



**Kirui v Principal, Bomet University College & another (Cause  
46 of 2019) [2022] KEELRC 1208 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1208 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE 46 OF 2019  
ON MAKAU, J  
MAY 25, 2022**

**BETWEEN**

**KIPNGETICH KIRUI ..... CLAIMANT**

**AND**

**PRINCIPAL, BOMET UNIVERSITY COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**BOMET UNIVERSITY COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's suit is contained in the amended Statement Claim dated 8<sup>th</sup> November 2021 which seeks the following orders: -
  - a. Immediate payment of 5 months unpaid salaries wrongfully withheld, from March 2019 to July 2019 at Kshs.201,255 per month equaling to Ksh.1,006,255/- plus interests at court rates.
  - b. Refund of Kshs.145,000 being expenses for relocation from Bomet to Eldoret.
  - c. Payment of salary arrears wrongfully withheld as per the 2017/2021 Collective Bargaining Agreement.
  - d. Maximum compensation equal to unpaid salaries for 'frivolous' breach of his secondment contract.
  - e. General damages for discrimination, defamation, pecuniary embarrassment among others.
  - f. The Costs of this claim to be borne by the respondents.
2. The claimant averred that in 2016 he was appointed as the Assistant Co-ordinator of Moi University and was obligated to look into modalities of establishing a substantive university at Bomet County.



As a result of his outstanding stakeholder engagement, the respondent institution was established vide gazette notice dated 27<sup>th</sup> of July, 2017 and he was then appointed as the acting Deputy Principal - Administration.

3. Thereafter, he was appointed as the acting Registrar and later as the Registrar of Planning and development. The last two positions were for a term of three years, renewable as provided in Section B.33 of the Public Service Commission Human Resource Policies and Procedure Manual for the Public Service Published in May 2016.
4. On 30<sup>th</sup> October, 2018, an advertisement was made for the position of Registrar - Planning and Development which he applied alongside other applicants. However, on 18<sup>th</sup> March, 2019, and before the interviews were done, he was redeployed back to Moi University, bringing to an end his secondment to the respondent. By then his aforementioned three-year contract given by the respondent had not lapsed but his salary was stopped immediately.
5. A dispute arose as to whether the claimant was on secondment and whether he could be redeployed to Moi University and as such he was kept away from work from March 2019 to the end of July without receiving any salary. He was also denied arrears of salary increments under the 2017/2021 Collective Bargaining Agreement in respect of the month of March 2019 to July 2019. It was also stated that the respondents breached the claimant's secondment contract and forced him to forfeit his three years leave days.
6. In addition, it was averred that the respondents defamed the claimant by maliciously publishing his name on the daily newspaper under the title "Millions lost in a scam".
7. The respondents' defense is contained in the amended Statement of Response dated 10<sup>th</sup> November, 2021 in which they admitted that the claimant was employed by Moi University but seconded to the 2<sup>nd</sup> respondent from November 2017. They further averred that the terms and conditions of service for the claimant were governed by the employment contract between him and Moi University. However, they averred that the last letter of appointment they gave the claimant was dated 9<sup>th</sup> January 2018. They also averred that apart from the said appointment letter, the general relevant employment regulations and the law governed the relationship between them and the claimant.
8. They stated that the decision to redeploy the claimant was arrived at after following the laid down procedures and the law. They further averred that upon redeployment vide the letter dated 13<sup>th</sup> March, 2019 the claimant failed to report back to Moi University but he instead preferred to file a suit in Employment and Labour Relations Court at Kericho Cause No.17 of 2019. The suit was however struck out on technicalities and then he brought the instant suit which according to the respondents is *res judicata*.
9. They faulted the claimant for failing to disclose to this court that he has since reported back to work at Moi University and that he is only seeking to recover money for the period in which he had ceased being their employee.
10. The respondents stated that the claimant's salary and other dues for the period he worked for the 2<sup>nd</sup> respondent until his redeployment in March 2019 to Moi University were duly paid as per the terms of his employment contract.
11. They denied the defamation claim and averred that the same was a mere allegation. They further stated that the recruitment process for the position of Registrar Planning and Development was conducted in line with the relevant laws and that the position was filled on merit.



12. Finally, they asserted that the claimant's claim for unutilized leave days is legally untenable as per the 2<sup>nd</sup> respondents Human Resource Policy Manual and prayed that this suit be dismissed.

### **Summary of the Evidence.**

13. The claimant testified as CW1 and basically adopted his statement dated 27.1.2020 and supporting affidavit sworn on 31.7.2019 as his evidence in chief.
14. He reiterated that he was seconded to the 2<sup>nd</sup> respondent from Moi University with effective from 9<sup>th</sup> November, 2017 after the Bomet campus was elevated to a University college by a Gazette Notice published on 27<sup>th</sup> July 2017. On 9<sup>th</sup> November, 2017 he was seconded to the 2<sup>nd</sup> Respondent, Acting Registrar (Administration) until a substantive Registrar was appointed.
15. However, in January 2018, he was appointed Acting Registrar Planning and Development for six months although the position did not exist in the Statutes of Moi University. On 10<sup>th</sup> June 2018, the said appointment was extended for another six months until.
16. That when the acting Principal Mr. Thomas Cheruiyot reported in October 2017, he was not happy with him and he requested the 2<sup>nd</sup> Respondent's council to appoint him as acting Registrar (planning and development) without consulting him.
17. Never the less he took up the said position and worked diligently despite frustrations from the said acting Principal who failed to approve payments for his allowances for over 6 months. When his initial contract of 6 months lapsed, it took a further 3 months to be renewed and likewise his allowances were not paid. Resultantly, he was compelled to make follow ups in order to get paid.
18. He stated that his secondment contract was supposed to be for three years renewable once subject to the post being filled substantively, which was never done. Consequently, he contended that the stoppage of his salary payment was discriminatory.
19. He further stated that on 4<sup>th</sup> April, 2019 the 2<sup>nd</sup> Respondent sent him an email attaching a letter of redeployment to Moi University dated 13<sup>th</sup> March 2019. He then found his office locked. He also received half salary in March 2019 and was not paid his salary for December 2018. When he sought to know why he never received his salary for December 2018 he was told that his name was omitted due to computer error.
20. He admitted having received his salary in January 2019 but his allowances were not paid. He stated that on 9<sup>th</sup> April, 2019 he wrote a letter to the 2<sup>nd</sup> Respondent seeking to know the fate of his accrued annual leave days and he was advised that his leave details had been forwarded to Moi University which responded that leave days are not transferable from one institution to another. He contended that by a gazette notice dated 27.7.2017 the second respondent became independent and therefore it owes him his leave days.
21. He said that on 30<sup>th</sup> October, 2018 the 2<sup>nd</sup> Respondent advertised for the position of Registrar Administration, Planning and Development and he applied for the same. But no interviews or appointment was done and as such he feels discriminated because he worked tirelessly to ensure establishment of the second respondent.
22. On cross examination, he stated that according to the letter dated 15<sup>th</sup> December, 2016 there was no time limit for his appointment. With regard to letter dated 9<sup>th</sup> January, 2018, he admitted that he was appointed to work as acting Registrar Planning and Development for six months. He confirmed that he received all his salary up to 17<sup>th</sup> March, 2019. He further confirmed that according to redeployment



letter he was supposed to report to Moi University on 18<sup>th</sup> March, 2019 but he reported on 1<sup>st</sup> August 2019. He maintained that his allowances from January 2019 were not paid.

23. Prof. Loice Maru, the 2<sup>nd</sup> Respondent's Deputy Principal Administration and Finance testified on behalf of the Respondents as RW1. She adopted her statement dated 4<sup>th</sup> March, 2020 and produced the bundle of documents in the respondents' list of documents dated 4<sup>th</sup> March, 2020 as exhibits. The statement dated 4<sup>th</sup> March, 2020 reiterated the averments contained in the respondents amended statement of response set out herein above.
24. On cross examination, she stated that claimant's salary was stopped in January 2019 after his contract lapsed. She further stated that the Claimant's application for renewal of the contract was rejected and he was redeployed to his employer, Moi University. She testified that after secondment by Moi University, the 2<sup>nd</sup> respondent employed the claimant on a six months' contract as an acting Registrar Planning and Development because that position was vacant.
25. She further stated that during redeployment, the information about Claimant's accrued annual leave days between 27<sup>th</sup> July, 2017 and 13<sup>th</sup> March, 2019 were forwarded to Moi University and on 31<sup>st</sup> July, 2019, the 2<sup>nd</sup> Respondent received a letter from Moi University stating that leave days were not transferrable from one institution to another and that the Claimant ought to have utilized his leave days while working for the Respondents. She reiterated that the Claimant's salary and allowance up to the 17<sup>th</sup> March 2019 were duly paid.
26. It was her testimony that redeployment was done procedurally and with knowledge of the Vice Chancellor of Moi University and that the claimant ceased being an employee of the 2<sup>nd</sup> respondent with effect from 18.3.2019.
27. During reexamination, she stated that Moi University never objected to the redeployment of the claimant.

### **Submissions.**

28. The Claimant submitted that redeployment to Moi University was prejudicial since it was done unilaterally and without any explanation. Further he applied for the position of Registrar Planning and Development when it was advertised and to date shortlisting has not been done nor any interviews conducted. He contended that he stood a higher chance to occupy the said office as he had previously worked in the same office in an acting capacity and delivered its full mandate.
29. He contended that his secondment to the 2<sup>nd</sup> respondent was stopped with effect from 1<sup>st</sup> August 2019 necessitating him to forfeit his annual leave and he accused the 2<sup>nd</sup> respondent of not paying his salaries. He also accused it of defaming him.
30. The Claimant submitted that the respondents cannot escape liability they did not substantiate their malicious publication relating to millions lost in a scam which was linked to his name. Further their failure to consider his application for the advertised position was discriminatory. Again the respondents acted contrary to the law by not attending to his appeal against the redeployment to Moi University.
31. He asserted that redeployment cannot terminate secondment except in accordance with the terms and tenure only. Therefore, he urged this court to look at the terms of secondment as contained in a letter dated 9/11/2017 and tenure of secondment pursuant to section B.33 of the PSC Human Resource Policies and Manuals published in May 2016 and hold that the respondents responsible for their malicious actions.



32. The respondents filed their submissions on 27<sup>th</sup> April, 2022 and discussed three main issues; whether the claimant was an employee of the 2<sup>nd</sup> respondent from 18<sup>th</sup> March 2019 to 1<sup>st</sup> August 2019; whether the claimant is entitled to claim for salary arrears for the period between 18<sup>th</sup> March 2019 to 1<sup>st</sup> August 2019, refund of Ksh.145, 000/- as relocation expenses from Bomet to Eldoret and salary arrears as per the 2017/2021 CBA wrongfully withheld; and who should pay costs of the suit.
33. On the first issue, the respondents submitted that the evidence on record shows that the claimant was appointed as acting deputy Principal (Administration) for the 2<sup>nd</sup> respondent on 15<sup>th</sup> December 2016 by the acting vice chancellor of Moi University. It was further submitted that vide a letter dated 17<sup>th</sup> October 2017, the claimant was recalled back to Moi University following the elevation of Bomet Campus to its current status as Bomet University College.
34. It clarified that on 9<sup>th</sup> November, 2017 the claimant was seconded as the Acting Registrar (Administration) Bomet University College vide a letter dated the same day and signed by then acting Vice Chancellor. The appointment was to take place immediately and last until the post was substantially filled.
35. They submitted that on arrival at Bomet University the claimant was appointed as the acting Registrar Planning and Development by then acting principal of Bomet University College. The appointment was to last for a period of six months with effect from the date of secondment.
36. That the claimant's secondment was extended for 6 months with effect from 10<sup>th</sup> June 2018 and that when the contract lapsed on 10<sup>th</sup> December 2018 the claimant was to return to Moi University where he was employed. However, his redeployment took some time as the council was deliberating on this issue and as such he continued to work at Bomet University College.
37. Eventually the Claimant's redeployment was approved on 13<sup>th</sup> of March, 2019 and he was issued with a letter to report back to Moi University with effect from 18<sup>th</sup> March, 2019. He was paid all his salaries and allowances for services rendered during the period he was seconded to the 2<sup>nd</sup> respondent.
38. They submitted that on receipt of the redeployment letter the claimant decided to file the present matter in court and failed to report back to work at Moi University despite the 2<sup>nd</sup> respondent's communication to Moi University about the redeployment of staff through a letter dated 20<sup>th</sup> March, 2019.
39. They thus submitted that the claimant was seconded to the 2<sup>nd</sup> respondent from Moi University for a certain period of time and upon lapse of such time he was to go back to the said employer. They argued that the contention has not been controverted by any material evidence and therefore in their view, from 18<sup>th</sup> March 2019 to 1<sup>st</sup> August 2019 the claimant was not an employee of the 2<sup>nd</sup> respondent.
40. To fortify the foregoing view, they relied on the case of Rev. *John Mugania Verses Kenya Methodist University & Prof. Mutuma Mugambi*, Cause No.133 Of 2013 (2012) eKLR where the court held that;

... secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may Quote}... secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so



seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment.”

41. On the second issue, the respondents submitted that the claimant is not entitled to the reliefs sought as he had ceased being an employee of the 2<sup>nd</sup> Respondent.
42. On the costs the respondents urged the court to be guided by the provisions of section 27 of the *Civil Procedure Act* Cap 21 laws of Kenya. They further relied on the case of *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, where the Supreme Court of Canada noted that the traditional purpose of costs is indemnification and that a regular award of costs has four standard characteristics: -
  - “(i) They are an award to be made in favour of a successful or deserving litigant, paid by the loser;
  - (ii) Of necessity, the award must await the conclusion of the proceedings as the success or entitlement cannot be determined before that time;
  - (iii) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceedings;
  - (iv) They are not payable for the purpose of assuring participation in the proceedings”
43. In view of the submissions above, the respondents urged this court to dismiss the claimant’s suit with costs.

#### **Issues for determination and analysis**

44. From the material placed before this court by the parties, the following issues fall for determination: -
  - a) Whether the redeployment of the claimant to the principal employer amounted to a breach or unlawful termination of his contract with the respondents.
  - b) Whether the claimant is entitled to the reliefs sought
  - c) Who should bear the costs of this suit?

#### **Breach or unlawful termination of claimant’s contract**

45. It is not in dispute that at all material time to this suit, the claimant’s Principal employer was Moi University. It is also a fact that the claimant was seconded to work for the 2<sup>nd</sup> respondent as the acting Registrar (Administration) with effective from 9<sup>th</sup> November, 2017 and to continue until the position was substantially filled. It is also clear that the Claimant was instead appointed for six months as the acting Registrar Planning and Development
46. The claimant contends that to date that position is still vacant despite the vacancy having been advertised and application made. He is one of the applicants but to date he has not been called for the interview. He believes that he stands better chance to clinch that position because he had acted in the said position (Registrar Planning and development).



47. The Respondents agree that the claimant was seconded from Moi University to work for the 2<sup>nd</sup> respondent as acting Registrar (Administration) from 9<sup>th</sup> November, 2017 until the position was substantively filled. They however, contend that on 9<sup>th</sup> January, 2018 the claimant was appointed acting Registrar Planning and Development for the 2<sup>nd</sup> respondent. The new appointment was for 6 months but it was renewed for another 6 months with effect from 10<sup>th</sup> of June 2018 to lapse on 10<sup>th</sup> December, 2018.
48. In the case of *Rev. John Mugania Verses Kenya Methodist University & Prof. Mutuma Mugambi*, Cause No.133 Of 2013 the court held that;
- “... secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment.” [Emphasis added]
49. I agree with the above precedent that a seconded employee is supposed to sign a contract with the temporary employer to govern their relationship. It follows that if the new employer fails to formally appoint the seconded employee or the parties fail to agree on the terms of their temporary engagement, then the parties can end the relationship and the employee has the right to return to his principal employer.
50. In this case the claimant was seconded to the 2<sup>nd</sup> respondent to serve as acting Registrar (Administration) but on arrival he was appointed as AG Registrar Planning and Development with effect from the date of secondment for a period of six months. The claimant accepted the new contract by signing the letter dated 9<sup>th</sup> January, 2018. He also accepted the extension of the appointment for a further 6 months by signing the letter dated 10<sup>th</sup> June, 2018 on the same date. Therefore, he cannot insist at this point that he was denied the position of acting Registrar (Administration), which he was seconded to hold by the Principal employer vide the letter dated 9<sup>th</sup> November, 2017.
51. After the lapse of the said appointment on 10<sup>th</sup> December, 2018, the claimant continued with his work as the acting Registrar Planning and Development until 17<sup>th</sup> of March 2019 when he was redeployed back to Moi University. The question that arises is what became of the claimant after his contract ended on 10<sup>th</sup> December, 2018.
52. It is common ground that the position he was acting was advertised. There is no evidence that the position was substantively filled by the time his contract period lapsed on 10<sup>th</sup> December, 2018. It is also a fact that the Claimant continued working until 17<sup>th</sup> March 2019 when he was formally redeployed to his principal employer and his salary formally stopped by the 2<sup>nd</sup> respondent. Until that time the Claimant remained in the employment of the 2<sup>nd</sup> respondent.
53. He rendered services to the 2<sup>nd</sup> respondent and in return he was paid his salary until the respondent served him and the principal employer with the letter dated 13<sup>th</sup> March, 2019 severing the secondment relationship. I would, in the above circumstances, find that the respondents and the claimant impliedly renewed the expired contract for another period of 6 months or until the recruitment of a substantive



Registrar, whichever came first, because that was the basis of the claimant being seconded to the 2<sup>nd</sup> respondent by the letter dated 9<sup>th</sup> November, 2017.

54. As at 17<sup>th</sup> March 2019, the 6 months had not lapsed and there is no proof that a substantive Registrar Planning and Development or Administration had been appointed. In the circumstance the court agrees with the claimant that the redeployment amounted to premature termination of his contract as the acting Registrar Planning and development. The redeployment was none abruptly and prematurely before the expiry of the contract which would have expired on 10<sup>th</sup> June 2019. Therefore, I am satisfied that the claimant has proved on a balance of probability that his redeployment amounted to breach and unfair termination of contract of employment on secondment because it was not done in accordance with equity and justice.

### **The reliefs sought**

55. The Claimant prays for salary from March –July 2019 contending that he reported to Moi University from 1<sup>st</sup> August, 2019. However, flowing from the findings above, it is apparent that the claimant ceased being employee of the 2<sup>nd</sup> respondent from 17<sup>th</sup> of March 2019 and he was supposed to report to Moi University on 18<sup>th</sup> March 2019. During hearing the claimant confirmed that the 2<sup>nd</sup> respondent paid all his salary up to 17<sup>th</sup> of March 2019. Therefore, he is not entitled to the claim for salary for the period after 17<sup>th</sup> March 2019 as sought by prayers (a) in his amended Memorandum of claim.
56. Similarly, he is not entitled to prayers (b), that is, relocation expenses of Kshs.145,000 because he has not proved the same right using the contract of employment or any other evidence like receipts for hired transport. However, it is a matter of common sense that he spend some money for relocating from Bomet town to Eldoret town which for lack of evidence, I award him Kshs. 100,000. The distance of 211 kilometres is given by google between Bomet to Eldoret by road.
57. The claim for salary arrears under the 2017/2021 Collective Bargaining Agreement wrongfully withheld lacks particulars and it has not been substantiated by evidence. Consequently, I decline to grant the same as prayed.
58. The prayer for maximum compensation equal to unpaid salary is also not clear whether it is based on the contract of employment or a provision of the law. Compensatory damages ought to restore the innocent party to the financial position he would have been without the impugned breach. In this case the claimant was released on 17<sup>th</sup> March 2019 to report to his principal employer on 18<sup>th</sup> March, 2019.
59. The principal employer did not object but the claimant failed to report as directed and instead went to file suit in court to challenge the termination of his secondment. Had he reported as directed, he would not have lost any salary. Therefore, I find and hold that the respondents did not cause any loss of income to the claimant by reason of his redeployment to the principal employer.
60. The claimant also prayed for general damages for discrimination, defamation and pecuniary embarrassment. This claim was introduced by the amendment done on 9<sup>th</sup> November, 2021. No sufficient evidence was tendered to establish the said discrimination, defamation and pecuniary embarrassment on a balance of probability. Consequently, I decline to award the damages sought.
61. In the end I enter judgment for the claimant against the respondents for the sum of Kshs. 100,000 plus interest at court rate from the date of filing suit. The claimant hired a lawyer to file this suit and therefore I award him costs of the suit. The award of damages is subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 25<sup>TH</sup> DAY OF MAY, 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 15<sup>th</sup> April 2020, this ruling 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**

