



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. E002 OF 2021

TONNY OIRA BIRONGA.....1ST CLAIMANT
EVERLYNE MOGERE.....2ND CLAIMANT
JOHNSON NYANDIKA MORIASI.....3RD CLAIMANT
REBECCA OKARI.....4TH CLAIMANT
NICODEMUS NYAMWEYA MORARA.....5TH CLAIMANT
PATRICK NUMBI MAMBOLEO.....6TH CLAIMANT

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD
COUNTY GOVERNMENT OF NYAMIRA.....2ND RESPONDENT

JUDGEMENT

1. The 1st and 3rd – 6th claimants are employees of the Teachers Service Commission while the 2nd claimant is employee of the Ministry of Interior & Coordination of National Government. On 1/3/2016, the Chairman of the 2nd Respondent wrote to the claimant's respective employers seeking for the release of the claimants to work for the 1st respondent on secondment. The letter also asked the said employer to suspend pension for the claimants until retirement age and offered to pay their salaries and other benefits for the contract period.

2. The Claimants were released by their respective employers on secondment to the 1st respondent effective 1.4.2016 and they were given contracts setting out the terms of engagement.

3. In the course of time, the 2nd respondent advertised substantive vacancies in the positions the claimants were holding and they were recruited on permanent and pensionable terms. However, the said recruitment was nullified, but they continued under the secondment contract. From 1.4.2016, they were not added in the respondent's pay roll and they kept of agitating until the respondent agreed to pay.

4. On 29.3.2019, the 1st respondent released the claimant back to their respective employers and copied the release letter to the 2nd Respondent. As the time of the release letter the claimant were yet to be added in the respondents Pay Roll and had not been paid any salary. Therefore, they brought this suit on 26.3.2021 seeking the following reliefs: -

- a) *Kshs. 24,592,372;*
- b) *General damages for breach of contract and consequent inhumanity;*
- c) *Certificate of service and statement of last payment;*
- d) *Exemplary damages;*

e) *Costs of the suit; and*

f) *Interest of (a) above at court rates.*

5. The respondents filed defence on 3.6.2021 in which they admitted that they requested for deployment of the claimants to the 1st respondent on secondment terms, in order to bridge the staffing needs in the county Government. They further admitted that the claimants were released to the County Government on secondment terms as requested. However, the respondent averred that the claimant's appointment was marred with controversies and consequently nullified by the 1st respondent because lawful procedure was not followed in recruiting the claimants.

6. The respondents further averred that the 2nd respondent advertised the position held by the claimants in order to regularise the appointments. The respondents averred that the claimants were notified of the cancellation of their appointments and they were never deployed to their stations nor were they assigned any duties.

7. The respondents further averred that the claimants applied for the jobs after the advertisement and they were interviewed and appointed vide letters 26.10.2016. The respondents also averred that even the appointments made on 26.10.2016 were nullified by the court by judgment delivered in ELRC NO. 13 of 2016. The respondent contended that the substance of the said case was the same as the in the instant case and therefore the suit is res – judicata.

8. On the other hand they averred that the claim for salary for the contracts nullified in April 2016 is time barred for being filed more than 3 years from the time of separation. For the reasons stated above the respondents averred that the claimants are not entitled to the relief sought in their memorandum of claim.

9. The suit went to full hearing. Both sides called one witnesses and thereafter filed written submissions.

Claimants Evidence

10. The 1st claimant, Mr. Tonny Oira Bironga testified as CW1 on behalf of all the 6 claimants. He restates the facts in the memorandum of claim and his written statement dated 22.3.2021. *In brief* he stated that the 2nd respondent wrote to their employers in March 2016, requesting for their release to the 1st respondent on secondment. He further testified that their employers released them immediately and they were appointed by the 2nd respondent effective 1.4.2016 vide written contracts for 3 years.

11. He further testified that in the course of time, the 2nd respondent advertised positions and they applied because they were promotional positions. However they failed in the interviews and continued working in their earlier positions. He contended that the continued working throughout the period of secondment. They never abandoned work and they never received any letter terminating their secondment contract. Never the less they were never placed on the respondents' payroll.

12. On Cross-examination CW 1 stated that he was appointed by the 2nd respondent. On 22.3.2016 and he was released by the Teachers service Commission on 5/4/2016. He was appointed Assistant Director Alcoholic Drinks Control and Licensing and he started work on 6.4.2016. He reported to the Head of Department Executive committee member in charge Mr. Ogwara.

13. He testified that they were promised payment but up to the end of their 3 years contract and they were never placed on the payroll and they were never paid. He contended that he has produced documents evidence to show that they kept on pushing for their pay but nothing was paid. He reiterate that they applied for the new positions advertised in July 2016 because they were promotional. He applied for the position of County Deputy Director Alcoholic Drinks Control and Licensing Job Group Q, which was permanent and pensionable. His position on secondment was a contract one. He maintained that his secondment contract was never revoked. He also contended that he was among those who filed **Kisumu ELRC 13 of 2017** and clarified that the court dismissed the suit but it never nullified their appointment.

14. On re-examination, CW1 maintained that the claimants worked in acting capacity upon their secondment to the 1st respondent until the end of their contracts term when they released by a letter from the County Secretary and the Head of County Public Service.

15. The second Respondent ead of County Public Service.s' Director HR and Administration testified as RW1. He also adopted his written statement dated 31.5.2021 and the respondents list of documents as is evidence in Chief. In brief he admitted that all the six claimants were seconded to the respondents by their respective employers and they were given appointment letters.

16. He confirmed that the 1st Claimant was appointed Deputy Director alcoholic Drinks control 2nd 4th, 5th and 6th claimants were appointed principal Cultural offices while 3rd claimant was appointed Deputy Director Youth and social services. He confirmed that the appointments were on secondment basis and not direct appointment. The secondment was as a request from the executive Committee Members concerned but the County Secretary and ead of ublic Service, Mr Onchma nullified the said appointment by his letters dated 1/4/2016 pending inerogations the letter was copied to the Chief offcfr Gendedr. Head of Public Service, Mr. Eric Onchama, nullified the said appointment by his letters dated 1.4.2016 pending interogations. The letter was copied to the Chief Officer Gender.

17. PW 1 further testified that on 19/4/2016, the 2nd respondent wrote to the Chief Officer gender, advising that the said appointment should not be acted d upon. On 29/4/2016, the Chief Officer gender, responded saying that there was unable to assign duties to the claimants due to the controversy. Consequently, RW1 contended that the claimants never took up the appointments after they were revoked by the letter dated 1.4.2016.

18. RW1 further testified that the claimant's jobs were advertised and the claimants applied. After shortlisting and interviews the claimants were appointed by new letters. He maintained that the second appointment is the evidence that the initial appointments on secondment were nullified.

19. RW1 further testified that another controversy arose concerning the second appointments and the claimants filed **Kisumu ELRC No. 13 of 2017** but the suit was dismissed and the appointments were nullified. He maintained that the claimants were never employees of the respondents because they were never allocated any duties or even entered in the payroll.

20. On Cross-examination, RW1 admitted that he had no written authority from the 2nd respondent to give evidence herein. However, he contended that he had been verbally authorized. He was the Chief HR office before 2019 when he became the Director.

21. He admitted that the 2nd Respondents Chairman, Mr Nyakundi is the one who requested for the claimants' to be seconded to the 1st respondent and he is the same person who signed their appointment letters. RW 1 admitted that the claimants were not under his supervision. However, he admitted that in his written statements, he alleged that the claimants had absconded duty and never rendered any services.

22. RW1 further admitted that the claimants were never served with warning letters or taken through disciplinary proceedings, for the alleged absconding of duty. However, he admitted that the County Secretary and ead of public service released the claimants back to how employees by the letter dated 29.3.2019 and thaked them frothe services they rendered to the County of Nyandrwa. Head of Public Service released the claimants back to their employers by the letter dated 29.3.2019 and thanked them for the services they rendered to the County of Nyamira.

23. RW1 admitted that the claimants were not paid during their period in the County of Nyamira. He also did not know whether there was any budget allocation for the claimants. He stated that secondment occurs where an employer requests for skill which it does not have while recruitment refers to direct appointment by the employer.

24. RW1 maintained that the claimant were appointed on secondment but their appointment was evoked and the positions were advertised.

25. On re-examination, RW1 admitted that he is not a member of the 2nd respondent Board but contended that he did not need written authority to request the board in giving evidence herein. He maintained that he was unaware of any budget allocation for the claimants.

Claimants' Submissions

26. The claimants submitted that their secondment to the respondents was grounded on the statues and the constitution. They cited section 15 (2) (a) of the Sixth Schedule to the constitution, section42 (i) of the Public Service Act, section 73 of the County Governments Act.

27. They submitted that their appointment on secondment was never revoked from 31.3.2016 to 29.3.2019 when they were released to return to their respective employer after their 3 years contract lapsed. In their view, the County Secretary and Head of Public Service, Mr. Onchama Aori merely gave advisory by the letter dated 1.4.2016 but he never revoked the secondment contracts. They submitted that the same Mr Onchama Aori wrote the release letters on 29.3.2019 after the contracts lapsed and thanked them for the services rendered.

28. The claimants submitted that RW1 misled the court by alleging in his written statement that they absconded work. They maintained that the witness never produced any evidence to prove such absconding, like warning letters or other disciplinary action. Consequently they contended that they were employed by the respondents on secondment vide the letters dated 31.3.2016 and remained in the said employment until 29.3.2019 when they were released to return to their respective employers.

29. The claimants urged that they were never released by the respondents before 29. 3. 2019 and as such they are entitled to their salary and benefits under their secondments contracts. For emphasis, they relied on case of **NahashonCheruiyot & Ngeno –vs Strengthening of Mathematics & Science Education project &Another [2015] e KLR** where the court held that if an employee fails to perform as expected during the secondment contract, the employer on secondment should ask the Primary employer to recall the employee and not to terminate the employment of the seconded employee.

30. The claimant also placed reliance on the “**Guidelines on secondment in the public Service**” published by the Public Service Commission (PSC) in October 2016 and more specifically paragraph 5 which provides for one months' notice before termination of a secondment contract except where termination is for serious misconduct issues or emergency or exceptional circumstances. According to the claimants, their secondment appointment was never terminated under any such circumstances.

31. The claimants further submitted ha they never resigned from the secondment appointment when they applied for the advertised position and therefore when the new appointment were nullified they reverted to their position of secondment until the end of their contracts. They contended that if the respondent did not want their services, nothing was easier than to issue termination of the secondment contracts, but they never did so.

32. On the other hand, the claimants submitted that County Assembly of Nyamira funds in the supplementary budget of 2o18 the claimants accrued salaries and benefits totalling to Kshs 24,537,193 which funds were received by the employer but was never paid to the claimants even after warning by the Council of Administration of Justice.

33. The claimants urged the court to order for the payment of the reliefs sought because the actions by the respondent aroused in the claimants, a legitimate expectation that they would be paid for rendering their services during the secondment which was never terminated before the lapse of 3 years.The said expectation was affirmed by the appropriation of funds for their salaries and benefits.

Respondent's Submissions

34. The respondents; submitted that the claimants never rendered any services to the respondent under the contract dated March 2016. They contended that the claimant's contracts unlawful contracts *abinitio* and they were revoked by the County Secretary and Head of County Public service, Mr. Onchama Aori by the letter dated 1.4.2016 under section 75 (a) of County Government Act. They further contended that the Chief Officer Gender, Mr. Ernest Murara, wrote the letter dated 29.4.2016 stating that the claimants were never Assigned duties due to illegalities and irregularities in their appointments.

35. The respondents submitted that the appointments of the claimants was done in beach of the section 63 and the procedure set out in section 65(I) (a) and 66 of the County Government Act and Article 10 and 232 (c) (g) and (i) of the constitution. Consequently, according to the respondents the contracts though given by the 2nd respondent under section 63 of the County Government Act were not binding.

36. The respondent placed reliance on the case of **Governor Bungoma County v John Mining Timoi & 19 others [2019] e KLR** where the court of Appeal held that the failure to adhere to the principles of competition, merits, accountability, equality and transparency as advanced by section 65(I) of the County Government Act, rendered the nominations of County Chief officers unconstitutional, illegal and a nullity. The respondent urged this court to follow the foregoing decision.

37. The respondents further relied on **Republic v Secretary County Public Services Board & another Ex-parte HulbaiGediAbdille [2015] e KLR** where the court held that there cannot be a valid contract where such provisions of the County Government Act as section 65 and 66 and Article 10 of constitution are not complied with.

38. As regards reliefs sought, the respondents submitted that the claims are not entitled to the claim for Kshs 24,592,372 as salaries and benefits under the contracts dated March 2016 as they rescinded. The respondent reiterated that the claimants never rendered any services to them. The respondents further submitted that the claimants accepted the recession of the March 2016 contracts by their acceptance of the new appointments in October 2016, which were also nullified by the court.

39. Finally, the respondents submitted that the claimants are not entitled to certificate of Service because they never worked for them for required minimum period of 4 weeks. Therefore, they prayed for the suit to be dismissed with costs.

Issues for determination and analysis

40. There is no dispute that on 1.3.2016 the 2nd Respondent wrote to the claimant's primary employer seeking for them to be released to the 1st respondent on secondment. There is also no dispute that the claimants were released as requested and they were duly appointed for a term of 3 years. The secondment was requested under section 72,73 and 74 of the Count Government Act.

41. It is also a fact that on 1/4/2016, the County Secretary and Head of public service wrote to the Chairman of the 2nd Respondent recommending that the secondment of the claimants be withheld or revoked to facilitate further interrogation. It is also clear that on 17.6.2016, the 2nd respondent advertised the positions held by the claimants on secondment among other positions. Finally the claimants were interviewed and appointments on 26.10.2016 together with 50 other people. The said appointment was however nullified by the 2nd respondent on 24.1.2017 citing controversies that surrounded the recruitment and appointment of all the 56 appointees.

42. The Issues for Determination are-

- a) *Whether the secondment of claimants to the respondents was lawful.*
- b) *Whether the secondment contracts were terminated before the lapse of 3 years term.*
- c) *What was the effect of the second appointment on 26.10.2016 and subsequent nullification of the same on 24/1/2017?*
- d) *Whether the claimant are entitled to the reliefs sought.*

Whether the Secondment was Lawful

43. The claimant's case is that they were lawfully seconded to the respondents in accordance with the section 73 of the County Governments Act. They further argued that the Public Service Commission guidelines on secondment 2016 apply to them.

44. The respondent admits that under section 73 of the County Government Act, the 2nd Respondent can appoint claimants under a secondment contract. However, in this case, the respondent's case is that the secondment of the claimants in March 2016 was not in accordance with section 73 of the County Government Act and Article 10 and 232 of the Constitution.

45. The Section 73 of the County Government Act provides as follows:-

- i. The National Government shall put in place measures to protect its public officers on secondment to the counties from loss or disadvantage with respect to pension benefits, gratuity or other terminal benefits.***
- ii. Unless there is an agreement to the contrary, it shall be the responsibility of the National Government to pay the salaries, remuneration, allowances and other benefits due to the staff seconded to a County Government during the transition period.***

iii. If for any reason it is not necessary for an officer on secondment to remain seconded and the secondment period has not lapsed, the officer shall be entitled to revert back to the public office held before secondment.

iv. The County Public Service Board shall not allow a Public Officer to proceed on secondment if it is not in the interest of the public officer or the concerned County Public Service.

v. The County Public Service Board making a decision on secondment shall not allow the secondment unless it has considered the representation by the concerned authorized officer or head of department." [emphasis added]

46. Secondment to the County Public Service Board is allowed by the law for employees in the National government to County Governments by Section 73 above either for the interest of the employee or the concerned County Public Service. But what is secondment?

47. In general, secondments has been defined in the **Wikipedia** as "the assignment of a member of one organisation to another organisation for a temporary period." Clause 1.2 of the **Public Service Commission Guidelines on Secondments in the Public Service** published in October 2016 defines Secondment as:-

"...a temporary movement or 'loan' of an employee to a different organisation. Secondment means an arrangement in which pensionable employee is temporarily released from an Organisation within the Public Service to another organization which does not have reciprocal pension arrangement to provide critical skills while preserving the pension rights of the employee."

48. The basis of the claimants' secondment is captured in the minutes of consultative meeting held on 21.3.2018 concerning the claimants' petition to the Nyamira County Assembly. Minute 2/3/2010[sic] stated: -

"It was observed by the members that the then CE of Gender Youth Sports Culture Social Services, identified the officers and wrote to the CPSB to request for secondment of the six officers from the Teachers Service Commission. The County Public Service Board confirmed that indeed the then CECM GYSC and SS did identify the six officers five of who were working under the Teachers Service Commission and one in the Ministry of Interior for secondment and that the Board communicated with the affected state agencies for their release on secondment to the County. It is on that basis that the member noted that the CPSB offered the officers letters of appointment instead of secondment which was an omission"

49. The above minute went on to state that:

"Members, however noted that the secondment to the County for the six officers lapsed the moment they applied for and were appointed substantively to those positions. Consequently, this being the case the position of the ad-hoc committee is that the six petitioners are eligible and for the entitled to pay for period they were on the secondment up to the date they took up substantive appointments"

50. In conclusion, the committee made the following resolution: -

"...to pay the Petitioners for the period served on secondment and noted that the provision of the County Government Act 2012 article 73 part IV apply in the aftermath."

51. In view of the foregoing, it is clear that the secondment of the claimants to the respondent was justified and procedurally right. It was acknowledged by the said ad-hoc committee of the 1st respondent that the host department identified a gap in the staffing and requested the 2nd respondent to request for the secondment of the claimants to the host department. The 2nd respondent then exercised its mandate under of the County Government Act by receiving the claimants, signed a 3 years contract with each one of them and posted them to the Chief Officer of the host department.

52. There is no doubt that the County Assembly of Nyamira appropriated Kshs 24,537,193 for payments of the claimant's salary on secondment plus and arrears. The said appropriation was done under the County first supplementary estimate of revenue expenditure for the financial year 2018/2019.

The effect of the appointments on 26.10.2016 and subsequent revocation on 24/1/2017.

53. It is common ground that the on 17th June, 2016 the 2nd respondent advertised for recruitment of person to fill the positions held by the claimants on secondment among other positions. It is also a fact that the claimants applied and after the interview, they were all appointed on permanent and pensionable terms except the 4th claimants who was given 2 years contract.

54. According to the respondent and the aforesaid ad-hoc committee, the claimant's secondment contract ended when they applied and got appointed as employees of the respondent on 26.10.2016. However the claimants are in denial and contend that their second appointment and that of the other 50 persons was nullified by the 2nd respondent on 24.1.2017 citing controversies that surrounded the recruitment.

55. There is evidence on record to the effect that the appointments which were to take effect on 1.11.2016 never took effect. There is also evidence that the 2nd respondent advertised and recruited more employees than the number requested for, and without any budgetary provision.

56. It follows that the said second appointment of the claimants did not take effect and it was nullified by the employer. The claimants had applied for what seems to be promotional /greener pastures than the temporary secondment positions they were holding. There is no law that bars an employee on secondment from getting promotion or better terms of service. The logical conclusion is that if the greener pastures are denied, the employee does not lose the less green pastures he enjoyed before, unless it is shown that the employee served his primary employer with resignation letter before the new employer revokes the new appointment.

57. Consequently, I agree that when the respondents nullified the second appointment citing irregularities that surrounded the recruitments, then the claimants reverted to their secondment contracts for the remainder of their secondment term. This view is fortified by the letters of release by the County Secretary and Head of County Public Service dated 29.3.2019. The letters acknowledged that the claimants were in respondents' employment until the end of claim contracts. Head of County Public Service dated 29.3.2019. The letters acknowledged that the claimants were in respondents' employment until the end of claim contracts. The term of their contract ran from 1.4. 2016 to 1.4.2019.

58. The letters stated:

“RELEASE BACK TO TEACHERS SERVICE COMMISSION

The above matter refers. This is to inform you that your term of contract has come to an end with the Nyamira County Government. You are now officially released to Proceed to Teachers Service Commission w.e.f. 1st April 2019.

By copy of this letter the Chairman County Public Service is requested to confirm our release. On behalf of the County Government of Nyamira, I thank you for the services rendered and wish you the best in your next teaching assignment.

Erick Ochana Aori,

County Secretary and

Head of Public Service,

Nyamira County.

Cc

Secretary/Chief Executive Officer,

Teachers service Commission

P.O. Box Private Bag

Nairobi”

Head of Public Service Nyamira County

c.c.

59. In my view if there was any doubt as to when the claimant's secondment contract ended at Nyamira County Government then the above letter has clarified. The claimants served their entire contract term of 3 years and they were released with effect from 1.4.2019 to return to their primary employers.

Whether the claimants rendered services to the respondents

60. The answer to the question whether the claimants rendered services to the respondents is fairly straight forward. The foregoing release letter by the County Secretary and Head of County Public Services confirms that from 1.4.2016 till the time when the claimants were released to return to their primary employers, they were busy rendering services to the respondent. The said letter thanked them for their services.

61. Although RW1 in his written statement contended that the claimants absconded their duties, he admitted on cross examination that there is no evidence of any disciplinary action or proceedings taken against the claimants for the alleged absconding of duty. He also admitted that the claimants were never served with any warning letters for the alleged absconding. Consequently, I find and hold that the claimants have proved on a balance of probability that they never absconded work but they indeed rendered services to the respondents.

62. Even if they never rendered any services which has not been proved they were not to blame for that. It is the host employer who requested for them and kept them idle. If there was, no services to be rendered to the host employer should have released them to their primary employer even before the secondment period.

Whether the reliefs sought should be granted.

63. It has already been established that the claimants and the respondent were engaged in a binding contract of Services on Secondment from 1.4.2016 to and 1.4.2019. The terms of services were set out in the appointment letters dated either 22.3.2016 or 31.3.2016. The contracts were also governed by the Employment Act, County Government Act, and the Constitution of Kenya.

64. One of the obligations under the said appointment letter, statutes and the constitution is that the respondents were going to pay the claimants all their salaries and benefits for the whole period of their secondment service.

65. The said obligation is underscored in mandatory terms under section 17 of the Employment Act, which provides that the employer “ shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya either in cash, through a designated bank account, cheque, postal order or money orders, or in the absence of employee, through a person duly authorised by the employee in writing.”

66. The claimants were not paid their salaries and benefits during their term of 3 years contract and that amounted to a breach of contract. The claimants computed their aggregate claim sum of Kshs. 24,592,372. The said figure is almost equal to the figure of Kshs 24,537, 193 budgeted and appropriated by the County Assembly of Nyamira for their salaries and arrears. The said sum is computed in paragraph 23 of the Statement of Claim based on their minimum gross salary set out in letter of appointment for each claimant.

67. Having considered the contract of service for each claimant and the computation of the unpaid salary in paragraph 23 of the Statement of Claim is correct and I grant the same as prayed being Kshs 24,592.372. The said award is subject to statutory deductions but it shall attract interest at court rate from 1the date of filing the suit.

68. The claim for general damages for breach of contract is declined because the claimants have been awarded all their withheld salaries and benefits plus interest. Consequently, I am of the opinion that the claimants have been restored to the financial positions they would have been had the contract of secondment had been by the respondents.

69. The claimants are entitled to certificate of service for their contract period between 1.4.2016 and 1.4.2019, which was more than the minimum period of service required under section 51 of the Employment Act to qualify for a certificate of service.

70. The prayer for exemplary damages is not well founded in law or evidence and it is declined.

71. Finally, the claimants are awarded costs of the suit plus interest.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2022.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures, restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties 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