



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 14 OF 2020**

**(Before D.K.N.Marete)**

**KENYA UNION OF PRE-PRIMARY**

**EDUCATION TEACHERS.....CLAIMANT**

**VERSUS**

**SECRETARY, LAIKIPIA COUNTY**

**PUBLIC SERVICE BOARD.....1ST RESPONDENT**

**AND**

**COUNTY SECRETARY**

**LAIKIPIA-COUNTY GOVERNMENT.....2ND RESPONDENT**

**JUDGMENT**

This matter was originated by way of a Statement of Claim amended on 7th December, 2020. The issue in dispute is herein cited as;

*“Unfair labour practice exhibited by the Employer subjecting the target Employees to unstructured contract of service.”*

The Amended Claim was amended technically vide orders of this court dated 11th February, 2021 in a rectification of the obvious error and or omission on the part of the Claimant appearing on the face of the record. This was on the heading and paragraph 2 of part E- Relief Sought. This amend was by agreement of the parties.

The Respondent in a statement of Response to the Memorandum of Claim dated 12th August, 2020 denies the claim and prays that the same be dismissed with costs to herself.

The Claimant’s case is that the grievants are ECDE teachers of Laikipia County. These have been serving in the same position and were indeed inherited through the promulgation of the Constitution of Kenya, 2010 which devolves Pre-Primary Education to counties.

The Claimant’s further the case is that this matter is a referral under Section 69(a) of the Employment Act, 2007 having been disregarded by the Respondent at the conciliation stage and process.

The Claimant’s other case is that the Respondents deny that there was privity of contract *inter partes* and this is despite subjecting the grievants to monthly wages and statutory deductions. Further, NSSF records indicate that Laikipia County is the grievants’ employer.

The Claimant further puts her case as follows;

- *That the NSSF contributions are occasionally remitted and the grievants personal accounts for the NSSF are in default despite deduction.*
- *That there is definitely a contract of service between the grievants and the 1st Respondent within the meaning of Section 2,*

*Employment Act, 2007.*

- *That the County Government of Laikipia receives budgetary allocation from the National Treasury every financial year for running devolved functions inclusive of pre-Primary Education.*
- *The allocated resources remain unaccounted for.*
- *That no contract has been executed between the Respondents and the grievants and therefore on retirement, they are likely to suffer irreparable loss in regard to accrued benefits.*
- *That the grievants on attainment of 60 years are subjected to mandatory retirement with no benefits.*
- *The Respondent is in full control of the grievants and does not permit liberty of the person and so they are restricted from engaging and benefitting from any other gainful employment.*
- *That the grievants are subjected to disciplinary process by the Respondents.*

She prays as follows;

1. *THAT* *this Honourable Court do order the Respondents to pay each grievant covered by this suit the difference between the amount the Respondents have been paying them monthly and the salary recommended by Salaries and Remuneration Commission or the schemes of service, whichever is favourable to the grievants with effect from November 2016 when determination was made in Petition 127 of 2014.*
2. *THAT* *this Honourable Court do compel the Respondents to remit any unremitted statutory deductions at the time of this judgment, fine the Respondents Kshs.100,000.00 each and order them to refund to the employees covered herein the amount deducted but not remitted from their wages and pay the intended beneficiary on behalf of the employees with the employers' own funds.*
3. *THAT* *this Honourable Court do order the Respondents herein to regularize and convert terms and conditions of employment of all the 428 grievants whose names appear in the schedule annexed herewith to permanent and pensionable terms applicable to the minimum terms and conditions under the employment Act 2007, and or the E.C.D.E teachers schemes of service, the County Human Resource Manual and Remuneration Commission.*
4. *THAT* *the Labour Commissioner be directed to supervise the process of conversion from casual to permanent employment of the 428 grievants in consultation with Salaries and Remuneration Commission and Teachers Service Commission and to ensure that the court order in Petition 127 of 2014 is complied with in this process.*

5. *THAT* *cost of this suit be provided for the Respondents.*

The Respondents admit A (i) (ii) and B (i) and (ii) of the Claimant but *in toto* paragraphs C1, C2 and C3 of the claim and put the Claimant in strict proof thereof.

The Respondent's further case is that ECDE caregivers in the County were engaged pre -2013 and mostly by the Municipal Councils or respective Boards of Management for the host primary schools. Their case is a denial of even issuing any appointment letter to the grievants. These are issued by the respective Boards of Management.

The Respondents deny any antecedent responsibility emanating from employment and denies that no such employment really suffices *inter partes*.

The Respondents further case comes out as follows;

14. *In response to paragraph D.3 of the Memorandum of Claim, the provisions of the law under section 37(1) of the Employment Act 2007 is that the Court may convert contracts of casual employees and therefore the Court's right to such conversion is where there is an employer-employee relationship. There is no such relationship in this matter.*
15. *In response to paragraph D.4 of the Memorandum of Claim, the Courts inherent power under section 19(6) should not and cannot be exercised where there is no employment relationship in existence.*
16. *In response to paragraph D.5 of the Memorandum of Claim, the Respondent asserts that the ECDE teachers who allegedly are members of the Claimant have neither been an employee of the Respondents nor of the County Government of Laikipia.*

In summation , the Respondent's case is that this suit is wrongly instituted as a trade dispute under the referral section 69 (a) of the Labour Relations Act as read together with section 87, Employment Act, 2007 as there is no employer/employee relationship in place with the grievants and there is also no recognition agreement *inter partes*. This is as follows;

- i) *That the Respondent states that there is no Recognition Agreement between the Claimant and the Respondent or the Public Service Board of the County Government of Laikipia.*

ii) That the Public Service Board of County Government of Laikipia has never employed any ECDE teacher but it is currently in the process of employment in compliance with the Constitution of Kenya and the Basic Education Act.

iii) That at the time of Janet Muringi's employment, the Respondent did not have the legal mandate and or capacity to employ the Claimant or any other employees on a permanent basis, with leave allowance and other benefits.

iv) That in the County Government of Laikipia, ECDE teachers are employed by the Board of Management (BoM).

v) That the Respondent therefore has no employer obligations with regards to remuneration or NSSF obligations towards the Claimant.

vi) That the Respondent is therefore a stranger to the allegations and claim of unfair striking off of Janet Muringi's name from the monthly pay roll.

vii) That the County Government of Laikipia only remitted Kshs.5,000/- which was later increased to Kshs.10,000/- in the form of a stipend towards the Claimant and other ECDE teachers as a result of the requests from parents in the County Government of Laikipia. The stipend paid has been a way of assisting the parents who could not afford both food and teachers' pay.

viii) That the Claimant is misleading the Court in seeking to be retained on a payroll having attained the age of 60 years, which is the retirement age.

ix) That the Claimant's cause is incompetent, bad in law, fatally defective and otherwise an abuse of the Court.

The issues for determination therefore are;

1. Whether there exists employee-employer relations (privity of contract)?
2. Whether the grievants qualify for the reliefs sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether there exists employee-employer relationship, (privity of contract.) The claimant in her written submission dated 21st January 2021 answers this in the positive. She puts it thus;

*To deal with the issue of privity of contract, the Claimant wishes to draw attention of this honourable court to the annexed payroll schedule and the letter by Veronica Lekarsia (E.C.D.E co-ordinator) Laikipia County, dated 9th June, 2017 which says in part,*

*"The below indicated E.C.D.E caregivers were erroneously removed from the payroll in November 2016 and have not received their payroll and pay their arrears in full as they continue teaching in their respective schools."*

*We wish to bring to this honourable courts' attention, the N.S.SF statements of Janet Muringi Njomo, Miriam Njeri Ndungu and Elizabeth Wanjiku whose names are highlighted in the copy of payroll annexed herewith. This is a confirmation of privity of contract.*

*It is evident from the job advert marked "website" (at the top) is the culmination of the recruitment of the grievants whose population progressively increased on demand to 711. The document was filed in court in cause 216 of 2016 by the Respondents.*

On this, the Claimant further seeks to rely on Section 2 of the Employment Act, 2007 which defines a contract of service as:

*"Contract of service," as an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship"*

To the Claimant, this is the subsisting situation between the parties and therefore a case of a contract of service or employment prevails in the circumstances.

The Claimant further seeks to buttress her case by relying on the authority of **Edward Ngarega Gacheru v Nation Media Group Limited, cause No.844 of 2018** where the court observed as follows;

*In the present case, the court sees no difficulty in finding that the parties were in contract of service due to deduction of P.A.Y.E.*

Again,

*...the court held as evidence the provision of work station at the respondent's premises. The grievants work in public establishments (ECDE Centres) vested in the County governments.*

Thirdly held that, *subjecting the employees to regulations of the employer and giving direction on how to work, constitute employee-*

employer relations. In the instant case, the replying affidavit of the county secretary filed in Cause 14/2020 in this court, ( the 2nd Respondent herein) dated 12/8/2020 (annexed) at paragraph 7, avered that, “ The county government of Laikipia however has recruited 15 ward E.C.D.E co-ordinators who have been co-ordinating the E.C.D.E activities in each ward.” This is a confirmation that indeed the county government of Laikipia gives the grievants direction and overall supervision in their duties. This is proof that the grievants are subject to regulations of the Respondents. There is clearly employee-employer relations.

Court further held, thus; “Contracts of service which are expressly camouflaged as not being such contracts (like in the instant case) will be smoked out as inconsequential to the extent that they are rectified and the minimum terms of service in the Employment Act 2007 are applied as appropriate.

The Claimant likened the application of PAYE to the NSSF deductions in the instant case and further abided with the finding and observation of court that contracts of service which undercover (camouflage) their intentions should be exposed as such.

The Claimant further seeks to rely on the provisions of Section 7, 8 and 9 of the Employment Act which express the meaning and nature of a contract of service and particularly section 9(2) which mandates an employer to reduce the contract in writing. This is as follows;

*7.No person shall be employed under a contract of service except in accordance with the provisions of this Act.*

*8. The provisions of this Act shall apply to oral and written contracts, and*

*9 (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3). The Respondents have wilfully refused to comply with this provision.*

The Respondent’s in their written submissions dated 29th January 2021 reiterate their case of non-employment of the grievants. It is their further case that there is no privity of contract between the parties, the grievance being employees of the then Municipal Councils or respective Board of Management of the host primary schools.

It is their further case that the stipend payment to the ECDE caregivers is not an employment obligation. It is in the form of assistance to parents who cannot afford both food and teachers pay and is *ex gratia*.

She also relies on the authority of **Samuel Wambugu Ndirangu v 2NK Sacco Limited (2019)eKLR** where the court observed as follows;

*“In our jurisdiction, an employee is defined in the Employment Act in Section 2 as follows;*

*Employee means a person employed for wages or a salary and includes an apprentice and indentured learner;*

*Applying the control test, which is as to whether the employer controls or has the right to control the employee, not only as to the result of the work to be done but also as to the method and means by which the said task is to be accomplished, the question or whether or not there is an employer-employee relationship for purposes of this matter would therefore depend on whether the ‘employer’ has control over the ‘employee’. Put another way, where the element of control is lacking and where the person who works for another does so more or less at his own pleasure and is not subject to definite conditions of work or hours of work, the relationship of employer-employee does not exist. The indicia of this relationship of employer-employee is largely absent in the case before me. A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee’s conduct (this is what gives the test the *nom de guerre*-control test).”*

She therefore flatly denies a case of employment of the grievants.

A look at the respective cases of the parties reveals opposing positions. However, one is able to clearly establish a case in favour of the Claimant. The Claimant in evidence has established the following as facts in support of her case;

- That 711 ECDE teachers are on full time occupation as teachers in this sector in Laikipia County.
- That these teachers serve in the ECDE sectors of the various public primary schools for the County.
- That since 2016, these teachers have had monthly stipends from the Respondents.
- That the teachers are controlled and disciplined by the Respondents or their agencies.
- That pre-primary education is a constitutionally devolved function of the Counties per part II of the 4th schedule of the Constitution of Kenya, 2010.
- That the Respondents are therefore entitled to the charge of ECDE education in the County and therefore the caregivers thereof.
- That in Petition No.127 of 2014/ **Kenya National Union of Teachers V County Governments of Kenya, 2016 eKLR**, the matter

of employment of ECDE teachers was settled with orders that this be employed by the County Government in consultation with the Teachers Service Commission.

Conclusively, the Claimants case and submission is that the Respondents denial of employment of the ECDE teachers is merely that, *a denial*. It is an attempt at scapegoating and abdication of the responsibility so constitutional endowed to herself. I cannot agree more.

This is convincingly evidenced and elicited by a look at Sections 2, 7, 8, 9 and 9 of the Employment Act, 2007 which define and explode the import of a contract of service and details the respective roles of the respective parties to employment

This matter therefore comes out in favour of the Claimant. The Respondent must fail on the basis of lack of compelling evidence in support of their case.

The 2nd issue for determination is whether the grievants qualify for the reliefs sought. She is. Having won on a case of employment for the grievants, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim with orders for relief as follows;

1. That the Respondents be and are hereby ordered to meet and pay each grievant in this suit the difference between their current monthly stipend and the salary recommended by Salaries and Remuneration Commission or the schemes of service for ECDE teachers, whichever is the favourable and higher with effect from November, 2016 when determination was made in Petition 127 of 2014.

2. That this Honourable Court do compel the Respondents to remit any unremitted statutory deductions at the time of this judgment, to the respective authorities so entitled.

3. That the Respondents do and are hereby ordered to regularize and convert terms and conditions of employment of all the 428 grievants whose names appear in the schedule annexed herewith to permanent and pensionable terms applicable to the minimum terms and conditions under the Employment Act, 2007 and or the E.C.D.E Teachers Schemes of Service, the County Human Resource Manual and the Salaries and Remuneration Commission Guidelines.

4. That an audit be had by the parties to verify the position of the difference between 428 grievants and newly brought out 711 alleged grievants with a view to incorporating them to employment and therefore the benefits of these orders of court.

5. That the Commissioner of Labour be and is hereby ordered to manage and supervise, with the involvement of the parties, the execution of these orders of court, to wit, amounts and means of pay, conversion of terms from casual to permanent employment of the 428 grievants in consultation with Salaries and Remuneration Commission and Teachers Service Commission and also ensure that the court order in Petition 127 of 2014 is complied with in this process.

6. That the Commissioner of Labour be and is hereby further ordered to be architectural and articulate in the implementation of this delicate exercise of execution of these orders of court and report back in 120 days.

7. Mention on 29th June, 2021 for a report on execution and implementation by the Commissioner of Labour.

8. That the costs of this claim shall be borne by the Respondents.

**Dated and delivered at Nyeri this 25th day of February 2021.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Samuel Opiyo for the Claimant Union

2. Miss. Mutungi instructed by Mutungi Kithinji & Company Advocates for the Respondents