



**Matemba v County Government of Kakamega (Claim E025 of 2023)
[2023] KEELRC 2207 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2207 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CLAIM E025 OF 2023
JW KELI, J
SEPTEMBER 22, 2023**

BETWEEN

DR COLLINS KIZITO MATEMBA CLAIMANT

AND

THE COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

JUDGMENT

1. The Claimant instituted this suit on 31st October 2022 by filing the Statement of Claim dated 31/10/2022 supported by his verifying affidavit dated 26th October 2022 at Bungoma. The suit had been triggered by termination of the Claimant's services as a County Executive Committee Member for Health Services, Kakamega County, after new elections. Vide the said Statement of Claim, the Claimant has prayed for the following reliefs:
 - a. A declaration that the Respondent had no authority to terminate the Claimant from office in the manner done;
 - b. A declaration that the Respondent has no authority whatsoever to propose any person to occupy or exercise the office of the County Executive Member for Health services in the Kakamega County Government;
 - c. The first respondents be barred from replacing or purporting to replace the Claimant as the County Executive Member for Health Services in the Kakamega County Government.
 - d. Settlement of all dues as per the Claimant's contract of employment for the unexpired term up to December 31,2022 as admitted in the letter of October 13, 2022.
 - e. Special damages as per Paragraph 14 of the claim.
 - f. Payment of all terminal dues as admitted in the letter of October 13, 2022



- g. Exemplary damages for loss of Reputation, discriminatory practices by the respondent and defamation of character causing the claimant to be exposed to obloquy and public odium and suspicion.
 - h. Issue the claimant with a certificate of Service as admitted in the letter of October 13, 2022.
2. Also filed in this suit are the Claimant's list of documents dated 31/10/2022 (comprising of 14 documents that were eventually adopted by the court as Claimant's Exhibits 1- 7, 8(a), 8(b), 8(c), 9-10 to 11(a) and (b) and the Claimant's witness statement (un-dated).
 3. The claim was opposed. The Respondent filed its Response to Statement of claim dated 28/11/2022 and filed on even date.
 4. The Claimant filed a Reply to the Response to the claim dated 19th January 2023 on 20th January 2023.
 5. By an order dated 20th April 2023, this matter previously filed at Bungoma as E028 of 2022 was transferred to Kakamega for hearing and determination.

Hearing and Evidence

6. The Claimant's case was heard orally on the 25th May 2023 with the Claimant as the only witness of fact in his case. The Claimant produced his evidence as the claim filed, the claimant's list of documents filed on 31/10/2022 (comprising of 14 documents that were eventually adopted by the court as the plaintiff's Exhibits 1- 7, 8(a), 8(b), 8(c), 9-10 to 11(a) and (b)) and the Claimant's witness statement filed on 31/10/2022.
7. The respondent did not call any witness and relied on its response to the defence pointing out that the Claim was based on matters of law.

Claimant's case in summary

8. The Claimant submits that he served previously as a County Chief Officer in the Ministry of Education, Science and Technology from 25th November 2014(C- Exh -1) and was later appointed as the County Executive Committee Member for Roads from June 2015 to 31st December 2017(C-Exh-2). Due to his good performance in the previous postings, he was appointed by the Respondent as the County Executive Committee Member for Health Services effective from 8th August 2017 to 28th February 2021 (C-Exh -3).
9. On expiry of the said term in February 2021, the Claimant requested for extension of his term of service through the letters dated 1st March 2021 [C-Exh- 8(a) & C-Exh-8(b)], and by a letter dated 29th October 2021((C-Exh-8(c), the Claimant's contract was extended with effect from 1st November 2021 to 31st August 2022.
10. Subsequently, through a letter dated 7th March 2022(C-Exh-4) the former Governor of Kakamega, Wycliffe Oparanya, (as he then was) extended the Claimant's contract that was to expire on 31st August 2022 to 31st December 2022 for a smooth transition . The extension was to lapse on the recruitment of new Executive Committee Members under Section 42(2) of the County Government Act, or upon termination of the contract by effluxion of time whichever was to come first.
11. The Claimant argued that he was on 29th September 2022(C-Exh-5), unlawfully dismissed with immediate effect and the Respondent disguised its malicious intent of the unlawful termination by paying the Claimant a one month salary in lieu of notice. The Claimant argues that the Respondent



- acted maliciously and selectively, as it did not treat the other cabinet members, as they treated him which was clearly an act of discrimination.
12. The Claimant argued that in accordance with the EACC Circular dated 22nd September 2022 produced as C.Exh.9, the Respondent in terminating his services acted against the advisory by EACC that cautioned incoming County administrations from unlawfully terminating the services of existing staff, that they felt they could not work with.
 13. The Claimant submitted that his term of contract was to run up to 31st December 2022, and seeks compensation for the unserved period, being his salary totaling to Kshs. 1,212,750/- for October 2022 to 31st December 2022, including his allowances and other remuneration that was due to him.
 14. It is also not in dispute that the Claimant's basic pay as at the time of termination was Ksh. 242,550.00 as shown on the pay slip for September 2022 produced as C.Exh. 11(a) and the Kenya Gazette Notice No.8794 by the Salaries Remuneration Commission produced as C.Exh.11(b).
 15. The Claimant received his salary for September 2022 and on 30th September 2022, handed over his duties to the incoming County Executive Committee member one Mrs. Rachel Jaluha Okumu(C.Exh 10).
 16. The Claimant aggrieved by his termination issued a demand letter (C.Exh.6) alleging unlawful termination and sought compensation thereof for the unserved period of his Contract term and allowances.
 17. The Respondent responded to his demand through the letter dated 13th October 2022(C.Exh.7) addressing itself to the effect that the termination of the Claimant was in compliance with the provisions of Section 31(a) of the County Government Act, 2012 and the Claimant's claim for illegal and unlawful termination was untenable.

Defence case in summary

18. The defence did not call any witness and its case was based on the Response to the Statement of claim dated 28th November 2022. The Respondent argued that the Claimant knew or ought to have known that the letter dated 7th March 2022(C-Exh-4) extending his contract to 31st December 2022 beyond the life of the former county government was illegal, null and void and had no effect and the new Governor in issuing the letter dated 29th September 2022((C-Exh- 5) informing the claimant that his contract had been terminated was in line with the provisions of law.
19. The Respondent maintained that the Claimant having being a public servant was expected to be knowledgeable of matters pertaining the County Government and ought to have sought clarification or researched on the validity of his purported contract extension and he would have found that the said extension was unprocedural, illegal, null and void and he would have turned it down to that extend of the illegality. The Respondent stated that the Claimant's claim for legitimate expectation is not available on an illegality and any claim for compensation is not available on an illegal act.
20. The Respondent stated that the Claimant continued to be in the office after 15th September 2022 when the Governor-elect was sworn in office and it was not of right for the Claimant to be appointed under the new County government.
21. The Respondent argued that the former county executive members and Chief officers were aware that their tenure was tied to life of the previous County Government that appointed them; and they did not have legal right to serve under the new government.



22. The Respondent stated that the Claimant was at liberty to apply to the new Government for a new contract term upon its inauguration and submitted that the claim should be dismissed with costs.

Written submissions

23. The parties filed written submissions after the oral hearing. The Claimant's written submissions drawn by Siganga & Company Advocates were dated 12th June 2023 and received in court on 13th June 2023. The Respondent's written submissions drawn by Lutta & Company Advocates were dated 7th June 2023 and received in court on 9th June 2023.

Determination

Issue for determination

24. The Claimant identified the following issues for determination in the claim:-
- a. Whether the Respondent's action of terminating the claimant from service was unlawful, malicious and unprocedural.
 - b. Whether the claimant is entitled to the prayers sought.
25. The Respondent identified the following issues for determination:-
- a. Whether the term of office of the Claimant was tied to that of the former Governor?
 - b. Whether the Claimant is entitled to the reliefs sought.
26. The court having heard the case and perused the submissions was of the considered opinion that the issues placed before the court by the parties for determination were as follows:-
- a. Whether the Claimant was unfairly terminated from his position of the County Executive Committee Member (CECM)?
 - b. Whether the Claimant was entitled to remedies sought.

Issues a. Whether the Claimant was unfairly terminated from his position of the County Executive Committee Member (CECM)?

The Claimant's submissions

27. The Claimant submitted that his term of service was extended from 31st August 2022 to 31st December 2022(C-Exh-4) and while quoting the extension letter, submitted that his services could only be terminated upon the new executive members being recruited or on effluxion of time.
28. The Claimant submits that the termination of his contract was selective as it affected some of them leaving other Committee members, and this amounted to discrimination under Section 5 of the [Employment Act, 2007](#).
29. The Claimant submits that he legitimately expected that his termination of service would be upon the new executive members being recruited or on effluxion of time, as per the express terms contained in the letter of 7th March 2022(C-Exh-4), and relying on section 45 of the [Employment Act, 2007](#), invited the court to consider whether it was just and equitable to terminate his employment. He relied on the case of [Kenfreight \(EA\)Ltd V Benson K. Nguti](#)(2016) eKLR where the court expressed itself as follows:-



“Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair”.

30. The Claimant submits that his termination followed an unfair, malicious and unprocedural process and violated his right to fair labour practices and fair administrative action under Article 41 and 47 of the *Constitution*, respectively. To buttress this assertion the Claimant relied on the case of *Republic v Vice Chancellor Jomo Kenyatta University of Agriculture and Technology* (2008) eKLR where the court quoted Lord Wright at page 345 in *General Medical Council Spackman* (1943) 2 ALLER 337 who stated: “if the Principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision.”

Respondent’s submissions

31. The Respondents submit that the CECM’s term is tied to that of the appointing governor. That the Claimant’s term of office as CECM ended when the previous governor left office and in the alternative when the new governor was sworn in a Governor - elect. That CECMs are Governor appointees and as such their terms run with the tenure of the appointing governor and relied on the provisions of the *Constitution* Article 179 which states as follows:- ‘179-(2) The county executive committee consists of — (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly. 7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.’
32. That under section 30 of the County Government Act 2012 on the functions of the Governor are state as :- in 30(2)(d) “appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of the *Constitution*.” The Respondent relied on the decision in *Kisumu County Public Service Board and another v Samuel Okuro & 7 others* (2018)e KLR where it was held ‘[28] Further, under Article 179(7), the term of office of executive committee members appointed by the governor is tied to the term of the appointing governor such that if the governor ceases to occupy the office, the appointment of the executive committee member also ceases.”
33. The Respondent submits that the term of the Claimant lapsed with the appointment of the new governor and with the swearing in of governor-elect and to that end relied on the decision in *Geoffrey Agwera Ndubi v John Obiero Nyagarama & 6 others; Bladys Bogonko Momanyi & 4 others* (Interested Parties) [2020] eKLR where it was held:-“ 52. It is the finding of court that the office of CEC member is tied in the hip to the office of the Governor. The two offices arise upon conclusion of a general election and their term is to run continuously to the next general election unless the officer is removed from office in terms of Section 39 and 40 of the *County Governments Act* 2012.” This position was also echoed in the authority cited by the Respondent in *Francis Angueyah Ominde v Wilbur Ottichillo & 2 others; Henry Mangogo Lumbasio & 20 Others (Interested Parties)*(2020)eKLR where the court held: “67.the court will therefore agree with the petitioner that the term of a County Executive Committee member is tied to the term of the appointing Governor unless the term is curtailed in the manner of removal as contemplated by the aforesaid legal provisions.”
34. The Respondent further argued that under Article 182(6) of the *Constitution*, a person assumes the office as a governor and holds the same unless otherwise removed, until the newly elected county governor assumes office after the next elections held under Article 180(1).
35. The Respondent further submitted that the extension of the Claimant’s terms of service beyond 15th September 2022 when the Governor-elect was sworn in, was an illegality, which is unenforceable and does not bind the Respondent. The Respondent took issue with the extension of the Claimant’s



contract which was still valid, five months before the same expired, a position that was confirmed by the Claimant during hearing.

36. The Respondent submits that the Claimant's assertions of malice, ulterior motive and discrimination in its statement of claim cannot succeed as the Claimant was paid his salary in lieu of notice and gratuity as per the termination letter and his contract of employment and his claim ought to be dismissed as it is based on an illegality and is unenforceable by the court.

Decision

37. The Claimant was initially appointed to the post of Executive Committee Member for Health by the former Governor Kakamega County Hon . Oparanya vide letter dated 5th October 2020(C-Exh-3). On the 29th October 2021 the contract was extended by the same governor from 1st November 2021 to 31st August 2022(C-Exh-8(c). Before the expiry of this contract, vide a letter dated 7th March 2022 the same Governor while referring to the contract expiring on the 31st August 2022 , extended the said contract to 31st December 2022 on the grounds of ensuring smooth transition to the next government. The contract stated in part:- ‘ please note that, this contract shall be deemed to have terminated upon recruitment of new Executive Committee member in line with the provision of section 42(2) of the County Government act 2012 or upon termination of the contract by effluxion of time...’
38. General elections were held in this country on the 9th August 2022. The Kakamega general elections were delayed and held on the 29th August 2022 with the new Governor being sworn in on the 15th September 2022.
39. The Claimant led evidence that he was issued with a letter of termination dated 29th September 2022 of his employment as CECM of health by the new Governor Hon. Barasa. The Claimant faulted the termination for lack of fair procedure and for unlawful termination of his contract as there was no new executive committee member committee and his contract had not expired. Further the termination as selective with some of the CECM being terminated leaving others.
40. The Respondent's position was that the term of employment as CECM was terminated by operation of the law pursuant to Article 179(7) of the *Constitution* to wit 7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office. That the court of appeal has pronounced itself on the issue in *Kisumu County Public Service Board and another v Samuel Okuro & 7 others* (2018)e KLR held ‘[28] Further, under Article 179(7), the term of office of executive committee members appointed by the governor is tied to the term of the appointing governor such that if the governor ceases to occupy the office, the appointment of the executive committee member also ceases.’
41. The court found the letter of 7th March 2022 issued by the former governor was irregular for 2 reasons. One that the extension was done while there was a valid contract. Secondly, the extension was beyond the term of the governor contrary to the provisions of Article 179(7) of the *Constitution* that, ‘If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.’ The court upholds the court of appeal decision in *Kisumu County Public Service Board and another v Samuel Okuro & 7 others* (2018)e KLR held ‘[28] Further, under Article 179(7), the term of office of executive committee members appointed by the governor is tied to the term of the appointing governor such that if the governor ceases to occupy the office, the appointment of the executive committee member also ceases.’ To find that the term of the Claimant ran concurrently with the appointing authority of the former governor and his appointment was deemed to have ceased on the exit of the former governor.



42. That brings me to whether the termination was unfair for lack of due process. The court looked into the decision relied on by the Claimant Kenfreight (EA)Ltd V Benson K.Nguti(2016) eKLR where the court expressed itself as follows:- Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair”.
43. Under Article 179(7), the term of office of a County executive Committee member ceased on the appointment of a new governor. The Governor for Kakamega was sworn in on 15th September 2022, and at that point, the Claimant’s term of office which had been bestowed on the claimant by the former governor ceased by operation of law. There was no mandate placed on the new Governor upon his assumption of office to continue to engage the Claimant. The Claimant’s term of office lapsed by effluxion of time and by operation of law and the reasons provided in the termination letter relating to Article 179 of the Constitution (supra) amounted to valid reasons to warrant the termination of the claimant’s service.
44. It was a mistake on the part of the former Governor to irregularly extend the contract of the Claimant and others into the term of the new governor who had a constitutional duty to appoint his cabinet (CECMs) under Article 179 of the Constitution.
45. As to the EACC Advisory dated 22nd September 2022(c-Exh-9), the court finds that the advisory on management of exiting staff and recruitment of new staff was not applicable to CECMS but to employees of the Public Service Board, a position acknowledged by EACC in the said letter, that CECMs are not recruited by the Public Service Board.
46. The court looked into the issue of discrimination. Whether or not it was true that only the Claimant and a few others had their contracts terminated and whether that amounted to discrimination to taint the termination by the new governor.
47. The court having stated the law on the terms of service of CECMs to be concurrent with the appointing governor finds that the act by the new governor was supported by the law. Whether or not others were terminated or served entire term was neither here nor there as the substantive claim of valid contract had failed. The court uphold its finding in Sabana v County Government of Kakamega County & 2 others (Employment and Labour Relations Petition E012 of 2022) [2023] KEELRC 1649 (KLR) , where The court found that there cannot be a right to property of a public office and upheld the decision in Attorney General & another v Andrew Kiplimo Sang Muge & 2 others [2017] eKLR where the court held:-

“To begin with there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder. See *South African Veterinary Council v Szymanski* 2003 ZASCA 11. See also *Justice Kalpana H. Rawal v. Judicial Service Commission & 3 others* (supra).In *Eckerson v City of Des Moines*, 137 Iowa 452, the Iowa Supreme Court emphasized that:

“Public offices are created in the interests of the general public, and not for the benefit of any individual. And no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected..... ..In the case of statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing thereof, the right of the incumbent to further act ceases eo instante, notwithstanding the term for which he was elected has not expired.”

48. The court finds that the termination of the contract was what is called by operation of the law as stated under article 179(7) of the Constitution and no legitimate expectation could accrue to the Claimant.



Issue b. Whether the Claimant was entitled to remedies sought.

49. The letter of termination stated the Claimant was to be paid one month salary in lieu of notice as per the existing Public service Regulations. During hearing, the claimant confirmed having being paid the salary for September 2022 and his gratuity up to the time of his departure and he had no pending payments under his contract term.
50. Having held the claim for unlawful termination had no basis, the termination being on operation of the law, the order of compensation for loss of reputation and discrimination was not merited and the Claimant was not entitled to a salary beyond his contract term.
51. The court holds that all other orders sought to declare the Claimant’s termination unlawful and stop the appointment of a new County executive Committee Member have no merit and have since been overtaken by events.

Conclusion and disposition

52. In the upshot the court holds that the term of employment as Kakamega County CECM Health of the Claimant expired on the former Governor, his appointing authority, ceasing to hold office under Article 179(7) of the *Constitution* to wit:- ‘7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.’”
53. That the claim for unfair termination and discrimination had no basis consequently. This was a normal termination with notice pay in lieu for one month. That the prayer under (i) succeeds and the Claimant is to be issued with a Certificate of service under Section 51 of the *Employment Act*, 2007.
54. In conclusion the Claim is held to be without merit and is dismissed in its entirety save for the issuance of the Certificate of Service. Considering the nature of the employment and the confusion caused by outgoing governor of an extension of contract, I exercise my discretion on costs and hereby order each party to bear own costs in this Claim.
55. Right of appeal in 30 days .
56. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22ND SEPTEMBER 2023.

JEMIMAH KELI,

JUDGE.

In the presence of:-

Court Assistant : Lucy Macheso

For Appellant : Ms. Ouma h/b Siganga

For Respondent:- Moga h/b Lutta

