



**Kenya Union of Pre-Primary Education Teachers v Secretary, Tharka Nithi County Public Service Board & 3 others (Employment and Labour Relations Cause E010 of 2021) [2023] KEELRC 1067 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1067 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E010 OF 2021  
ON MAKAU, J  
APRIL 27, 2023**

**BETWEEN**

**KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS ..... CLAIMANT**

**AND**

**SECRETARY, THARAKA NITHI COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER, DPT OF EDUCATION THARAKA NITHI COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER, FINANCE THARAKA NITHI COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY SECRETARY THARAKA NITHI COUNTY GOVERNMENT .... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The suit herein is contained in the amended statement of claim dated March 4, 2021 seeking the following reliefs.
  - a. That this honourable court do declare that the grievants were subjected to unfair labour practice and were discriminated against in the entire recruitment process.
  - b. That a declaration be made that the entire recruitment process conducted after the expiry of the initial 2 years contract was discriminatory.



- c. That this honourable court do order the respondents to give the 15 grievant herein appointment letters on permanent and pensionable terms being minimum terms and conditions under the *Employment Act*.
  - d. That this honourable court do order the respondents to back date the grievants' salaries to March, 2020 under the permanent employment.
  - e. That this honourable court do order the respondents to compensate the grievants for loss of income for the period they remained out of employment at the rate of 6 months full salary subject to SRC approved grade.
  - f. That costs of the suit be provided for by the respondents.
2. The facts of the case according to the claimant are that its 15 members (hereinafter called the grievants) were employed by the respondents as ECDE teachers on 2 years contract from January, 2015 to December, 2017. After serving through the contract term, they continued working and receiving salaries for two months and then they were replaced by other ECDE teachers who were secretly recruited.
  3. The said recruitment was done without any advertisements and interviews and therefore the grievants were discriminated contrary to Section 5 of the *Employment Act*. Further the respondents disregarded the orders made by the High Court in its judgment in Petition No 17 of 2014 which directed County Governments which had hired ECDE teachers before the judgment were to regularize the contract in consultation with the Teachers Service Commission. (TSC)
  4. The claimant averred that the recruitment process carried out after the expiry of the initial contract 21<sup>st</sup> March 2016 contravened Article 232 of the *Constitution* and Section 66 of the *County Government Act* as the vacancies were not advertised. Further clause B 7(2) of the County HR manual which provides for fair and competitive recruitment process, was also violated.
  5. The respondents were given time to file response to the claim but they did not do so at the close of the hearing and the claimant has submitted that it was never served with any defence to the claim.
  6. The suit was disposed of by written submissions on the strength of the documentary evidence filed. The claimant filed a witness statement by one of the grievants, Ms Emmaculate Kainyu Miriti dated March 4, 2021. The witness stated that she accepted a job offer under a 2 year contract drawn on March 21, 2016 by the Chairman of Tharaka Nithi County Public Service Board (CPSB).
  7. The contract provided 27 leave days every year of service and gratuity of 31% of the total basic salary at the end of the contract term. She was a qualified teacher registered by the TSC. The contract ended on July 30, 2017 but in January, 2018, she and the other grievants continued serving and indeed received salary for January, and February.
  8. In the meanwhile they received information from the Head Teachers of the host primary school (ECDE centres) that the County Government wanted to conduct interviews for ECDE teachers. The interviews were then conducted and within a week, the successful candidate was posted to replace her. The same fate befell the other grievants on March 6, 2018. The successful candidates were given 2 years contract and thereafter they were appointed on permanent basis.

### Submissions

9. The claimant submitted that the claim is uncontroverted because the respondents did not file any defence to oppose the claim. Further the respondent did not produce any documents as requested by



the claimant to demonstrate whether the recruitment process was competitively done. No evidence was adduced to prove that the vacancies were advertised as required under section 66 of the County Government Act and clause 7(b) of the County HR manual. Consequently, it was submitted that the failure to adduce the said evidence was proof that the grievants were discriminated during the recruitment process.

10. Reliance was placed on the case of Abigael Jepkoskei Yatar & another Vs China Human International Co Ltd [2018] eKLR to fortify the above submissions. Further it was submitted that the failure to conduct fair and competitive recruitment process offended Article 232 of the Constitution.
11. Finally the claimant submitted that the said recruitment did not comply with judgment by the High Court in Petition 127 of 2014 which required County Governments to recruit ECDE teachers from those registered by the TSC subject to regularizing contracts of the already employed ECDE teachers.
12. The respondents filed joint submissions on January 12, 2023 contending that the grievants contracts lapsed automatically on December 30, 2017 and there was no option of renewal or extension. It was submitted that the court as no mandate of rewriting the contract for parties, but to enforce the contract terms. Reliance was placed on the case of County Government of Migori Vs Hope Self Help (2020) eKLR.
13. In view of the foregoing matters, the respondents submitted that the grievants were not discriminated or subjected to any unfair labour practices. The relationship between the grievants and the respondents was governed by contract and the claimant has not pleaded breach or violation of the said contract by the respondents.
14. As regards the recruitment after the expiry of the contracts it was submitted that the recruitment was done in strict adherence to the law. Further, it was submitted that the claimant did not plead particulars of the alleged discrimination. Reliance was placed on the case of Esposito Franco Vs Amrason Jeffa Kingi & 2 others 2009 eKLR where the court held that a claim for discrimination under the constitution must plead the particulars of the infringement, and the manner in which it was done.
15. Further it was submitted that the fact that the grievants had worked for the respondent did not give them automatic success in the recruitment process, nor does the court have the power to direct the respondents to issue the grievants with appointment letters on permanent and pensionable terms. For emphasis, the respondent cited the case of Olive Mwibaki Mugenda & another Vs Okiya Omtata Okoiti & 4 others (2016) eKLR that courts should not deal with matters which the statute has directed other persons to deal with. In the instant case, it was submitted that the power to recruit employees from the respondent belongs to the HR department of the Tharaka Nithi County Government and not this court.
16. Finally it was submitted that the grievants are not entitled to any compensation as their contract lapsed automatically by effluxion of time on December 30, 2017 and there was no option of renewal. Further the grievants served through the term and they were paid all their remuneration and therefore the suit should be dismissed.

### **Analysis and Determination**

17. I have considered the material before the court, and it is clear that the grievants were employed by the respondents as ECDE teachers under two years contracts which lapsed on December 30, 2017. It is also a fact that after the lapse of their contracts, they continued to work and to receive salaries upto March 6, 2018 when they were replaced by newly appointed ECDE teachers.
18. The issues in dispute are:-



- a. Whether the recruitment of the new teachers was fair and competitive,
- b. Whether the grievants were discriminated during the recruitment of the new teachers.
- c. Whether the reliefs sought are merited.

### **Fair and Competitive Recruitment**

19. The claimant contends that the recruitment process was done secretly but the respondent contend that the process was done in strict compliance with the law. Article 232 (1) of the Constitution provides one of the values and principles of public service as -;

- “(f) (f) transparency and provisions of the public of timely, accurate information;  
(g) subject to paragraph (h) (i) fair competition and merit as the basis of appointments and promotion.”

20. Further Section 66 of the County Government Act provides that:-

“If a public office is to be filled, the county Public Service Board shall invite applications through advertisements and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged.”

21. The county HR manual referred to by the claimant was not produced as exhibit in court. Consequently I have not seen it to confirm whether clause 7 (b) was violated. However from a reading of Article 232 the Constitution and Section 66 of the County Government Act reveal that recruitment for County Public Officers must not be done secretly but in open, fair and competitive manner.

22. In this case, the claimants witness Ms Emmaculate Kainyu Miriti stated as follows in her witness statement-;

- “7. We got information from the head teacher of the primary school which hosts our ECDE centre that the County Government wanted to conduct interviews for ECDE teachers.
8. The interviews were conducted and within a week, the successful candidate was posted to replace me as well as the others who by that time were serving for the sixth day into March 2018.
9. Those who were hired served from Mach 2018 till March 2021 when they were appointed on permanent employment.”

23. The foregoing excerpt from the witness statement demonstrates an admission that the recruitment of the ECDE teachers in March 2018 was not done secretly. The grievants were made aware of the exercise and did nothing. They waited until they were replaced by their successors. By that time their contract terms of 2 years had lapsed and they had not sought fresh appointment as required by the same law they have cited in this case.



24. Further if the grievants were aggrieved by the decision of the County Public Service board in the recruitment of the ECDE Teachers, they ought to have appealed to the Public Service Commission under Section 77 of the County Government Act which provides that:

“ Any Person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer may appeal to the Public Service Commission (in this part referred to as the commission’) against the decision.

- (2) the commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of-
  - a. Recruitment, selection, appointment and qualification attached to any office.
  - b. Remuneration and terms and conditions of service ...”

25. Section 87 (2) of the Public Service Commission Act then provides that;

“ A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the commission to hear and determine appeals from County Government Public Service unless the procedure provided for under this part has been exhausted”

26. The foregoing provisions support the view that the claimant had an avenue availed to it by the statute to challenge the recruitment process if it was viewed to be unfair and discriminatory. The provisions confirm that this court lacks jurisdiction to entertain the claimant herein until the procedure provided for under section 77 of the County Government Act and Section 86 and 87 of the Public Service Commission Act is exhausted.

27. A court of law downs tools once it finds that it lacks jurisdiction over the dispute. Without prejudice to my earlier finding that the impugned recruitment was not done secretly, I must hold that this court lacks jurisdiction and cannot make any one more step in the suit. Consequently, I strike out the suit for want of jurisdiction and each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 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 15<sup>th</sup> 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.

