irregularity. Consequently, the court was urged to dismiss the petition with costs.
10. On December 7, 2022, the petition was argued through a virtual hearing.

Submissions

11. Mr Maranya, learned counsel for the petitioner submitted that the basis of the petition herein is the letter dated November 10, 2022 served on November 15, 2022. He reiterated the facts set out above and maintained that the petitioner's contract as chief legal Advisor ended automatically on January 29, 2021 when he was competitively recruited as the County Solicitor under the Office of the County Attorney Act.
12. The counsel admitted that the offer letter dated January 29, 2021 was not accepted by signing within the required 14 days because it was retrieved by the 2nd respondent after a discovery that non-practicing allowance was not included in the offer letter. However, the counsel submitted that acceptance was not limited to only signing the offer letter.
13. He contended that it was enough that immediately after the appointment, the petitioner took over the new role of county solicitor, he changed office, changed supervisor and got new staff. He continued discharging the duties of County Solicitor and receiving the corresponding salary until November 15, 2022 when he received dismissal letter dated November 10, 2022.
14. It is the petitioner's case that he signed the offer letter promptly on September 1, 2021 the same day he received the corrected copy. It was submitted that the delay to correct the error in the letter dated January 29, 2021 was due to the failure by the 2nd respondent to hold meeting. It was submitted that the letter issued on September 1, 2021 retained the date and original particulars.
15. It was submitted that the petitioner was entitled to serve for 6 years and as such the termination by the 1st respondent was illegal and *ultra vires* since only the 2nd respondent had the legal mandate over his contract and is comfortable with the employment of the petitioner.
16. Further, it was argued that the ground for his dismissal was not a fair ground because he never delayed signing acceptance to the offer letter. It was further argued that the petitioner was not accorded any hearing before his appointment was terminated, and therefore rules of natural justice were breached.
17. It was submitted that there was non-compliance with the rules of natural justice and the right to hearing and fair administrative action were violated before the dismissal. It was further alleged that the dismissal letter was also not from the petitioner's employer and it should therefore be quashed for being unconstitutional, arbitrary and unreasonable.
18. The court was urged to find that it has jurisdiction to interpret the Constitution in relation to employment and labour relations, as was held in the case of Okiya Omtatah Okiiti v Kenyatta University Council & others (2015) eKLR. It was argued that removal from office was administrative action done maliciously without following due process of the law and the rules of natural justice, and



was done by person without any legal mandate. The court was therefore urged to quash the impugned letter in order to protect the petitioner and safeguard public service from impunity.

19. Mr Kaumbi learned counsel for the respondents opposed the petition. He relied on the replying affidavit sworn on December 1, 2022 by Mr Rufus Miriti, 1st respondent. He contended that the said affidavit was proper because the county secretary is the head of the County Public Service pursuant to section 44(3) (a) of the [County Government Act](#).
20. On the other hand, he submitted that the petition has not met the competency threshold since it has not set out with concise clarity the constitutional provision that have allegedly been infringed.
21. As regards the merits of the petition, it was submitted that article 27 of the [Constitution](#) cited in the petition does not apply to this case as the petitioner was employed to serve in the office of the Governor for 3 years renewable for 2 years and the contract was renewed for 2 years upto August 31, 2022.
22. As regards the letter of appointment dated January 29, 2021 it was submitted that clause 8 expressly required the petitioner to sign acceptance within 14 days but he delayed until September 1, 2021, about 7 months out of time. It was submitted that the court cannot impute another meaning to an express contract but can only look at the contents of the document.
23. It was reiterated that the petitioner ought to have resigned from his former job to take up the new job as county solicitor but he instead continued working under the office of the Governor until August 31, 2022 when his first contract lapsed. Consequently the alleged discrimination was denied.
24. Besides, it was argued that had the petitioner taken up the new job, he would have violated integrity requirements by holding two public jobs. As such the respondents maintained that the petitioner never accepted the offer for the position of County Solicitor within the required time.
25. In a brief rejoinder, Mr Maranya submitted that petitioner did not leave the county of Meru but merely changed his role from Chief Legal Advisor in the office of the Governor to County Solicitor and as such there was no need to tender resignation in the former position. It was further submitted that the respondents have not produced the pay roll to prove that the petitioner had two jobs and he was paid twice.
26. Again it was submitted that no evidence was adduced to show that the petitioner was given the appointment letter dated January 29, 2021 and kept it until September 1, 2021 when he signed the acceptance. It was contended that the 2nd respondent is an independent entity and the 1st respondent has not produced evidence to prove that he had authority from the board to represent it and swear replying affidavit on its behalf.
27. Finally, the counsel wondered why the respondents waited until November 10, 2022 before stopping the petitioner from his new appointment and instead continued paying him.

Analysis and Determination

28. Having carefully considered the material presented by the parties, the following issues commend themselves or determination:-
 - a) Whether the petition meets the competency threshold.
 - b) Whether the petitioner left his position of chief legal advisor in office of the Governor from January 29, 2021 and became the County Solicitor.



- c) Whether the letter dated November 10, 2022 violated the petitioner’s fundamental rights and freedoms and contravened the principles of natural justice.
- d) Whether the petitioner’s contract term of 6 years was proper in circumstances of the case.
- e) Whether the relief sought ought to be granted.

Competence Threshold

- 29. The respondents contends that the petition herein does not meet the threshold of a competent constitutional petition because it does not plead with clarity the provision of the Constitution which is alleged to have been infringed. However having carefully considered part c and d of the petition, (more specifically paragraph 21 and 27) I am satisfied that the petitioner has pleaded with some reasonable degree of precision the provisions of the Constitution which he alleges to have been infringed and the manner in which the same was allegedly infringed.
- 30. Consequently, I find that the petition meets the competence threshold as per the decision in the case of Anarita Karimi Njeru v Republic (1979) eKLR where the High Court held

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if any to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they were alleged to be infringed.”

From Chief Legal Advisor to County Solicitor

- 31. There is no dispute that the petitioner was employed a chief legal advisor in the Office of the Governor where he served for a whole contract term of 3 years. It is also common ground that the said contract was extended for a further term of 2 years upto August 31, 2022. Further it is a fact that the petitioner was competitively recruited as the county solicitor by 2nd respondent and an offer of appointment was issued to him *vide* the letter dated January 29, 2021. Finally it is a fact that the offer letter gave him 14 days within which to accept by signing and returning the letter to the 2nd respondent but the petitioner never signed the offer letter until September 1, 2021.
- 32. The petitioner contends that acceptance is not limited to signing the offer letter. He stated that the offer letter was found to have errors and it was retrieved for correction with respect to the term of non-practicing allowance. In the meanwhile, the petitioner alleges that he took over the new role as the county solicitor, changed office, staff and the new employer paid him his salary. He maintains that the offer letter was given to him again on September 1, 2021 and he signed acceptance the same day.
- 33. The respondents are in denial and avers that the petitioner did not accept the offer of the position of County Solicitor within the prescribed time and therefore the offer lapsed. They further contend that the petitioner continued serving as the Chief Legal Advisor in the office of the Governor until August 31, 2022 when his 2 years’ contract lapsed.
- 34. I have carefully considered the evidence and the rival submissions but I have not seen any evidence tendered to prove that the petitioner was issued with any other offer letter for the position of county solicitor other than the one marked “KK4”. If there was such letter, the petitioner could have produced a copy as an exhibit. He could also have produced further evidence to prove that the 2nd respondent requested for the return of the letter. Further he could have produced evidence of him returning the “erroneous offer letter” like a forwarding letter or at least a delivery book to support that allegation.



35. As regards the allegation that the petitioner took over his new role of county solicitor, there is no evidence in the form of payslips or at all to show that he was added into the payroll in that capacity. He also did not adduce any evidence even from fellow employees to prove that he, indeed, took over the new role and left the former job.
36. This court agrees with the respondents that, a resignation letter and clear handing over records could have made it easier for the petitioner to discharge his burden of proof. In this case he has failed to discharge the evidentiary burden of proving that he terminated the initial contract in the office of the Governor and entered into a new contract of 6 years with the 2nd respondent.
37. In view of the foregoing matters, the court finds that the petitioner has failed to prove that he entered into a valid contract with the 2nd respondent based on the offer letter dated January 29, 2021 or at all. He has also failed to demonstrate by evidence that he discharged any duties of a County Solicitor and received pay for the same which was different from what he was earning prior to January 29, 2021. Therefore the court holds that based on the evidence on record the petitioner continued serving in the office of the Governor as the Chief Legal Advisor until August 31, 2022 when his 2 years' contract lapsed by effluxion of time.
38. Accordingly his extended stay in office on the basis of the offer letter dated January 29, 2021 and accepted on September 1, 2021 was a mistake which cannot be used to validate a contract that never was. For the foregoing reasons the letter dated November 10, 2022 was proper in the circumstance of this case where a new government was taking over.

Violation Of Fundamental Rights And Freedoms

39. The petitioner complains that his fundamental rights to human treatment and dignity, right to fair administrative action, right to fair hearing and freedom from discrimination were violated by the impugned letter dated November 10, 2022. He contends that he was not accorded any opportunity to defend himself before being bundled out of the office. Further he complains that the 1st respondent who authored the impugned letter had no legal authority to issue the said letter and therefore he acted *ultra vires*.
40. I have already made a finding of fact that there was never a valid contract entered between the petitioner and the 2nd respondent as alleged. It follows that the 2nd respondent had no role in the petitioner's contract that lapsed on August 31, 2022 and therefore the 1st respondent being the Head of County Public Service was right in notifying the petitioner that his contract had lapsed vide the letter dated November 10, 2022. Such notice is not the one which terminated the petitioner's contract as Chief Legal Advisor as the contract had already lapsed.
41. Although the petitioner alleges that the respondent failed to end his services immediately after August 31, 2022 but allowed him to continue working and paid him, the court reiterates that a valid contract cannot be implied from circumstances of this case because a new government was coming into office. If anything public funds paid in error or through mistake is always recoverable from the payee or through a surcharge against the person who paid.
42. In view of the foregoing matters, the court finds that the petitioner has failed to prove by evidence that his rights as enshrined under article 27, 28, 31, 41, 47, 48 and 236 of the Constitution were violated by the 1st respondents' letter dated November 10, 2022. The contents of the letter were factual and therefore nothing more was required other than to convey the information to the petitioner.



Reliefs

43. Having made a finding of fact that no valid contract was formed between the petitioner and the 2nd respondent based on the offer letter dated January 29, 2021, that the petitioner never resigned from the position of the Chief Legal Advisor in the office of the Governor to take up the new position of County Solicitor; and that no violation of constitutional rights has been demonstrated by evidence, the court holds that the petitioner is not entitled to the reliefs sought. Consequently, the petition lacks merits and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF JANUARY, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE

