



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E040 OF 2021.

MICHAEL OTIENO ONYANGO.....PETITIONER

VERSUS

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

THE COUNTY GOVERNMENT OF KISIL.....2ND RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER

HEALTH SERVICES/PUBLIC HEALTH & SANITATION.....3RD RESPONDENT

JUDGMENT

Introduction

1. Before Court is a petition dated 2nd June, 2021 and filed in court on 17th June, 2021. The Petitioner further filed a Supplementary affidavit sworn on 10th November, 2021 and filed on 17th November, 2021.
2. The Respondents did not reply to the petition despite prove of service vide numerous returns of service filed before court.
3. The Petitioner canvassed the petition through written submissions
4. Through the Petition, the Petitioner seeks reliefs, including:
 - a) A declaration that he is entitled to protection under the Constitution, and essentially, to enjoy the Fundamental Rights and/or Liberties stipulated under the Bill of Rights to the fullest extent, in accordance and/or compliance with Article 21 of the Constitution, 2010.
 - b) A declaration that the actions and/or omissions of the Respondents, including the refusal to pay the Petitioner’s requisite remuneration and emoluments, despite being a Bona fide employee of the 1st and 2nd Respondents, constitutes and/or amounts to an unfair labour practices, punishment, mistreatment of the Petitioner and discrimination.
 - c) A declaration that the refusal to pay the Petitioner, yet the other employees who are subject of the same posting order Number 3/2017, have been paid and continue to be paid, amounts to and/or constitutes denial of the legitimate expectation, cruel and inhuman treatment and thus violates the provisions of Article 28 of the Constitution, 2010.
 - d) An order of Judicial Review in the nature of Mandamus do issue to compel the Respondents herein, and in particular the 1st and 2nd Respondent to process and pay the outstanding salaries, emoluments and/or allowances, due, owing and payable to the Petitioner, w.e.f 19th January, 2017, being the date of employment and/or engagement.
 - e) A permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees from harassing, intimidating, threatening or otherwise subjecting the Petitioner to any unfair threats, with a view to forcing the Petitioner to resign and/or otherwise desert duty, so as to pave way for disciplinary action and/or otherwise dismiss, without lawful cause and/or basis.
 - f) Payment of the sum of Kshs. 3,851,154/-, together with accruing salaries/emoluments and/or allowances
 - g) Interest at court rate on the sum found due, owing and payable pursuant to paragraph (f) hereof

h) Costs of the petition

i) Such orders and/or writs as the court may deem fit and expedient.

5. The petition is premised on the following grounds:

i. That the Respondents recruited the Petitioner through a competitive process, and appointed him to the position of Pharmaceutical Technologist, vide a letter dated 19th January, 2017. The Petitioner avers that he was posted to Nyaribari cache Sub-County hospital, where he reported and commenced his authorized duties, and continues to serve to date.

ii. That despite being duly engaged by the 1st and 2nd Respondents and placed under the supervision of the 3rd Respondent, the Respondents have failed, neglected and/or refused to process and release the Petitioner's remuneration, emoluments and allowances, due, owing and payable.

iii. That the failure to process and pay the Petitioner, has denied him a source of living and livelihood, causing him grave denial and deprivation.

iv. That being aggrieved by the non-payment of his remuneration and allowances, the Petitioner filed case Referenced **KISII CMCC E&LRC CAUSE NO. 11 OF 2019**, seeking orders to compel the Respondents to release his remuneration.

v. That the Respondent filed a Preliminary Objection based on Section 77 of the County Government Act, resulting in the lower court declining jurisdiction and striking out the case.

vi. That the total amount due and owing to the Petitioner from the Respondents is Kshs. 3,851,154/-, being salary, house allowance, commuter allowance, risk allowance, health service allowance and extraneous allowances, all for the 54 months of service rendered to the Respondents.

vii. That the failure to release the Petitioner's remuneration and emoluments has subjected him to unfair labour practices contrary to Article 41 of the Constitution.

viii. That the Petitioner has not been given reasons for the failure to release his remuneration or an explanation on the turn of events, in total violation of Article 47 of the Constitution.

6. The Respondents filed a memorandum of appearance but did not reply to the petition nor did they appear in court or file submissions.

Analysis and Determination

7. I have considered the petition, the grounds in support, together with the supplementary affidavit and the submissions by the Petitioner. The issues for determination are:

i. Whether the Petitioner is an employee of the Respondents

ii. Whether the Petitioner's rights were infringed upon

iii. Whether the Petitioner is entitled to the reliefs sought

Whether the Petitioner is an employee of the Respondents

8. The Petitioner's case is that he was appointed to the position of Pharmaceutical Technologist effective 19th January, 2017. In support of this position, the Petitioner has exhibited a letter of offer of appointment Referenced KSI/C/2/15/VOL.5(105). The offer of appointment was subject to acceptance. The Petitioner has also produced before this court his letter of acceptance of the offer of appointment dated 3rd March, 2017.

9. The Petitioner has further produced a posting order dated 20th March, 2017, Referenced **Posting Order No. 3/2017**, which bears his name and the station to which he was posted to. The Petitioner has further produced in evidence a duty Rota for Keumbu Subcounty hospital which show that the Petitioner attended duty.

10. The totality of the documents referred to above, and in the absence of contrary evidenced, points to a possibility of the Petitioner being in the service of the Respondents.

Whether the Petitioner's rights were infringed upon

11. The Petitioner's assertion is that since his appointment to the position of Pharmaceutical Technologist in the service of the Respondents on 19th January, 2017, he has never been remunerated nor paid any form of emoluments for the services rendered. The Petitioner further stated that he is still in the service of the Respondent to date, despite not being paid his salary and allowances.

12. The Petitioner asserted that the failure by the Respondents to release his salary amounts to unfair labour practices. Article 41 of the Constitution entitles every person to fair labour practices, fair remuneration for work done and such employment not to be adversely compromised without notice or a hearing

13. The elements of fair labour practices as elaborated in Articles 41(2), (3)(4) and (5) of the Constitution, include a worker's right to fair remuneration. (*See Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute Petition No. 2 of 2013*).

14. It is unfathomable that an employer can enjoy the services of an employee for close to five years without paying salary to that employee; just as it is unbelievable that an employee can work for five years without pay or a word from the employer in relation to the status of his employment.

15. The Petitioner presented his appointment letter as prove of being an employee of the Respondents, where he contends that he works to date. The Petitioner's evidence has not been controverted.

16. The Petitioner has further submitted that he filed suit earlier in relation to non-payment of his remuneration which the Respondent sought its dismissal on the basis of Section 77 of the County Government Act, which demands that parties exhaust internal appeals mechanisms before seeking redress from the court.

17. The Respondent evidently took advantage of the lacuna in the law to deny the Petitioner his rightful entitlement.

18. In the absence of contrary evidence, the court finds and holds that the Petitioner was subjected to unfair labour practices contrary to Article 41 of the Constitution.

Whether the Petitioner is entitled to the reliefs sought

19. Having determined that the Petitioner's rights were infringed upon, it then follows that he is entitled to relief in accordance with the equitable maxim that there is no wrong without a remedy. In this regard, the court makes orders as follows:

i. A declaration that the actions and/or omissions of the Respondents, including the refusal to pay the Petitioner's requisite remuneration and emoluments, amounts to unfair labour practices, punishment, mistreatment and discrimination.

ii. An order of Judicial Review in the nature of Mandamus do and is hereby issued to compel the Respondents herein, to process and pay the outstanding salaries, emoluments and allowances, due, owing and payable to the Petitioner, w.e.f 19th January, 2017.

iii. A permanent injunction restraining the Respondents by themselves, agents, servants and/or employees from harassing, intimidating, threatening or otherwise subjecting the Petitioner to any form of threats in relation to this petition.

iv. The costs of this suit and interest shall be borne by the Respondents.

20. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Ochwal Present for the Petitioner

N/A for the Respondent

Christine Omollo- C/A