



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

PETITION E002 OF 2021

GIDEON KIBET TOROMO.....CLAIMANT

VERSUS

BARINGO COUNTY GOVERNMENT.....1ST DEFENDANT

THE GOVERNOR BARINGO COUNTY.....2ND DEFENDANT

BARINGO COUNTY PUBLIC SERVICE BOARD.....3RD DEFENDANT

RULING

1. Through a Notice of Motion dated 26th January, 2021, the applicant sought orders among others that:

- a. That the court do issue an order restraining the respondents from declaring vacant, advertising or conducting any interviews for a position of Chief Officer Baringo County Government pending hearing and determination of this application inter-parties.
- b. That the court do issue an order restraining the Respondents from declaring vacant, advertising or conducting any interviews for position of Chief Officer health services and interfering with the respondents' duties as Chief Officer Baringo County Government pending hearing and determination of the petition filed herewith.
- c. That the respondents, be directed to reinstate/restore the claimant into his office as the Chief Officer Health Services in Baringo County pending the hearing and determination of the petition filed herewith.

2. The application was supported by the affidavit of the petitioner who deposed inter alia that:

- a. That preceding to this claim, I was acting and diligently discharging my services as the Chief Officer, Health Services Baringo County.
- b. That I was employed by the Baringo County Government as the County Chief Officer Health Services vide a letter of appointment dated 29th June, 2018.
- c. That upon assumption of office I discharged my functions as a Chief Officer Health Services with high levels of integrity and commitment as was stipulated in the contract form the date of appointment.
- d. That vide letter addressed to me dated 8th December, 2020 the County Secretary at the behest of 1st and 2nd Respondents purported to terminate my service referring to "BELATED EXTENSION OF SECONDMENT" dated 4th November, 2020. *Annexed herewith and marked as 'GKT3' is a copy of the said letter.*
- e. That the County Government through the office of the county Secretary and head of Public Service purported to wrongly interpreted and relied on the said letter acted on its strength and purported to terminate my contract which to say the least was devoid of any valid reasons/explanations. See the letter referring to "secondment to Baringo County Government" dated 8th December, 2020. *Annexed herewith and marked as 'GKT4' is a copy of the said letter.*
- f. That in-fact the purported letter from the ministry of health by the principal secretary was for an extension of Secondment to the County government from the 1st July 2018 to 14th October, 2020. And the purported termination based on the letter was

mischievous and abuse of the law.

g. That I hold that the above mentioned letter dated 8th December, 2020 signed by the County Secretary Baringo County Government purporting to constructively dismiss me is malicious, mischievous and does not hold any water, its contents are vague/ambiguous since it has not disclosed valid reasons for my termination.

h. That I still maintain that the contract entered between me and the Baringo county is not secondary to any other contract and is therefore valid and binding upon the respondent and the County Government of Baringo and all due processes must be followed on release or termination of my services.

3. The 1st respondent filed a replying Affidavit through one Francis Komen who stated among others that.

a. That I am the County Secretary of the 1st Respondent hence competent to make and swear this affidavit.

b. That the said application is overtaken by events, is lacking in merits and is made in bad faith.

c. That is true that on 29th June, 2018 the Petitioner/Applicant was appointed as the County Chief Officer in the Department of Health services with effect from 1st July 2018. The appointment letter provided that the Petitioner will serve in the said position until another duly appointed Chief Officer reports to the Department. Annexed and marked FK1 is a copy of the appointment letter.

d. That the petitioner is an employee of the Ministry of Health and was on secondment to the County Government of Baringo.

e. That in the belated secondment to the 1st Respondent, the Principal Secretary Ministry of Health was categorical that the Petitioners' secondment was with effect from 1st July, 2018 to 30th June, 2020.

f. That the Petitioner's secondment period has since lapsed and his contract with the 1st Respondent ended on 30th June, 2020 following the lapse of the secondment. *Annexed and marked FK2 is a copy of the secondment letter.*

g. That there is no extension of the Petitioner' secondment by the Ministry of Health beyond 30th June, 2020.

h. That the 1st Respondent has already appointed Mr. David Cherop as the County Chief Officer for Preventive and Promotive Health Services. As such there is no vacancy in the office of the County Chief Officer to warrant the orders sought by the Petitioner.

i. That the petitioner left employment as soon as his secondment lapsed following our release letter, a copy of which is *annexed herewith and marked FK3.*

j. That it was incumbent upon the Petitioner to seek extension of his secondment beyond 30th June, 2020. Since the Petitioner's employer, the Ministry of Health was categorical in its belated extension that his secondment will lapse on 30th June 2020, we are under no obligation to extend the Petitioner's contract.

k. That the Petitioner was duly informed in writing that the 1st Respondent had released him to his principal employer the Ministry of Health following the lapse of his secondment.

4. The Court has reviewed and considered the Motion, the supporting affidavit and the replying affidavit by the respondent. The Court has further considered submission by counsel for either party and notes that the question that stands to be resolved is whether the applicant has put up a *prima facie* case with probability of success and further whether damages would not be adequate in the event the petitioner succeeds in the main petition.

5. It was not disputed that the petitioner by a letter dated 29th June, 2018 was appointed as County Chief Officer in the Department of Health Services. The appointment letter provided that the petitioner would serve in that position until another duly appointed Chief Officer reported to the Department.

6. By a letter dated 3rd September, 2018, the 2nd respondent informed the petitioner of the revision of his contract period from one year to four years with effect from 1st July, 2018. It is however important to note that the letter of 29th June, 2018 appointing the claimant as County Chief Health Officer with effect from 1st July, 2018, did not specify the period but merely stated that the petitioner would serve the position until another duly appointed chief officer reports to the departments.

7. By a letter dated 4th November, 2020 and titled "**BELATED EXTENSION OF SECONDMENT**" the Principal Secretary Ministry of Health informed the petitioner that his request for secondment contained in his letter dated 23rd July, 2018 had been granted approval for belated extension of secondment to the County Government of Baringo with effect from 1st July, 2018 up to and including 30th June, 2020.

8. The letter dated 3rd September, 2018 referred to earlier, granted the petitioner a contract to serve as County Chief Health Officer for four years with effect from 1st July, 2018. This implies the petitioner was to serve until 31st June, 2022.

9. Further, the letter dated 4th November, 2020 which the respondent seemed to have relied on to claim the Petitioner contract with them had expired was dated almost five months after the expiry of the approval of the petitioner's secondment to serve as Chief Health Officer – Baringo County.

10. From the foregoing one of the issues to be determined in the main petition would be the effect of the belated secondment letter dated 4th November, 2020 on the contract entered into between the petitioner and the Respondents on 1st July, 2018 and modified by the letter dated 3rd September, 2018 and further whether the respondent was justified in releasing the petitioner back to Ministry of Health on the basis of expiry of his secondment yet they had a running contract with the petitioner for four years.

11. This is an interlocutory application and the role of the court as observed earlier is to establish whether the applicant has established a *prima facie* case with probability of success and if successful, damages would not be adequate compensation.

12. From the foregoing the Court is persuaded that the petitioner has established a *prima facie* case with some probability of success however the Court is of the view that damages would adequately compensate him if successful.

13. Section 49 of the employment Acts caps the amount for compensation for unfair termination of employment to twelve months salary.

14. The claimant has sought reinstatement however *prima facie* and from submission by counsel and deposition by the respondent that the position previously held by the petitioner has been filled, makes a reinstatement order less likely.

15. In any event, this matter was brought ex-parte and the duty judge then did not consider it merited the grant any of interlocutory orders preserving the position previously held by the petitioner. I too, have not been so persuaded that it deserves interim orders.

16. Concerning the bringing of this suit as a constitutional petition, the Court holds the view that the issues involved are ordinary employment disputes and did not require to be escalated as constitutional petition.

17. In conclusion, the Court does not find the granting of the interim orders sought merited and hereby dismisses the motion.

18. Costs will be in the cause.

19. **It is so ordered.**

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF FEBRUARY, 2022

ABUODHA NELSON JORUM

JUDGE ELRC