



**Nyangala v Vihiga County Government (Cause 6 of 2023)
[2023] KEELRC 2193 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2193 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE 6 OF 2023
JW KELI, J
SEPTEMBER 21, 2023**

BETWEEN

LYDIA PAMELA NYANGALA CLAIMANT

AND

VIHIGA COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. The Claimant vide memorandum of claim dated 14th June, 2016 and amended on 26th October 2022 sought the following reliefs against the respondent: -
 - a. An order directing the respondent to issue a letter appointing the claimant as an information office from 4th November 2013 up to the end of the term of the Governor of the Respondent
 - b. An order directing the respondent to pay all underpaid salaries, allowances and other benefits due to an officer serving in group ‘J’ Kshs. 31,270/- monthly salary, House allowance 7,500/- and commuter allowance of Kshs. 4,000/- from 4th November 2013 up to the end of the term of the Governor of the Respondent.
 - c. An order that costs of this claim be paid together with interest
 - d. Any other or further relief deemed appropriate.
2. The Claimant in support of her claim filed witness statement dated 14th June 2016 and list of documents of even date with copies of the documents. The claimant on amending the memorandum of claim further filed Claimant’s further list of documents dated 26th October 2022 together with the bundle of documents.
3. The claim was opposed. The Respondent entered appearance and filed response dated 31st August 2016 and a further amended response dated 30th August 2022 together with list of witnesses and list of documents, witness statement of Wilfred Amasakha dated 30th August 2022 and the bundle



of documents. The respondent further on the 10th January 2023 filed response to the amended memorandum of claim.

4. The Respondent on the 18th January 2023 further raised a preliminary objection under section 77 of the County Government Act and the court having considered the period within which the suit had been pending directed the objection be canvassed in the claim.

Hearing

5. The Claimant's case was heard on the 15th February 2023 where the claimant testified on oath and adopted her witness statement dated 14th June 2016 and produced her evidence as C-exhibits 1-8. The claimant was cross-examined by Mr. Mukabi Advocate and re-examined by her counsel Odhiambo.
6. The response case was to be heard on the 17th April 2023 when Mr. Mukabi Counsel for the respondent informed the court that they will rely on their defence as stated in their letter dated 19th January 2023 and the defence case was marked as closed.

Written submissions

7. The claimant's written submissions drawn by Otieno, Yogo, Ojuro and company advocates were dated 3rd May 2023 and received in court on the 15th May 2023.
8. The Respondent's written submissions drawn by Tony Godia Legal counsel office of the County Attorney were dated 29th May 2023 and received in court on the 6th July 2023.

Determination

Issues for determination

9. The Claimant in her written submissions identified the following as the issues or determination in the dispute:-
 - a. Whether the claimant was appointed by the Governor, Vihiga County
 - b. Whether the claimant applied to work under the position of the radio producer under job group 'J'
 - c. Whether the claimant had a legitimate expectation to be employed under the position of a Radio Producers Under Job Group 'J'.
 - d. Whether the claimant is entitled to the prayers sought in the amended memorandum of claim dated 26th October, 2022.
10. The Respondent in their written submissions identified the following issues for determination: -
 - a. Whether there was employer employee relationship between the claimant and the respondent.
 - b. Whether the court has jurisdiction to entertain the suit herein.
 - c. Whether the claimant is entitled to the reliefs sought.
11. The court had during the proceedings indicated that it would deal with the issue of jurisdiction in the judgment so that is one of the issues. The court having heard the case and considered the issues identified by the parties was of the considered opinion that the issues for determination in the suit were as follows:-



- a. Whether the claimant was appointed by the Governor, Vihiga County and Whether there was employer employee relationship between the claimant and the respondent.
- b. Whether the claimant had a legitimate expectation to be employed under the position of a Radio Producers Under Job Group 'J'.
- c. Whether the court has jurisdiction to entertain the suit herein.
- d. Whether the claimant is entitled to the reliefs sought.

SUBDIVISION - Issue (a). Whether the claimant was appointed by the Governor, Vihiga County and Whether there was employer employee relationship between the claimant and the respondent

Claimant's case

12. The claimant in her witness statement dated 14th June, 2016 adopted as evidence in chief stated that the former Governor Akaranga sometimes in 2013 asked her to join his government, that after informal call and meeting in Nairobi she reported to duty on 4th November 2013 and went direct to the office of the Governor wherein the Governor asked the director of Human resources to give her appointment letter to Job Group H but she did not receive the letter.
13. That the governor asked her to set up a radio station and incorporated the said company, obtained the frequencies and was ready to start operations when the project was stopped. That on 14th October 2014 she was served with a letter dated 25th August 2014 offering her temporary appointment effective 1st September 2014 contrary to what they had agreed with the Governor that she would serve under his entire term.
14. The Claimant produced the letter dated 25th August 2014 being temporary appointment as information officer for 3 months effective 1st November 2010 which she accepted on 27th August 2014(c-exhibit 3). Further she produced a demand letter by advocate dated 27th November 2015(c-exhibit 1),claimant's academic certificates (c- Exhibits 4-6), application dated 13th June 2014 with resume attached (C-exhibit 7), copy of badge at public service at national county level (C-exhibit 8) and NSSF deductions between 2014-2017(C-exhibit 9).
15. During cross- examination the claimant told the court she started working with the said Governor in 2013 without appointment letter, that she had no formal invitation to meet the Governor nor did she receive invitation to meet the Governor, that her job was not advertised, she had not produced the advert for 11th June 2014 but the advert was for Job Group J which was under her qualification. That she was appointed for 3 months without a clause for renewal or extension. She was to leave after the 3 months. That as per her statement she stayed without extension and left in May 2017. That the term of the Governor ended in 2017 and she left in May 2017. The badge exhibit 8 was by the central government and was written national and county level government and not Vihiga County. The temporary contract did not indicate Job Group J. The claimant did not produce resignation letter of when she left, was not issued with payslip and had no banking details of salary in court. The claimant was interviewed by the County Public Service Board on the 30th June 2014 and issued with the temporary letter but the letter did not refer to any interview she did. The letter was signed by the Human Resources officer of the county. The claimant confirmed she understood that the contract was for 3 months.
16. On re-exam the claimant reiterated how she met and worked for the Governor and later applied, interviewed by the board and was issued with temporary letter and later in November



SRC verified credentials of all staff and issued her with the badge(c-exhibit 8) as indication she was working for the county, that she was deducted NSSF 2014-2017(exhibit 9). She was deployed to the communication culture office after another officer was employed.

Written Submissions

17. The Claimant submits that the then Governor sometimes in 2013 appointed her to serve during his tenure at his pleasure as information officer in the communication department of the respondent. The claimant alleged she was appointed by the Governor pursuant to article 179 (2) of the Constitution to wit:- ‘179(2) The county executive committee consists of— (a) the county governor and the deputy county governor; and (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.’ That she held the office at pleasure of the Governor and relied on the applicability of the doctrine of pleasure as stated in County Government of Nyeri and another v Cecilia Wangechi Ndungu [2015]e KLR

Respondent’s case

18. The Respondent relied on filed defence and did not call witness. There was no reply against the defence. In the statement of defence it was stated that the employment with the respondent was a preserve of the county public service board and not the Governor or Director of Human resource as alleged by the claimant and that the alleged appointment was an illegality. That the temporally appointment in any case was for a period of 3 months and lapsed on 30th November 2014. That there was no advertisement for any job in June 2014 as alleged by the claimant or any interviews for radio producer as alleged. That there was no claim before the court as the claimant alleged she was retained in the term of the Governor up to 2017 when the said term expired.
19. The Respondent questioned the claim on basis that if the claimant was engaged in 2013 what was the need for the advertisement a year later in 2014. Secondly the respondent submits that the appointing authority of the county government is the County Public Service Board established under article 235 of the Constitution and the County Government Act with mandate to:- ‘i) establishment and abolition of offices in the county public service; (ii) appointment of persons to hold or act in those offices; (iii) confirming appointments; or (iv) exercising disciplinary control over and removal of persons holding or acting in those offices; (e) provide for the promotion of the values.’ That the governor had no authority to employ the claimant in the position claimed. That if at all the said Governor employed the claimant that was an illegality which she invited the court to enforce. That evidence before the court was a contract of 3 months and there was no prove the claimant’s engagement was extended and that the NSSF contribution made in December 2013 was not proof the claimant was in employment and if so she was a ghost worker. The Respondent relied on the provision of section 9 (b) of the Employment Act to effect that any employment contract of over 3 months ought to be in writing hence there was no employer employee relationship between the parties.
20. That for lack of the employer employee relationship the court lacked jurisdiction. It was also the case of the respondent the court lacked jurisdiction under section 77 of the County Governments Act.

Decision

21. It is trite law that he who alleges must prove. The Evidence Act provides for the burden of proof as follows:- ‘section 107. Burden of proof. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
22. This court’s jurisdiction in a claim of employment is hinged on the existence of employer employee relationship as stipulated under section 12 of the [Employment and Labour Relations Court Act](#). The court will not grant any relief outside such a relationship. The burden to prove the existence of the fact of employer employee relationship lies with the person alleging the relationship and in this case the claimant.
23. The claimant told a story of having been called by phone by the former Governor Akaranga to a meeting allegedly arranged by a friend where they agreed on setting up a radio station and she alleged to have been promised to be issued with a letter of appointment as radio producer Job Group J. The Claimant in support of her story produced several documents. C-Exhibit 1 was a demand letter addressed to the chief officer Public Services and Administration dated 27th November 2015 through her advocates requesting for her appointment as advised by the Governor, a follow up demand letter dated 22nd January 2016(C-exhibit 2), a temporary appointment by chief officer Public Services and Administration dated 25th August 2014 offering temporary appointment as information officer for 3 months of which the claimant accepted the terms on the 27th august 2014(C-exhibit 3), claimant’s professional certificates in mass communication (C- exhibits 4,5 and 6), application letter dated 13th June 2014 and resume(C-exhibit 7), copy of Badge at national county level (C-exhibit 8) and copy of the claimant’s NSSF statement (C-exhibit 9).
24. The respondent submitted that the claimant did not provide evidence of engagement with the county outside the temporarily appointment which lapsed and that the NSSF statement was not proof of employment with the respondent as the mandate to employment staff for the county government lay with the County Public Service Board. The claimant relied on provisions of article 179 of [the Constitution](#). That her service was to be in the entire term of the Governor. The said provision reads:- ‘179. County executive committees (1) The executive authority of the county is vested in, and exercised by, a county executive committee. (2) The county executive committee consists of— (a) the county governor and the deputy county governor; and (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.’” The court finds that the claimant’s allegation of radio producer serving at pleasure of the Governor was mistaken as the position does not fall under Article 179 of [the Constitution](#) and in any case the said persons are approved by the county assembly.
25. The employment of county government public service is a mandate of the County Public Service Board as stipulated under section 59 of the [County Governments Act](#) to wit:- ‘59. Functions and powers of a County Public Service Board (1) The functions of the County Public Service Board shall be, on behalf of the county government, to— (a) establish and abolish offices in the county public service b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;”
26. The Claimant’s story of having been engaged or promised engagement by the former Governor does not hold water as it was not collaborated by any document or independent witness and lacks support



of the law. The claimant on amending her claim produced an application letter which had no evidence of having been received by the respondent and neither was the said advert produced which was denied in the statement of defence by the respondent. The said application and resume had no relevance to the claim as an application for employment does not confer legitimate expectation of employment right to the applicant. The claimant placed before the court exhibits 1 and 2 being demand letters by her advocates to be employed. The said exhibits watered down weight of the NSSF statement (exhibit 9) which the claimant relied on as proof she continued to work after the temporary appointment. The court noted that the statement did not have deductions for the year 2014 though it had some payments for years 2015 to 2017. The statement was from 2005 to 2017. It thus cannot be proof of employment by the respondent without collaboration by evidence of salary payment which could even have included a bank statement. The courts find that exhibit 1 and 2 being demand letters for employment by the claimant's advocates were evidence that the claimant was not in employment outside the 3 months temporary appointment of 2014 (exhibit 3). The respondent relied on the provisions of section 9(B) of the Employment Act which states:- '9. General provision of contract of service (1) A contract of service— (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.' That is the law. The court, however, did not find credible evidence of engagement of the claimant outside the temporary appointment of 3 months(exhibit 3). The copy of badge at national county level (C-exhibit 8) had no direct relation with the respondent. The court agreed with the respondent that the badge could have issued for either the national government or any of the 47 counties within the Republic of Kenya. The badge read:- 'Government of Kenya, Capacity Assessment and Rationalisation of the Public Services (CARPS) Programme at National and County Level 2014.'

27. The court considered the evidence before it produced by the claimant as analysed above . The court holds that the provisions of law relied on by the claimant namely Article 179(2) of *the Constitution* are inapplicable to the claimant's case. Employment to the county public service is an exclusive mandate of the county public service board under section 59 of the County Government Act to wit: - '59. Functions and powers of a County Public Service Board (1) The functions of the County Public Service Board shall be, on behalf of the county government, to— (a) establish and abolish offices in the county public service b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;'' Taking into account the findings on evidence as analysed above and the law the court holds that the claimant failed to discharge the burden of proof of the fact of employment by the respondent outside the temporary 3 month contract in 2014. The court finds there was no proof of employer employee relationship between the claimant and the Governor outside the temporary engagement which did not create any rights outside the contract of 3 months and further there was no proof of interview or engagement by the authorised entity being the Vihiga County public service board.

Issue(b). Whether the claimant had a legitimate expectation to be employed under the position of a Radio Producers Under Job Group 'J'.

28. The Claimant submits that before the expiry of her contract appointment she sat through interview and was retained till the lapse of Governors tenure. That she received a badge thereafter with effect that she had qualified for position of Radio Producer under Job Group J.
29. The court already analysed the evidence by the claimant and found the claimant had not discharged burden of proof of existence of fact of the engagement by the Governor, of the alleged advert for position of Radio Producer or any other position, and of the alleged interview or engagement after



expiry of the temporary appointment of 3 months(C- exhibit3). The authority relied on by the Claimant of Teresa Carlo Omondi v Transparency International Kenya 2017 e KLR was further not helpful. The court of Appeal in Transparency International - Kenya v Omondi (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) (17 February 2023) (Judgment) overturned the court's decision relied on by the Claimant and with respect to the legitimate expectation observed:- 'In the instant appeal, a cursory look at clause 13 of the contract of employment, allows either the appellant or the respondent, to terminate the agreement, by giving three(3) months' notice in writing or by paying three (3) months' pay in lieu of such notice. The appellant simply exercised its right as captured in the letter and as such, could not be deemed to have unfairly terminated the contract. It is old hat, that parties are bound by the terms of the contracts they enter into. 30. Concomitantly, the scenario would have been different if there was an indication, by act or omission from the appellant, to indicate renewal was forthcoming to whet the respondent's appetite, that her contract would be renewed and hence rely on the doctrine of legitimate expectation. In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation.'" The court applying the forgoing court of Appeal decision found no evidence of the alleged promises to the Claimant by the former Governor and further that the claimant was not one of the persons appointed under article 179 (2) of *the Constitution* thus the said expectation of employment or service at pleasure of Governor was highly misplaced and based on sinking sand.

Issue (c).Whether the court has jurisdiction to entertain the suit herein.

30. The court holds that this issue is overtaken by events in view of the finding of lack of employer employee relationship between the parties. Nevertheless if there existed employee employer relationship between the parties, the court would have declined jurisdiction as the claimant would have been obliged to first exhaust the mechanisms under the Public Service Commission pursuant to section 77 of the County Government Act which provides:- '77.Appeals to the Public Service Commission (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;'

Issue (d). Whether the claimant is entitled to the reliefs sought

31. The jurisdiction of this court to award any reliefs is premised on the existence of employee-employer relationship as stated under section 12 of the Employment and *Labour Relations Act* which states:- '12. Jurisdiction of the Court (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
- (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;



- (f) disputes between an employers' organisation and a trade union; (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.”

32. The Claimant must establish the existence of facts of any of the above disputes under section 12 of the Employment and [Labour Relations Act](#) for the court to consider award of the reliefs sought. The claimant in the instant case having failed to establish the employee- employer relationship with the Respondent to support her claim, the court has no jurisdiction to grant any of the reliefs sought. Further the court found no merit in the entire claim.

33. In the upshot the Memorandum of claim amended on the 26th October 2022 is dismissed.

34. Each party to bear own cost in the suit.

35. Right of appeal in 30 days.

36. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 21ST SEPTEMBER 2023

JEMIMAH KELI

JUDGE

In The Presence Of:-

Court Assistant : Lucy Macheso

For Claimant : Mr. Odhiambo

For Respondent: Mr. Mukabi

