



REPUBLIC OF KENYA



KENYA LAW
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**Nyinge v County Government of Nyandarua & another (Cause
426 of 2017) [2022] KEELRC 12777 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12777 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 426 OF 2017
HS WASILWA, J
OCTOBER 4, 2022

BETWEEN

REUBEN MUCHUCHA NYINGE CLAIMANT

AND

COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT

**THE PUBLIC SERVICE BOARD OF NYANDARUA COUNTY 2ND
RESPONDENT**

JUDGMENT

1. The claimant instituted this suit against the respondent vide a memorandum of claim dated October 16, 2017, alleging to have been unfairly terminated and seeking for compensation for the unfair termination. he sought for the following reliefs;
 - a) That the honourable court do establish that the respondents' removal of the claimant's name from the payroll was unjustified, wrongful therefore unfair.
 - b) The honourable court be pleased to reinstate the claimant back to work in the same capacity and conditions of employment including adjustment of any emoluments occasion by annual salary increase.
 - c) Payment for August, September and October, 2017 salary including annual increment.
 - d) General damages for psychological torture and discrimination.
 - e) In the alternative to the prayer for reinstatement the claimant be paid;
 - i. Notice pay.
 - ii. Salary till retirement age of 60 years.



- iii. Kshs 830,960 being the pension payable to the claimant had he worked till retirement age.
 - iv. Interests on the above at court rates till payment in full.
 - v. That the respondent pay costs of this suit.
2. The claimant joined the respondents' employment as an intern on July 18, 2013 in the IT and Communication department. That he did his internship with dedication that he received commendation from the governor press service.
 3. After completing his internship, he volunteered to work for the respondents from March 25, 2014 in the governor press department till April, 2015, when a vacancy arose for the position of Information and communication officer video, camera, where he tendered his application for the said position and secured the job vide an appointment letter of April 21, 2015 on a probation of 6 months but continued working till his termination on August 21, 2017.
 4. The circumstances leading to his termination is that on August 24, 2017 while the claimant was on duty, he was called by the payroll manager and informed that directions had been issued by human resource manager for his name to be deleted from the payroll.
 5. The claimant inquired from the 2nd respondent why his name was deleted from the payroll, however, the said board was not aware of the turn of events and directed the claimant to make an official complaint on the issue and copy the human resource manager and county secretary's office, which he complied but did not receive any response.
 6. At the end of the month of August, 2017, the claimant was only paid for 21 days and his pay slip indicated 'ROD' which loosely translate to retirement or death, on the August 21, 2017 meaning that the claimant was fired on the August 21, 2017. He stated that all previous pay slips indicated ROD as 60 years, indicating that his employment was on permanent terms till retirement age, which was to be on August 17, 2048.
 7. Despite making further inquiry through his advocates by the letter of September 21, 2017, the respondent refused to make a response on the claimant's employment position.
 8. The claimant avers that the abrupt termination without any notice or disciplinary hearing violated his right under the constitution and placed him in difficult financial position having been servicing a loan on the strength of the said employment. Additionally, that his dismissal was discriminatory since the said position was given to another employee.
 9. The respondent entered appearance on the November 25, 2017 and filed a response to claim on the May 11, 2018. In their defence the respondents stated that the claimant was irregularly employed by the county secretary in excess of its powers granted under section 44 of the *County Government Act*. Further that if the claimant was employed by the governor then the governor acted in excess of its powers by employing the claimant on permanent basis when the governor under the act ought to employ its staff on contract that lapses upon the expiry of the governor's term.
 10. It is stated that upon investigation into the employment of the claimant, it was established that the same was irregular and the 2nd respondent revoked the said appointment in accordance with section 75 of the *County Government Act*.
 11. The respondent avers that the claimant was the one that registered himself with lap trust pension scheme on August 31, 2015 while the 2nd respondent started its lap trust fund on the July 1, 2016 which



the claimant is not a member. Therefore the remittance of his pension deduction was not because the claimant was a permanent employee rather that it was based on request by the claimant.

12. It is alleged that the claimant was accorded hearing before the employment was revoked on August 21, 2017, therefore that the claimant worked till August 21, 2017 and not in September or October, 2017 therefore not deserving of the claim of salary for the said two months.
13. The respondent maintained that since the claimant was irregularly appointed, he cannot be reinstated to employment neither is he deserving of the reliefs sought in the claim, which the respondent urged this court to dismiss with costs.

Hearing.

14. The claimant testified as CW-1 and adopted his witness statement of September 16, 2017 and produced his documents as exhibits 1-17 respectively and the further list of documents as exhibit 18-20. He prayed for the court to allowed as prayed.
15. Upon cross examination by Mbiyu Advocate, the witness testified that he was employed by the secretary of the 2nd respondent. He confirmed that he was not employed by the 2nd respondent as per the procedure in the manual. He stated that the said employment was advertised and he applied for the same but was not shortlisted but that two other people were employed. He testified that his employment was subject to regularization by the 2nd respondent which was never regularized.
16. On further cross examination, the claimant testified that he was not employed by the secretary of the 2nd respondent but by the county secretary. He also testified that he was the one that applied to join the lap trust fund. He also testified that in 2016 he was informed that his position was phased out and upon applying to be transferred to another department, his request was declined.
17. On re-examination, the claimant testified that the letter of employment was drawn by the secretary who is the head of the 2nd respondent.
18. The respondent's assistant director, human resource management, Anne Muthoni Gathura, testified as RW-1 and adopted her witness statement of October 26, 2021 and produced the documents dated August 9, 2018 and the ones of October 28, 2021 as the respondent's exhibits. She testified that the claimant was appointed by the county secretary and was to be approved by the 2nd respondent, however the 2nd respondent did not approve his appointment as such the said employment was not regularized and the appointment was therefore irregular.
19. Upon cross examination by Awuor Advocate, the witness testified that the letter of appointment of the claimant dated 21 April, 2015 emanated from the County Government of Nyandarua and signed by the county secretary who is the head of the County Public Service Board(CPSB). She testified that the regularization of the claimant's employment was to be done within 6 months which was not done. She also admitted that there was no letter of termination issued to the claimant upon the alleged revocation of employment.
20. On re-examination the witness testified that the letter was from the county secretary as opposed to the secretary of the 2nd respondent when an employment was from the CPSB.

Claimant's Submissions.

21. The claimant submitted that the county secretary who issued the claimant with employment letter is empowered under section 55 (d)(ii-iii) of part vii of the County Government Act, to make such appointment since he is the head of the County Public Service Board. Therefore, that since the letter



of appointment was issued by the head of the 2nd respondent the contract was proper and not illegally obtained as alleged by the respondent.

22. It was argued that as much as section 64(5) of the *County Government Act* empowers the board to take corrective measures of irregular appointment, the claimant employment was not interfered with for the years worked and therefore the claim that the claimant's appointment was irregular is not justified and the move to remove the claimant from the payroll without notice was in actuation of ill motive, malice and vendetta which the court ought to take notice of. In support of this they relied on the case of *George maina Kamau v County Assembly of Muranga and two others* [2016] eKLR.
23. It is the claimant's submissions that once the probationary period lapsed and without any action by the respondent towards confirmation, the employment was automatically confirmed in accordance with provisions of section 71 of the *County Government Act*. similarly, that having worked past the probation period of 6 months and served the respondent under the said employment for about 2 years, his employment stood confirmed and the termination of the same ought to have followed due process as envisioned under section 76 of the *County Government Act*. To support this the claimant relied on the case of *Joseph Giteru Njomo and 26 others v Nyeri County Government and another* [2017] eKLR.
24. In conclusion, the claimant submitted that having been termination without notice, reason or being subjected to any disciplinary process under section 76 of the *County Government Act* and the sections 41 and 43 of the *Employment Act*, his termination was unfair and urged this court to find as such and reinstate him back to employment and in the alternative, order for his compensation for the unfair termination.

Respondent's submissions.

25. The respondent submitted from the onset that the employment of the claimant was irregular having been initiated by a person without power to make such appointment. It was argued that the county secretary is empowered under section 44 of the *County Government Act* to do various functions but not to make an appointment especially of CPSB employees. It is argued that employment to CPSB is carried out by the County Public Service Board and the county secretary is not a members of the board as contemplated under section 58 of the *County Government Act*, therefore cannot make such appointments.
26. It is submitted that section 86 of the *County Government Act*, empowers the board to delegate its powers but that the board has never donated its powers to the secretary to carry out appointment on its behalf. To support its case they relied on the case of *Erick Otieno Oricho and 6 others v County Public Service Board and 2 others* [2019] eKLR, where the court was clear to the fact that the neither the governor or the county secretary has powers to appoint persons to the serve under the public service board unless such powers have been delegated to them under section 86 of the *County Government Act*.
27. The respondent also relied on the case of *Leonard Sigey Arap Bett v Governor Bomet County and 2 others, salaries and remuneration Commission (Interested party)* [2021] eKLR, where the court held that;

“...The respondents proved by evidence that the oversight was corrected on June 30, 2020.

The petitioner contends that the appointment of the county secretary was declared null and void by the court and as such the alleged measures taken was also void. In my view it was immaterial whether the notice of the irregularity to the 3rd respondent came from county secretary or not.⁴¹ The revocation was done under section 75 of the *County Governments Act* which provides that:



“if it comes to the attention of the County Public Service Board that there is a reason to believe that any process or decision under this part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may –

- (a) Revoke the decision;
- (b) ...”

42. The revocation ended the said irregular appointments as the petitioner has not tabled any evidence to the contrary. He has also not tabled any evidence that other irregularly appointed staff are still in the 2nd respondent’s payroll. Consequently, I agree with the respondents that the said irregular appointments were revoked as required by the law months before the petitioner brought this suit.”

- 28. Similarly, that the claimant’s employment was revoked in accordance with section 75 of the County Government Act.
- 29. The respondent submitted that section 71 of the County Government Act that states that appointment of an officer will be deemed to have been confirmed upon expiry of probationary period, does not apply in this instance since the appointment of the claimant was irregular from the start and therefore the said section cannot have regularized a flawed process of appointment. Moreover, that the county secretary who made the said irregular appointment never made an application to the 2nd respondent to regularize the said appointment as per the employment contract that required the same be regularized by the board.
- 30. The respondent submitted further that since the employment was irregular, the claimant was informed of the same and the board proceeded to revoke it and remove his name from the payroll. It is argued that notice was not necessary in the circumstances since the employment was not proper.
- 31. In conclusion, the respondent submitted that since the employment was not proper and duly revoked under section 75 of the County Government Act, the reliefs sought by the claimant are not justified and the case should be dismissed with costs. They then relied on the case of Macfoy v United Africa Company Limited [1963] 3ALL ER 1179 where it was held that;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
- 32. I have examined all evidence and submissions of the parties herein.
- 33. From the claimant’s exhibit No RMN 3 the claimant was appointed to the position of information officer (video) job group j by county secretary and head of public service.
- 34. The letter of appointment was on the letter of head of the County Government of Nyandarua.
- 35. The letter indicated that this appointment was to be regularized by the County Public Service Board.
- 36. It is also evident that this appointment was never regularized by the CPSB of Nyandarua who are the appointing authority of the County Government of Nyandarua.



37. This is as provided for under section 63 of the [County Government Act 2012](#) which provides for duties of the CPSB as follows;-

“ 63.

- (1) Except as provided for in the Constitution or legislation. The County Public Service Board has the power to make appointments including promotions in respect of offices in the county public service.
- (2) The power of the County Public Service Board under subsection (1) shall be exercised—
 - (a) at the request of the relevant county chief officer of the department to which the appointment is to be made;
 - (b) at the request of the clerk of the county assembly; or
 - (c) on the County Public Service Board's own motion on account of best interest of the county public service and parity of treatment of public officers taking into account the circumstances of each case. Powers of the County Public Service Board to make appointments.”

38. It is therefore clear that the appointment of the claimant by the secretary was irregular because no request was made for his appointment by the county secretary and whose duties are laid out at section 44 of the [County Government Act](#) and which states as follows at section 44 (3);-

“ 44.

- (3) The county secretary shall —
 - (a) be the head of the county public service;
 - (b) be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee;
 - (c) convey the decisions of the county executive committee to the appropriate persons or authorities; and
 - (d) perform any other functions as directed by the county executive committee.”

39. In the circumstances I find the claim by the claimant has no merit and the same is dismissed accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 4TH DAY OF OCTOBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:



Awuor for claimant - present

Mbiyu for respondent – present

Court Assistant – Fred

