



REPUBLIC OF KENYA



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Kanga v County Public Service Board of Tharaka Nithi County & another (Cause E022 of 2021) [2023] KEELRC 2862 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2862 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E022 OF 2021
ON MAKAU, J
NOVEMBER 10, 2023

BETWEEN

KENNEDY NTWIGA KANGA CLAIMANT

AND

COUNTY GOVERNMENT OF THARAKA NITHI 1ST RESPONDENT

**COUNTY PUBLIC SERVICE BOARD OF THARAKA NITHI
COUNTY 2ND RESPONDENT**

JUDGMENT

Introduction

1. The claimant filed a Memorandum of Claim dated 1st July 2021 seeking the following reliefs against the Respondents for:
 - a. Payment of all the unpaid salaries and allowances for the months starting August 2017 to 31st August 2019 totalling to a sum of Kshs. 4,315,080/=
 - b. Payment of a sum of Kshs. 1,337,674.80 being the service gratuity at the rate of 31% of annual basic pay for the two years leading to the expiry of the contract.
 - c. Costs of the suit.
 - d. Interest on the above until payment in full.
2. The respondent denied liability and filed a counterclaim against the claimant the sum of kshs. 11,584,402 being the amount lost by the respondents due to the claimant's actions or omissions.



Factual background

3. The Claim is based on the Claimant's witness statement and bundle of documents dated on the same day. A further list of documents was filed on 4th October 2022 and the claimant's testimony during the hearing.
4. In brief, the claimant's case is that he was appointed to the position of Secretary, Tharaka Nithi County Public Service Board (herein after called "the Board") vide letter dated 26th July 2013 and the same was to take effect 14th August 2013. The terms of the contract were that:
 - i. The appointment was a six-year contract at the end of which the Claimant would be entitled to service gratuity at the rate of 31% of annual basic pay for every year served.
 - ii. The salary was in the range of Kshs. 114,543 -152,060 pm.
 - iii. The entry point salary was Kshs. 114,543/- pm in which the future incremental date was to be determined depending on the date of appointment.
 - iv. A house allowance of Kshs. 20,000/- p.m
 - v. Commuter allowance of Kshs. 20,000/- p.m.
5. He performed his duties with faithfulness, diligence professionalism, and in full compliance with his contract until he was directed to proceed on compulsory leave vide letter dated 11th September 2017. The reason cited was that he was under police investigation. His salary was withheld forcing him to challenge the Respondents' decision vide Nyeri ELRC JR No. 13 of 2017; *Republic v County Secretary, County Government of Tharaka Nithi & Another Exparte Kenneth Ntwiga Kanga* [2018] eKLR. The Court quashed the said letter by the Respondents vide its judgement of 11th May 2018.
6. However, he never resumed work since the Respondent frustrated and restrained him from performing his duties and continued to withhold his salary and allowance until the end of his contract. On 10th June 2019, he received a letter from the respondents informing him that his six years contract was to expire on 13th August 2019.
7. It is further claimant's case that the Respondent's actions to withhold his monthly salary and terminal benefits amounted to unfair labour practices. Therefore, he urged the Court order the Respondents to remit the amount of Kshs. 4,315,080/- being salary from August 2017 to August 2019 at the rate of Ksh. 179,795/- per month plus gratuity.
8. He confirmed that he was a member of the Board and also its secretary. He further confirmed that he signed all the appointment letters for the employees after resolution by the Board. He denied that he wrote the letter dated 5th August 2013 and because that was before he was sworn into office on 14th August 2013.
9. He stated that he was suspended on 11th September 2017 and he was asked to hand over to the Governor which he did in the presence of the Board Chairman. He handed over the minutes book, his personal file where he kept drafts, and computer hard disk. The seal was kept in the cabinet for important things of the Board and the Board HR officer one Karen Gatune was custodian of the keys to the cabinet.
10. On 15th September 2017, he was charged with abuse of office in Criminal Cause No. 789 of 2017 but he was not given any interdiction letter thereafter. He admitted that Karen Gatune was charged with him.
11. He admitted that when he reported back after succeeding in his Judicial review case, he was asked to stay away due to the pending criminal case and the appeal. He further admitted that he never worked



- since 11th September 2017 until his contract expired but he contended that he was entitled to salary during the compulsory leave. He contended that he was prevented from working by the respondents. He contended that he was sent on compulsory leave to allow investigations but his contract expired before the criminal case had ended.
12. He denied that he wrote any letter to Stephen Munene Njagi and contended that the same was not before the Court for him to see. He confirmed that there was a lot of fraud by the employees at the County but clarified that the allegations made against him in this suit were raised in the criminal case but he was acquitted.
 13. With respect to the extract from the Payroll stamped 31st March 2022, he stated that the same was prepared after he had left the Respondents. He stated that the list of the 24 employees were added to the payroll between October 2014 and April 2017. He stated that the Board was not responsible for adding employees to the payroll but the HR department. He admitted that the HR relied on the Appointment letters from the Board to add employees to the payroll. He denied liability to pay the lost amount of Kshs.11,584, 402 paid to the 24 persons in the extract payroll since he was not convicted in the criminal case. Besides, addition of people to the payroll was not his work.
 14. In response, the Respondents filed joint Memorandum of Response and Counterclaim dated 6th June 2022. They also filed a written statement by County Secretary Mr. Alexander Muchemi Muratha, formerly respondents' Director of human resources and two bundles of documents in the list date 6th June 2022 and 24th February 2023. Finally, Mr. Alexander Muratha tendered oral testimony during the hearing.
 15. In brief the Respondents' case is that the Claimant did not serve faithfully, diligently, professionally or in compliance with his contract. They accused the Claimant of fraud, negligence and breach of contract as in the following manner:
 - a. Failure to discharge his responsibilities/duties with integrity, commitment and efficiency.
 - b. Failure to prevent the introduction of ghost workers in the Respondents' payroll.
 - c. Deliberately issuing appointment letters to strangers with the aim of defrauding the Respondents.
 - d. Misappropriation of or directly occasioning loss of at least Kshs. 11,584,402.00
 16. It is further Respondents' case that the Claimant was, on 15th September 2017, charged with the criminal offence of abuse of office by arbitrarily and irregularly employing workers in absence of the authority of his office between 2015 and 11th September 2017. The Respondents averred that the Claimant together with others illegally introduced 24 workers into the County Government payroll occasioning the Respondents loss of Kshs. 11,584,402.00. The Respondent stated that the letters illegally appointing the workers were prepared and signed by the Claimant. However, the claimant was acquitted of the said charges.
 17. It is further Respondents' case that:
 - a. The Claimant's employment was scheduled to expire on 13th August 2019.
 - b. After the expiry of his contract, the Claimant refused to clear with the Respondents and was unable to account for the Kshs. 11,584,402.00 that the Respondents lost through his direct or indirect actions or omissions.



- c. The Claimant is estopped from claiming that the Respondents withheld his terminal dues on account of failure to clear with the Respondents.
 - d. The loss suffered by the Respondents exceeds the amount due to the Claimant, if any.
 - e. The Claimant has deliberately failed to disclose that the police investigations alluded to in paragraph 8 of his statement yielded to criminal prosecution in Chuka Criminal Case number 789 of 2019 (Republic v Kenneth Ntwiga Kanga & others).
 - f. After the expiry of his contract, the Claimant never visited the Respondents' offices to clear or demand for any payments whatsoever.
18. As a consequence of the foregoing matters the respondents contended that the Claimant breached sections 4.6 (h) of the Discipline Manual for Public Service of May 2016, section 15 of the Public Officers Ethics Act, Chapter 183 of the Laws of Kenya and section 44(4) of the *Employment Act* Cap 226. They reiterated that the Claimant should pay them the Kshs.11,854,402 because he caused them to lose that amount through his fraudulent actions, negligence and breach of contract.
19. However, during cross examination, RW1 admitted that the Claimant had a duty of issuing appointment letters to employees after the process of recruitment by the Board that the secretary to the Board prepares appointment letters from the Board's minutes and that the minutes of the Board for the period when the 24 employees were recruited have not been produced as exhibits.
20. RW1 further admitted that the suspension letter stated that the Claimant would be notified when investigations ended but he was never given any such notice. He also admitted that the Claimant did not add the 24 persons to the payroll but he contended that the claimant signed the appointment letters.
21. Finally, RW1 stated that, after expiry of contract, an employee is expected to clear with the office, and the clearance report signed by the person handing over, the person receiving and a witness. The procedure also applies when an officer is taking a suspension and leave.

Claimant's submissions

22. The Claimant framed the following issues for determination:
- a. Whether the Claimant is entitled to recover his salaries and allowances;
 - b. Whether the Claimant is entitled to receive gratuity payment;
 - c. Whether the Respondent's counterclaim is merited.
23. The Claimant submitted that the Respondent began to withdraw his salary and allowance after illegally sending him on compulsory leave, yet they didn't have the power to so do. He further submitted that his compulsory leave was quashed by the court in Nyeri ELRC JR No. 13 of 2017 on grounds that it was not compliant with provision of section 58 (b) of the *County Governments Act* (CGA). In essence the court held that the action by the respondents was unlawful, unprocedural and illegal as they did not have disciplinary powers over the Claimant. However, he was not allowed to resume work.
24. The Claimant submitted that he is entitled to the reliefs sought since the Respondents had no power to send him on compulsory leave. Further, the withholding of his salary was illegal, invalid and unlawful due to the procedural defects. He further submitted that the Respondents' actions violated his rights under articles 41 and 47 of *the Constitution*. He relied on the case of *Brian Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya* [2019] eKLR.



25. On the issue on gratuity pay, the Claimant submitted that the letter of 26th July 2013 stated that his contract would be for six-years and at the end of which the Claimant would be entitled to gratuity at 31% of annual basic pay for every year served. The Claimant contended that gratuity is either based on employer's practice or contract terms and in support relied on the case of *Nelson Kesbei v Narok County Government & Another* [2019] eKLR.
26. He contended that he always was ready and willing to discharge his mandate but the same was made impossible by the Respondents' actions to send him on compulsory leave and thus the Respondents should not be allowed derive profit from their unprocedural, illegal and unlawful acts against him for two years. In that regard, he argued that he was entitled to gratuity of Kshs. 1,337,674.80 for the two years leading to the expiry of his contract.
27. As regards the merit of the counterclaim, the Claimant submitted that the issues raised by the Respondent in the Counterclaim were raised in the Nyeri ELRCJR No. 13 of 2017 but the Court faulted the Respondents' actions. The Claimant argued that the Respondents' had no proof of the issue of the 24 ghost workers and the loss of Kshs. 11,584,402.00. Consequently, he submitted the same was baseless.
28. He argued that the Respondents did not call any of the workers as witnesses or produced a report either internal or police showing that the Claimant was guilty. Further, the Respondents failed to connect him to the payroll preparation and salary payment. He argued that had he been guilty of abuse of office, the Court would have found him as much in the criminal case. He contended that the suspension was a plan by the Respondents to remove him from office as he was employed by the previous regime. He therefore urged this Court to protect the integrity of employment contracts from the change in governance.
29. The Claimant submitted that he confirmed by evidence that he handed over to the Governor in the presence of the chair of the Board when he was sent on leave. He also submitted that RW1 confirmed that the seal was with the investigators and was returned upon conclusion of investigations. He also argued that the Respondents did not show that he went away with any official material that he refused to clear. He therefore urged the Court to find that he cleared with the Respondents as directed by the letter of 11th September 2017.

Respondents' submissions.

30. The Respondents submitted that, since the Claimant did not file any response to the Counterclaim, the same was unopposed and they proved their case on a balance of probabilities. In support, they relied on the case of *Punch Nigeria Ltd v Attorney General* 1996 Commonwealth Human Rights Law Digest 46 and the case of *Kariuki Gathitu v Attorney General* [2013] eKLR where the Court cited the case of Nairobi HCCC No. 1408/2004 Rumba Kinuthia v Attorney General.
31. The Respondents further submitted that, under section 59 of the County Government Act, only the County Board could appoint a person to serve in the county government. They submitted that, a person can only be appointed to an office created by an act of parliament or office created under section 62 of the CGA, and the appointment must be through a competitive process. They relied on the case of *Republic v Secretary County Public Board & another Ex parte Hulbai Gedi Abdille* [2015] eKLR to fortify the foregoing submission.
32. They argued that the Claimant illegally introduced 24 workers which was in contravention of sections 65 and 66 of CGA and Article 10 of *the Constitution*. Consequently, the Respondents submitted that the Claimant ought to compensate them for the money paid illegally to the 24 ghost workers.



They prayed for the counterclaim to be allowed since the Claimant admitted that the 24 workers were introduced under his watch. The Respondent also submitted that the Claimant was not entitled to any pay since he did not work for the period claimed. The Claimant relied on the cases of [D.K. Njagi Marete v Teachers Service Commission](#) [2013] eKLR and [Menginya Salim Murgani v Kenya Revenue Authority](#) [2008] eKLR to buttress their submission.

33. The Respondents further submitted that the Claimant is not entitled to gratuity since he did not serve from August 2017 to August 2019. They contended that the Court cannot rewrite the contract for the parties to include other terms not envisaged by parties. They relied on the case of [National Bank of Kenya Ltd v Pipeplastic samkolit \(k\) Ltd](#) [2011] eKLR in support of their submission.
34. They prayed for costs arguing that the successful party should be awarded costs. For emphasis, they relied on the case of [Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others](#) [2014] eKLR and [Republic v Communications Authority of Kenya and Another ex-parte Legal Advice Centre aka Kituo Cha Sheria](#) [2015] eKLR.

Issues for determination and analysis

35. I have considered the pleadings, evidence and submissions by the parties and the issues that arise for determination are as follows:
 - a. Whether the Claimant is entitled to his salaries and allowances for the 11th September 2017 to 13th August 2019.
 - b. Whether the Claimant is entitled to payment of any gratuity for the six years contract.
 - c. Whether the Respondent's counterclaim is merited.

Claim for salary

36. The issue of unpaid salary in this case is fairly straight forward. The claimant was sent on compulsory leave vide the letter dated 11th September 2017 and his salary withheld. He successfully challenged the said letter by way of Judicial Review before this court but the respondent declined to let him resume work. He also faced criminal charges until his contract lapsed on 13th August 2019. He is therefore entitled to payment of his salary for the period between 11th September 2017 and 13th August 2019 when the contract lapsed by effluxion of time.
37. He has computed the unpaid salary based on a gross pay of Kshs. 179,995 per month. The payslip for August 2019 reflected a gross pay of Kshs.181,347 but I will award what he has pleaded being total Kshs.179,995 x 23= Kshs.4,139,885.00.
38. He cannot be denied his legitimate salary on allegation that he did not perform any duties. He resisted the compulsory leave and won the case in court but the employer locked him out of work. He is therefore entitled to pay for no work done because of the employers' choice to deny him work even after this court had reinstated him. This view is fortified by the fact the claimant was acquitted of the criminal charges preferred against him on 15th September 2017. It is a breach of [the constitution](#) to mistreat a public officer at work place.
39. Article 236 of [the Constitution](#) provides for due procedure to be followed in disciplining of public officers as follows:

“ Article 236. Protection of public officers

A public officer shall not be-



- a. victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
- b. dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law”.

Gratuity

40. The issue of gratuity is also fairly straight forward in this case. The parties had a written contract which provided for payment of gratuity to the claimant upon completion of the contract. There is no doubt that the claimant never left his employment either on resignation or termination before the expiry of the contract term. The respondent acknowledged that fact by serving the claimant with a notice of expiry of contract dated 10th June 2019, indicating that his contract was to expire on 13th August 2019.
41. Consequently, I hold that the claimant is entitled to gratuity at the rate of 31% of his annual basic salary for the said period of six years. However, he has only prayed for two years and that is what I award him being Kshs. 1, 337,674.80.

Counterclaim

42. The respondents have prayed for Kshs. 11,854,402 as money lost due to claimant’s omission or fraudulent actions. The respondents have burden of proof on balance of probabilities that the claimant committed the alleged fraud. This is so even if no defence was filed by the claimant considering that the criminal case against him was never proved. The counterclaim is premised on a payroll extract showing 24 persons as ghost workers who were paid the said money as salary.
43. The respondents sent the claimant on a compulsory leave to pave the way for investigations on the matter. Further, they caused him to be charged with criminal case but after four years trial, he was acquitted of the charges. The claimant’s contract lapsed without disciplinary proceedings being conducted against him and without any conclusive report of investigation having been prepared. In fact even in this suit no such investigations report was produced. The said list of ghost workers was extracted from table 221 in the Staff Audit Report of September 2017 page 29. Under paragraph 9.2 the Audit Committee recommended the following to the County Public Service Board:
 - “ 1. The above listed in Table 211[sic] be considered as ghost workers;
 2. payroll analysis on how much they were paid since they were included in the payroll be done;
 3. investigations on how they were entered in the payroll without the prerequisite documents and authority be conducted.
 4. Take[sic] action including charging and reprimanding the officers involved in their payment and removing all of them from the County Payroll.”
44. There is no evidence to prove that the recommended investigations were conducted by the Board since no Board member testified herein. It follows that the respondents have failed to prove on a balance of probability that the said persons were in fact ghost workers as alleged. They have failed to link the claimant with the offence of adding of the alleged ghost workers to the payroll. They have also failed to prove that the appointment letters allegedly signed by the claimant in favour of the alleged ghost workers was illegally done without board’s approval. Consequently, the counterclaim fails as it has not been proved on a balance of probability.



Conclusion

45. I have found that the claimant is entitled to payment of salary and gratuity as prayed in the petition. I have found that the respondents have not proved their counterclaim on a balance of probability. Consequently, I dismiss the counterclaim and enter judgment for the claimant as follows: -

- a. Payment of all the unpaid salaries and allowances for the months starting 11th September, 2017 to 13th August 2019 totalling to a sum of Kshs. 4,139,885/=
- b. Payment of a sum of Kshs. 1,337,674.80 being the service gratuity at the rate of 31% of annual basic pay for the two years leading to the expiry of the contract.
- c. Costs of the suit plus interest at court rate from the date of filing suit.
- d. The award is subject to statutory payment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 10TH DAY OF NOVEMBER, 2023.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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

