



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 203 OF 2018

PATRICK MWANZA LUKOKO.....CLAIMANT

VERSUS

PUBLIC SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. Patrick Mwanza Lukoko (the Claimant) was initially employed as a Survey Assistant Trainee. He rose to grade of Land Surveyor 1.
2. On or around 12 April 2012, the Director of Surveys notified the Claimant (amongst others) of transfer/deployment to Trans-Mara as District Surveyor.
3. On 27 March 2014, the Principal Secretary, Ministry of Land, Housing and Urban Development informed the Claimant that he had been seconded to the County Government of Narok as a Land Surveyor.
4. With the transfer of land survey and mapping functions in line with the fourth schedule of the Constitution of Kenya, 2010, the Claimant applied through a letter dated 7 April 2015 to be redeployed to the National Government. Among the reasons given by the Claimant was conflicting instructions from the concerned bosses in the County and National Governments
5. Through an Internal Memo dated 2 May 2015, the Claimant was transferred back to the National Government. The Claimant was thereafter instructed through a letter dated 11 June 2015 to seek the consent of the County Government of Narok on the transfer since he was on secondment.
6. The Claimant sought the consent of the County Government through a letter dated 16 July 2015 but on 25 June 2015, the Chief Officer recommended his immediate transfer to Narok North. He was notified of the transfer on 14 July 2015.
7. The County Government requested the Claimant to hand over to a designated officer but through a letter dated 7 August 2015 to the Director of Surveys, the Claimant sought clarification as to whom to hand over. He also indicated in the letter that the County Government had decided to transfer him from Trans Mara West Sub County to Narok North Sub County with immediate effect.
8. On 11 August 2015, the Director of Surveys instructed the Claimant to hand over to a named national government officer immediately.
9. The Claimant handed over around 13 August 2015 and communicated with the Director of Surveys to the same effect.
10. Despite having handed over, the Chief Officer wrote to the Claimant on 25 August 2015 directing him to hand over to a person designated by the County Government.
11. The Claimant did not hand over as instructed and the County Surveyor notified the Chief Officer as much through a letter dated 7 September 2015. The letter also indicated that the Claimant had been away without permission from 17 August 2015.
12. On the same day, the Chief Officer wrote to the Human Resource department asking that disciplinary action be taken against the Claimant.
13. Feeling that the heat was increasing, the Claimant applied for 40 days leave on 4 September 2015. The application for leave was approved.

14. In the New Year, precisely on 18 March 2016, the Chief Officer issued a show-cause notice to the Claimant to explain absence from office from 3 November 2015.
15. The Claimant responded the same day indicating that he had been met with frustrations and thus was unable to fulfil his official functions.
16. The response was followed with an interdiction letter dated 15 April 2016 from the County Secretary.
17. Another show-cause notice dated 14 July 2016 was issued to the Claimant to explain why he had failed to declare his income and assets as required under the Public Officers Ethics Act.
18. The Claimant replied to the show-cause on 15 July 2016 stating that due to long absence from office arising from a disciplinary process he was undergoing, he had entrusted a colleague to deliver the declaration of income and assets but he had misplaced the forms.
19. Feeling frustrated, the Claimant formally placed his grievances before the Public Service Commission (the Commission) through a letter dated 13 October 2016.
20. The Commission requested the County Government to respond to the Claimant's grievances through a letter dated 8 November 2016.
21. The Claimant did not receive any feedback and he sent a reminder to the Commission on 13 February 2017. This prompted the Commission to send a reminder to the County Public Service Board on 23 February 2017.
22. The County Public Service Board did not bother to reply to the Commission and on or around 27 April 2017, the Commission sent 2 officers to Narok to investigate.
23. After the investigations, the Commission advised the County Public Service Board to conclude the disciplinary case against the Claimant expeditiously.
24. Seeing no solution in sight, the Claimant reported a complaint to the Intergovernmental Relations Technical Committee. Nothing much came out of the complaint.
25. On 25 February 2018, the County Public Service Board wrote to the Commission to report that it was in the process of compiling a report on the Claimant's case. The Board followed up with another letter to the Commission on 20 June 2018 recommending that the Claimant be dismissed from the public service.
26. The Claimant was aggrieved and he moved the Court on 29 May 2018 wherein he stated the Issue in dispute as Unfair termination of employment by means of constructive dismissal.
27. The Respondent filed a *Reply to Statement of Claim* on 6 December 2018 and on 14 October 2019, the parties filed a consent agreeing that the dispute could be determined on the basis of the record and written submissions to be filed.
28. The Court adopted the consent on the same day leading to the Claimant filing his submissions on 7 January 2020.
29. The Commission did not file its submissions within 21 days after service of the Claimant's submissions on 8 January 2020.
30. The parties identified 3 Issues in the consent adopted by the Court on 14 October 2019 and the Court will examine the same.
 - (i) Who between the Public Service Commission and the County Government of Narok was the employer of the Claimant at the material time?
 - (ii) If the Claimant's suspension from duty was in line with due process.
 - (iii) If there was constructive dismissal.

The employer

31. The Claimant was initially employed by the Public Service Commission. With the promulgation of the Constitution of Kenya, 2010 certain functions were devolved from the National to the County Governments.

32. The primary statutory provision giving effect on the devolution as far as public officers were concerned was section 138 of the County Governments Act which provides

138. Arrangements for public servants

- (1) Any public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming to effect of this Act and is serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from national government with their terms of service as at that date and

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- (a) the officer's terms of service including remuneration, allowances and pension or other benefits shall not be altered to the officer's disadvantage; and
 - (b) the officer shall not be removed from the service except in accordance with the terms and conditions applicable to the officer as at the date immediately before the establishment of the county government or in accordance with the law applicable to the officer at the time of commencement of the proceedings for the removal; and
 - (c) the officer's terms and conditions of service may be altered to office's advantage.
- (2) Every public officer holding or acting in a public office to which the Commission had appointed the officer as at the date of the establishment of the county government shall discharge those duties in relation to the relevant functions of the county government or national government, as the case may be.
- (3) The body responsible for the transition to county governments shall in consultation with the Public Service Commission and relevant ministries facilitate the redeployment, transfers and secondment of staff to the national and county governments.
- (4) The provision under subsection (2) shall not preclude—
- (a) the County Public Service Board or other lawful authority from promoting or appointing the officer to another public office in the county; or
 - (b) re-deployment by the relevant lawful authority.
- (5) The period of secondment under subsection (1) shall cease upon the transfer of a public officer from the national government to a county government or upon the release of an officer by the county government to the national government.
- (6) Appointment of a public officer by the Commission includes appointment of a public officer on powers delegated by the Commission.

33. The Claimant was formally seconded to the County Government of Narok through a letter dated 27 March 2014. The secondment was with effect from 1 January 2014. On 7 April 2015, the Claimant applied to go back to the National Government.

34. On 2 May 2015, the Director of Surveys issued a Circular listing officers whose secondment had been revoked and were being transferred (back) to the National Government. The Claimant was in the list. The Director must have been acting as an agent and/or authorised officer by the Commission.

35. Shortly, thereafter, on 11 June 2015, the Claimant was instructed to seek the consent of the County Government. The Court wants to believe that the source of the requirement for consent is located in section 138(5) of the County Governments Act.

36. The Claimant did what was expected of him. He sought consent from the County Government through his letter dated 16 July 2015. Instead of granting consent or release, the County Government decided to transfer him to Narok North. It made no response to his request for release.

37. As at the time of seeking release, the Claimant was still on secondment.

38. The legal employer, in the view of the Court, was the Commission (and the Commission through its agent had reversed the secondment vide letter dated 2 May 2015), whilst the County Government through the County Public Service Board was the putative employer (it was not until 17 May 2016 that the Commission issued a note indicating that all seconded staff stood released to the County Governments with effect from 1 July 2016).

Suspension and due process

39. The Claimant asserted that that his suspension did not accord with the requirements of the Fair Administrative Action Act because he was indefinitely on suspension from 15 April 2016 until 11 April 2018.

40. According to the Claimant, in terms of the Public Service Commission Guidelines on Management of public officers seconded to the County Governments, his suspension should not have exceeded 3-months.

41. The Public Service Commission Regulations envisage interdiction and suspension of public officers.

42. The Claimant did not demonstrate that his interdiction was contrary to the applicable Regulations. He did not properly develop or advance the assertions on unfair suspension.

Constructive dismissal

43. *Constructive dismissal* occurs when an employee resigns claiming that there was a fundamental breach of contract on the part of the employer and that this breach caused them to resign.

44. The employer's action must constitute a breach which is significant enough to go to the very root of the contract and, typically, would involve some major change to one of the key terms of employment, introduced without the employee's agreement. The effect is that the employee feels the situation is intolerable to the extent that there is no alternative but to resign.

45. The breach of contract may be a breach of one of the express terms of the contract or a breach of an implied term. *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27).

46. The Claimant herein did not resign but was rather *dismissed* and therefore the question of *constructive dismissal* would be at most presumptuous.

Lawfulness of the dismissal

47. The Claimant's also challenged the lawfulness of the dismissal. His contention was that because he had not been transferred to the service of the County Government, the County Government had no authority to dismiss him. In his view, it was the Commission which had the legal authority to dismiss him.

48. The Claimant also asserted that by dint of section 9(1) & (2) of the Guidelines for Transition of Staff to Counties made pursuant to the Transition to Devolved Government Act, a County Government did not have the authority to dismiss a seconded public officer.

49. The County Government had through its letter dated 20 June 2018 made a recommendation to the Commission to dismiss the Claimant

50. The Commission's response in its letter of 27 September 2018 was that because all seconded public officers to the counties had been released with effect from 1 July 2016, the County Government had the legally authority to dismiss the Claimant.

51. As it is, the County Government did not dismiss the Claimant. It made a recommendation. The organ to which the recommendation was made attempted to run away from assuming legal responsibility. Most probably because of the previous conduct of the County Government.

52. What the Court is confronted with is a legal quagmire concerning a public officer who while serving on secondment to a County Government applied to be transferred back to the National Government, a request which the National Government accepted.

53. The National Government then directed the Claimant to hand over to a named National Government officer but the County Government refused to release him, later transferred him then subjected him to disciplinary action for failing to hand over to a named County Government officer and now cries for justice.

54. The Commission knew or ought to have known that the Claimant was in the list of seconded staff whose secondment had been revoked. It should therefore have not allowed the County Government to proceed any further.

55. The Commission was lacklustre in dealing with the cries for assistance from the Claimant.

56. Some of the actions under challenge were committed by officers of the County Government. It is not clear why the Claimant did not join the County Government as a party.

57. In the view of the Court, the County Government was a necessary party.

58. Despite the foregoing, the process of dismissing the Claimant was not legally complete due to legal missteps and failures on the part of the Commission and the County Government.

59. In light of the above, the Court

(a) Declares that the Claimant is still technically an employee of the Public Service Commission.

(b) The Public Service Commission is ordered to address and resolve the employment status of the Claimant within 45 days.

(c) The Claimant is deemed to have been on interdiction on half salary from 15 April 2016 until the Public Service Commission resolves his case.

60. No order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 27th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant K.N. Wesutsa & Co. Advocates

For Respondent Janet Lang'at, Senior Principal Litigation Counsel, Office of the Attorney General

Court Assistant Chrispo Aura