



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC PETITION NO. E054 OF 2021

OJWANG BERYLE ACHIENG.....1ST PETITIONER

SUNDAY AKOTH OYARE.....2ND PETITIONER

JARED OMONDI AKAI.....3RD PETITIONER

RONNY CHREASER NYAKODI.....4TH PETITIONER

FRYANNE ACHIENG UHURU.....5TH PETITIONER

VERSUS

HOMABAY COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

COUNTY GOVERNMENT OF HOMABAY.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioners lodged this Petition together with a Notice of Motion Application, both dated 19th September, 2021 and filed in court on 20th September, 2021.
2. The application was certified urgent and fixed for interparties hearing on 6th October, 2021. During the hearing, the Petitioners prayed that the application be allowed as prayed as the same was not opposed.
3. The court dismissed the application and directed Parties to canvass the petition through written submissions.
4. The Respondents filed their Response to the petition on 15th October, 2021.
5. The petition is premised on Articles 2, 3, 10, 22, 27, 28, 47, 63, 165(3), 258 and 259 of the Constitution. The Petitioners seek the following orders:
 - i. A declaration that the actions of the 2nd Respondent were against public policy, the Constitution and the relevant Statute.
 - ii. A declaration that the Respondents breached the rights of the Petitioners.
 - iii. A declaration that all the Petitioners be reinstated to their respective positions as per their appointment letters.
 - iv. A declaration that the 2nd Respondent pays the Petitioners their accrued dues since the date of appointment.
 - v. The Respondents pay the Petitioners the costs of the petition

The Petitioners' Case

6. The Petitioners contend that they were all recruited by the Respondents on various dates between 4th January and 17th February, 2017, as clerical officers. The Petitioners further aver that upon their appointment, they were posted to various duty stations within the jurisdiction of the 2nd Respondent.

7. The Petitioners state that the officers in charge of the receiving stations confirmed that they had reported to their work places and did letters to that effect to the Respondents.

8. The Petitioners aver that three months after they reported on duty, they were dismissed from duty without any reason, rendering them jobless. It is their assertion that their termination was illegal as no investigation was carried out linking them to any form of misconduct.

9. It is the Petitioners' case that they sat interviews prior to being appointed to their positions.

The Respondents' Case

10. The Respondents' case is that the Petitioners' employment letters are fake, fraudulent, unprocedural, and unauthorized.

11. It is the Respondents' assertion that the purported recruitment of the Petitioners is illegal and contrary to the provisions of Part II of the Respondents' Human Resources Policies and procedure manual for public service and Sections 65 and 66 of the County Government Act, which requires wider circulation of the advertisement and competitive recruitment.

12. The Respondents state that there was no advertisement and/or declaration of the vacancies the Petitioners now purport to have been appointed to, contrary to the existing Regulations of the 2nd Respondent. The Respondents further aver that there are no records of the Petitioners' applications, shortlist and neither were they interviewed for the positions as alleged.

13. It is the Respondents' position that the officers who signed the purported employment letters had no authority so to do, and acted unprocedurally and that their actions were ultra vires, hence null and void.

14. The Respondents state that the 1st Respondent conducted a head count and a pay roll audit in December, 2017, and the Petitioners neither appeared for the head count nor were their names in the County payroll. It is the Respondents' position that the Petitioners have never worked at any of their health facilities.

15. The Respondents avers that the purported appointment of the Petitioners did not meet the requirements of Articles 10, 27(4), 56 and 232 (1) of the Constitution. It is their case that there was no request from the Respondents' department of health to recruit nor was any approval given for the recruitment of the Petitioners.

16. The Respondents aver that the Petitioners tried to conspire with some of their staff to enter them into the Respondents' payroll without success. The Respondents states that they are aware of ghost workers that were sent away in December, 2017 and is the reason the Petitioners are claiming for salaries from December, 2017.

17. The Respondents' state that the Petitioners want the court to sanitize an illegality so that they are absorbed into the service of the Respondents. They further aver that they have no vacant positions and that their personnel emolument is currently overstretched.

18. The Respondents state that the Petitioners have neither been victimized nor discriminated against and are only seeking to join their employ through conspiracy and fraud.

19. It is the Respondents case that the Petitioners petition has not met the threshold for granting of the orders sought and has been brought in bad faith.

Analysis and Determination

20. The issues for determination in this petition are:

- i. Whether the Petitioners were employees of the Respondents
- ii. Whether the Petitioners deserve the reliefs sought

Whether the Petitioners are/were employees of the Respondents

21. The Petitioners claim to have been appointed to the service of the Respondents on various dates between 4th January and 17th December, 2017. The Respondent deny ever appointing or posting the Petitioners to any of their stations.

22. The Petitioners have produced in evidence appointment and posting letters, said to have emanated from the Respondents. The Respondents have both in their replying affidavit and submissions, denied the appointment and posting letters produced by the petitioners herein.

23. All the posting orders said to be letters posting the Petitioners to various stations of the Respondents are unsigned, while the letters

confirming that the Petitioners reported to their respective stations, are addressed to the Chief Officer of health, but the language communicating the reporting is directed at the Petitioners. The letters were obviously not written by a human resource professional.

24. Secondly, the appointment letters produced in evidence are illegible and this court is unable to ascertain their authenticity.

25. The Petitioners have not proved to this court that they went through a legitimate recruitment process, which resulted in them being issued with the appointment and posting letters produced before this court. It was incumbent upon the Petitioners to produce all the documentations relating to the entire recruitment process and not just appointment letters.

26. In the opinion of this court, the Petitioners have not proved that they were legitimate employees of the Respondents. They have also not controverted the assertion by the Respondents that they could have been ghost workers. If they were not, they would have presented themselves for the head count and pay roll audit mounted by the Respondents.

27. The Petitioners were recruited between January and February 2017 and terminated three months' later. For this reason, the instant petition is time barred by dint of Section 90 of the Employment Act.

Petitions are ideally meant to enforce a violation of Constitutional rights and not generally subject to the statute of limitation. However, the instant petition is a simple employment matter and which could have been lodged as an ordinary claim if not for the intention of avoiding the perils of limitation of time per Section 90 of the Employment Act.

28. The Petitioners cannot cite Constitutional provisions to lay claim to benefits conferred by a flawed and unconstitutional process. An employer is under no obligation to onboard persons who are unprocedurally recruited to its service.

29. The upshot is that the petition is dismissed in its entirety.

30. Parties shall bear their own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH

DAY OF JANUARY, 2022

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Petitioners

Ms. Namusubo present for the Respondents

Christine Omollo- C/A