



Yaa & another (Suing as Administrators of the Estate of Frederick Yaa Charo) v Kilifi County Government (Cause 76 of 2017) [2022] KEELRC 1440 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1440 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 76 OF 2017
BOM MANANI, J
JUNE 21, 2022**

BETWEEN

**FIKIRI FREDRICK YAA 1ST CLAIMANT
BEATRICE JUMWA KAINGU 2ND CLAIMANT
SUING AS ADMINISTRATORS OF THE ESTATE OF FREDERICK YAA
CHARO**

AND

KILIFI COUNTY GOVERNMENT RESPONDENT

RULING

1. Fredrick Yaa Charo, now deceased, was employed by the now defunct municipal council of Malindi. After promulgation of the *Constitution* of Kenya 2010, the respondent was established as a county government unit in the coastal region of the republic of Kenya. The respondent has county administrative authority over the area that hitherto comprised *inter alia*, the municipal council of Malindi. As a result of these constitutional changes and by its letter dated December 19, 2013, the respondent absorbed the said Fredrick Yaa Charo into its workforce and deployed him to its finance and economic planning department.
2. It does appear that the employer-employee relationship between the parties experienced some challenges which resulted in the respondent suspending the said Fredrick Yaa Charo from duty. This was through a letter dated March 30, 2015 authored by the respondent's secretary. It is this suspension that appears to have triggered the current suit in which Fredrick Yaa Charo accused the respondent of unfair termination.
3. As is clear from the record, Fredrick Yaa Charo died before prosecuting his claim. Consequently, the current claimants applied for and were granted permission to continue with the suit in their capacities as legal representatives of the estate of the deceased claimant.



4. In its defense to the claim, the respondent denies liability for wrongfully terminating the deceased claimant on *inter alia* the ground that in law the respondent had no power to hire or fire the deceased claimant. Thus, the deceased claimant erroneously sued it. In the respondent's view, this action ought to have been brought against the County Public Service Board (CPSB) established within the respondent's jurisdiction to manage human resource issues and not the respondent itself.
5. To enable the disposal of the point of law aforesaid as a preliminary issue, the respondent issued a Notice of Preliminary Objection dated April 20, 2022. The notice reiterates the aforesaid point of law.
6. On April 27, 2022, the parties agreed to urge the preliminary objection through written submissions. These were subsequently filed.
7. If I understand the respondent correctly, the gist of its argument is that as a constitutional organ established under article 176 of the Constitution, its functions are limited to policy and governance issues which do not include the hiring and discipline of staff serving under it. The latter is the preserve of the CPSB established under section 57 of the County Governments Act (CGA) to serve the respondent. Consequently, the suit by Fredrick Yaa Charo being a claim for alleged wrongful termination ought to have been commenced against the CPSB of Kilifi County as the human resource management organ of the respondent.
8. In the respondent's view, the current suit flies in the face of these provisions of law. Thus, it is incompetent and should be struck out.
9. I have considered the submissions by the parties. I have also considered the authorities cited by them.
10. The law as I understand it empowers every county government to establish and abolish office within its jurisdiction. Further county governments are mandated to appoint and remove personnel from the offices so established. Specifically, article 235 (1) of the Constitution provides as follows: -

“A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for: -

 - (a) Establishing and abolishing offices in its public service;
 - (b) Appointing persons to hold or act in those offices, and confirming appointments; and
 - (c) Exercising disciplinary control over and removing persons holding or acting in those offices.”
11. Under section 56 of the CGA, each county is required to constitute its own public service appointed in the manner prescribed under article 235 of the Constitution. By virtue of section 59 of the CGA, the CPSB established in every county executes the mandate under article 235 of the Constitution as read with section 56 of the CGA on behalf of the county government.
12. It is not in doubt that the CPSB is a distinct legal entity in terms of section 57 of the CGA. However, it is clear to me that all that these organs do is to execute human resource management mandates of respective County Governments on behalf of the said county governments. The CPSBs do not execute this mandate for their own benefit. They are mere agents of the respective county governments under which they are established.
13. In my view therefore, whilst suits concerning the management of county public service ought to be directed at the CPSB of the relevant county government, these boards are not the only necessary parties



to such actions. The relevant county governments being the actual employers and therefore principals are as well necessary parties to such action.

14. Having regard to the foregoing, I consider the commencement of a suit by an employee against either of the entities aforesaid without the inclusion of the other as mere non-joinder of a necessary party to the action. This does not render the suit fatally defective. It only occasions a defect in the pleadings that can be cured through an amendment to add the party that has been omitted from the action (see *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 Others* [2016] eKLR).
15. Strictly speaking in my view, the CPSB is like a disclosed agent of the respective county government for which it has been established. The principal actor remains the county government as it ultimately shoulders the responsibility to settle any claims that may arise. In other words, a suit relating to specified human resource personnel directed against a CPSB without the inclusion of the relevant county government is in law hopeless.
16. I have considered the decisions cited by the parties. In both *Tabitha Njambi Chigua and 12 others v County Government of Kiambu* [2016] eKLR and *Osman Abdullahi Sheikh v County Government of Garissa* [2020] eKLR, I do not think that the court considered the agency position in which the CPSBs stand vis a vis their respective county governments. I respectfully do not agree with the view expressed in the Osman Abdullahi case that merely because the recruitment process was undertaken by the CPSB, the claimant was its employee. In recruiting the claimant, the CPSB was merely discharging its agency mandate for the county government of Garissa.
17. The foregoing notwithstanding, it has been emphasized time and again that striking out of pleadings is a draconian step that should only be taken as a last resort (see *Bruce Lule v Mulki A Issa* [2021] eKLR). It must be avoided where the proceedings can be saved through an order for amendment (see *Bayplan Credit Limited v Gesa Building & Civil Engineering & 2 others* [2015] eKLR).
18. In the premises, I decline to grant the preliminary objection. Instead, I grant the applicants' request to amend the Statement of Claim to bring on board the relevant County Public Service Board as a necessary party to the action. I direct the Applicants to serve the resultant summons as appropriate. Costs of the objections will be in the cause.

DATED, SIGNED AND DELIVERED ON THE 21ST DAY OF JUNE, 2022

B O M MANANI

JUDGE

In the presence of:

.....for the claimant

.....for the respondent

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 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.

B O M MANANI

JUDGE

