



**Kamaria v County Government of Embu & 2 others (Cause
279 of 2016) [2023] KEELRC 1518 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1518 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 279 OF 2016
ON MAKAU, J
JUNE 9, 2023**

BETWEEN

PROFESSOR JOE K KAMARIA CLAIMANT

AND

COUNTY GOVERNMENT OF EMBU 1ST RESPONDENT

THE GOVERNOR EMBU COUNTY GOVERNMENT 2ND RESPONDENT

EMBU COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

JUDGMENT

1. By an Amended Memorandum of Claim dated February 24, 2017 the claimant alleges that his salary was stopped by the respondent from November 2016 without any prior notice. Therefore he seeks the following reliefs:-
 - i. Reinstatement of the claimant to his position with full pay and without loss of benefits and,
 - ii. Payment of the claimant's accrued salaries and allowances amounting to Kshs.170,543/- per month made up of a basic salary of Kshs.114,543/-, rental house allowance of Kshs.21,668/-, special house allowance of Kshs.18,332/- and commuter allowance of Kshs.16,000/- as well as any other lawful dues, privileges, benefits, and financial emoluments from the month of November 2016 to date and timely payment of the same for the entire term of his employment based on the 2nd respondent's term of office;
 - iii. That the Respondents either jointly or severally be barred from interviewing, considering, recommending, appointing and replacing either by themselves, servants, agents any other person to the position of Economic Adviser save the claimant herein.
 - iv. That the Respondents either jointly or severally be restrained from terminating the services of the claimant pending the hearing and determination of this suit.



- v. Any other remedy that this Honorable court may deem fit to grant; and
 - vi. Costs of the cause.
2. The respondents filed a joint defence objecting to the suit on ground that the court lacks jurisdiction to hear the matter by dint of section 77 of the *County Government Act (CGA)*. They averred that there is no reasonable cause of action against 1st and 2nd respondent since the claimant has annexed an appointment letter issued by the 3rd respondent, which is a body corporate with the power to recruit, employ and discipline the claimant solely. Therefore they averred that the 1st and 2nd respondent are not privy to the contract between the claimant and the 3rd respondent.
 3. The respondents further averred that the claimant absconded duty from September 20, 2016 and never reported back. He was served with a show cause letter dated January 6, 2017 but failed to respond. They averred that an employer has a right and statutory duty to deduct an employee's wages under section 19 (1) (c) of the *Employment Act* for absenteeism without basis.
 4. The respondents averred that the claimant was neither transferred, nor was his employment terminated in the reshuffle of September 20, 2016. Finally, they denied all relief sought and urged the court to dismiss the suit with costs.
 5. The claimant filed reply to the defence contending that the court has jurisdiction to determine the suit. He contended further that his appointment letter was signed by the 2nd respondent and maintained that the respondents are all privy to his contract of employment.
 6. On the other hand, the claimant denied the alleged absence from work and averred that from the date of appointment he performed his duties diligently without fail. He further denied ever being served with the alleged show cause letter and maintained that disciplinary procedure was not followed before stoppage of his salary. Therefore he prayed for judgment as prayed because the defence filed by the respondents is devoid of truth, in bad faith and sheer malice.

Evidence

7. On January 24, 2023 the suit was mentioned in court in the presence of counsel for the two sides and the court fixed the suit for hearing on February 9, 2023. On the said date, only the claimant attended and gave evidence.
8. The claimant adopted his written statement dated March 21, 2017 and 4 documents in the list dated even date, as part of evidence. In brief his evidence was that he was employed on January 15, 2015 as Economic Advisor to the 2nd Respondent (Governor) and he was entered in the 1st respondents' (County Government) pay roll in Job Group R under PF No.20150002225. His basic salary was Kshs.114,543.00, house allowance of Kshs.21,668.00, special house allowance of Kshs.18,352.00 and commuter allowance of Kshs.16,000.00. He was also entitled to gratuity at 31% basic salary and airtime.
9. Effective November 2016, the respondents stopped payment of salary and allowance without prior notice or any justifiable reason. There was no prior warning letters served on him cautioning him on the alleged absenteeism and as a result of the stoppage of his salary he has suffered mental anguish due to loss of income and right to livelihood.
10. He stated that he was to serve until the end of the term of office of the sitting Governor which ended on August 9, 2022.



11. On being shown the letter dated September 20, 2016 referenced “Reshuffle of senior Officers of Embu County Government”, he stated that he was never informed of any reshuffle from his role as Economic Advisor of the Governor. However, he confirmed that column 7 of the reshuffle letter, another person was given the position of Economic Advisor of Governor but he was not assigned any other role. Instead his salary was stopped.
12. The foregoing notwithstanding, he continued to render his service for advising the Governor as before and never absconded duty as alleged. Therefore he prayed for the reliefs sought in the suit.

Submissions

13. It was submitted from the onset that all the reliefs sought have been spent except the claim for unpaid salary at the rate of Kshs.170,543.00 per month from November 2016 till the end of the term of the appointing Governor in August 2022. It was further submitted that the claimant never absconded duty in September, 2016 as alleged by the respondents as no evidence was tendered to that effect.
14. Reliance was placed on section 107, 108 and 109 of the *Evidence Act* and the case of *Catherine Muthoni Kamutu v Kenya Planters Co-operative* (2022) eKLR to fortify the submission that the burden of proof of the alleged absconding of duty was on the respondents. In the claimant’s view the said burden has not been discharged because the respondents only filed a defence without any supporting evidence.
15. It was submitted that on September 20, 2016, the claimant came across a notice titled “Reshuffle of senior Officers of Embu County Government” in which the claimant had been replaced by Ms Mary Mercy Wanja Munene as Economic Advisor to the Governor, but the claimant was not assigned any new role. As such he continued to report to work and the Governor kept on allocating work to him.
16. On the other hand, it was submitted that the respondents breached section 17(1) of the *Employment Act* and article 41 (1) and (2) of the *Constitution* by stopping his salary abruptly without any reasonable or probable cause despite the claimant attending work. It was submitted that even after the reshuffle on September 20, 2016 the respondents were legally bound to continue paying the claimant his salary as long as he diligently presented himself for allocation of duties by the Governor.
17. For emphasis, the claimant cited the case of *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* (2013) eKLR, article 15 of the *African Charter on Human and Peoples Rights* and article 23 of the *Universal Declaration on Human Rights*.
18. It was submitted that the respondents violated the claimant’s rights to payment for work done. It was reiterated that the claimant worked for the respondents from January 15, 2015 to August, 2022 and he had no other gainful employment during that period.
19. Finally it was submitted that the replacement of the claimant with Mary Mercy Wanja Munene as the Economic Advisor of the Governor violated the claimant’s rights to fair administrative action as guaranteed under article 47 of the *Constitution* since there was no reason given and fair procedure was not followed.

Issues for determination

20. The issues for determination are:-
 - a. Whether the court has jurisdiction to determine the suit.
 - b. Whether the claimant absconded duty from September 20, 2016.
 - c. Whether he is entitled to salary from November, 2016 to August, 2022.



- d. Whether costs should be awarded.

Jurisdiction

21. The respondents contend that the proper forum for determination of this suit is the Public Service Commission by dint of section 77 of the [County Government Act](#). Section 77 (1) and (2) provides that:-

- “(1) (1) 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 qualifications attached to any office;
 - b. remuneration and terms of service;
 - c. disciplinary control;
 - d. national values and principles of governance under article 10, and values and principles of public service under article 232 of the [Constitution](#);
 - e. retirement and other removal from office;
 - f. pension benefits, gratuity and any other terminal benefits; or
 - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”

22. In this case the decision to stop payment of salary and to reshuffle the claimant was not by the County Public Service Board but the 1st and 2nd respondents. The reshuffle letter dated September 20, 2016 was by the Governor. It follows therefore that the claimant could not appeal to the Public Service Commission under section 77 of the [County Government Act](#). The said section expressly provides for an appeal from the decision of the Public Service Board.

23. I gather support from the Court of Appeal decision in the case of [Kisumu County Public Service Board & another v Samuel Okuro & 7 others](#) (2018) eKLR where the court held as follows:-

“(47)...moreover, the court cannot uphold an action of the Governor that is clearly ultra vires his constitutional and statutory mandate.

(48) We have come to the conclusion that the Governor initiated the removal of the respondents without following the appropriate machinery. The respondents being County Public Officers, the Governor could not terminate their services without involving the County Board and the County assembly. In sending the respondents on compulsory leave and terminating the respondents’ contract, the Governor usurped the role of the County Board. This denied the



respondents their rights under section 77 of the County Government Act that allows any County Public officer that is dissatisfied with the decision of the County Board in a disciplinary process to appeal to the public service commission.

Further, the respondents' constitutional fundamental rights were violated.

(49) In that regard the learned Judge acted within her constitutional jurisdiction in reviewing the appellants' action and granting the order of certiorari to protect the respondents from violation of their fundamental rights and to prevent the appellants from acting in a manner that contravenes the *Constitution* and the statute."

24. The above precedent is on all fours with the instant case. Consequently, I reject the objection by the respondents that this court lacks jurisdiction to determine the dispute in it. What I gather from the above decision by the Court of Appeal is that the Governor of a County Government has no legal mandate to take disciplinary action against public officers in the county public service. Doing so would mean that the governor is usurping the role of the County Public Service Board and his decisions is not appealable to the Public service commission under section 77 of the CGA and therefore this court has jurisdiction to quash such illegal decisions.
25. Further, as at the time of the said ultra vires decision, the *Public Service Commission Act* 2017 had not yet been enacted and therefore the legal position then, was that an employee had the option of either to appeal if aggrieved by a decision made by the county public service board or file suit before this court which enjoys unlimited original jurisdiction to determine all disputes involving employment and labour relations. The claimant exercised the latter option and his legitimate expectation to have the suit determined must be granted. That would protect him from the said ultra vires decisions by the Governor.

Absconding duty from 20th September 2016

26. The claimant denied the allegation that he failed to report to work and maintained that he continued reporting to his work and advising the governor from the date of appointment on January 15, 2015 until the end of the governor's term on August 9, 2022. He contended that, the reshuffle of senior staff done vide the Memo dated September 20, 2016 gave the position of Economic Advisor of the Governor to another person but he was not assigned any other role. However his salary and allowances were stopped effective November 2016 without prior notice or any justifiable reason.
27. I have perused the said Reshuffle notice and confirmed that another person was given the position of Economic Adviser to the Governor effective September 20, 2016 but the claimant was not assigned any new duties. The County Secretary in his replying affidavit sworn on January 16, 2017 stated in paragraph 6 and 7 that the redeployment of another person to the Office of the Governor as an Economic Advisor did not automatically amount to termination of the claimant's employment, and that the failure to redeploy him meant that he retained his position in the governor's office.
28. The affidavit annexed a copy of a letter from the Chief of Staff to the County Secretary informing him that the claimant among other officers had failed to report to work since September 20, 2016, and sought advice. The same letter shows endorsement by the county secretary on November 16, 2016 advising the Head of Payroll to stop salary for the claimant and the other officers as the office of the governor sorts the matter since there was a case of absenteeism. The claimant and the Governor were not copied any other said letters.



29. When the salary was stopped in November 2016, the claimant served a demand letter to the respondents on December 7, 2016 alleging unlawful termination of his employment and the respondent through their lawyer on December 14, 2016 denying termination of employment. They also contended that the stoppage of the salary was due to the claimant's absconding of duty. Thereafter the county secretary served the claimant with a show cause letter dated January 6, 2017 accusing him of absence from work from September 20, 2016.
30. The respondent's did not adduce any evidence during the hearing to rebut the allegation by the claimant that he continued to render his services to the Governor until the end of his term. The appointment letter dated 15th January 2015 stated that:
- “I am pleased to inform you that you have been appointed as Economic Advisor to H.E. the Governor on contractual terms of service with effect from 9th January 2015 based on his term of Office.”
31. The court takes judicial notice that the first term of office of all the County Governors under the 2010 constitution started in March 2013 and was to lapse in August 2017. The respondents never terminated the claimant's contract but only stopped his salary. They did not give any evidence before this court why they stopped the salary and they also failed to prove by evidence that indeed the claimant absconded his duties from September 20, 2016. I say so because, by the aforementioned replying affidavit, the respondents admitted that the claimant's employment was never terminated.

Reliefs sought

32. In view of the finding that the claimant's employment contract was never terminated, and the respondents have not justified the stoppage of his salary from November 2016, I find that the claimant is entitled to his salary from November 2016 to August 2017. The award is for Ten (10) months gross pay equaling Kshs. 1,705,430.00 less statutory deductions. The rest of the prayers were overtaken by events upon the expiry of his contract term in August 2017. The claimant is also awarded costs plus interest at court rates. Judgment is therefore entered against the respondents jointly and severally upon the foregoing terms.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE, 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

