



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**CAUSE NO. 88 OF 2018**

JACOB OUMA NYAMBOK.....1<sup>ST</sup> CLAIMANT  
OYUGI MOSES OJWANG.....2<sup>ND</sup> CLAIMANT  
OKUMU BOB OCHULA.....3<sup>RD</sup> CLAIMANT  
JANE ATIENO ADONGO ONGOLA.....4<sup>TH</sup> CLAIMANT  
RAEL ANYANGO NYOTA.....5<sup>TH</sup> CLAIMANT  
JOSHUA ONYANGO NYOTA.....6<sup>TH</sup> CLAIMANT  
NELSON ODEGO OLAGI.....7<sup>TH</sup> CLAIMANT  
NELLY OCHIENG' OKETCH.....8<sup>TH</sup> CLAIMANT  
JANE ADHIAMBO GOR.....9<sup>TH</sup> CLAIMANT  
JUDITH AUMA NGWATO.....10<sup>TH</sup> CLAIMANT  
EVANGE ONGELE MCHURA.....11<sup>TH</sup> CLAIMANT  
EVERLINE AOKO BARAZA.....12 CLAIMANT  
CAROLINE ADHIAMBO OTIENO.....13<sup>TH</sup> CLAIMANT

**VERSUS**

MIGORI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT  
MIGORI COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The applicant filed application dated 14/5/2020 praying for Orders:-

1. Spent
2. Spent
3. Spent

4. **THAT** the Honourable Court be pleased to Order and/direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either by themselves, their Agents,

Servants, Representatives and/or Employees to employ the claimant/applicant on a permanent and pensionable terms having worked on a casual basis for long period of time even though he had required qualifications.

5. **THAT** in default of compliance with prayers 2, 3 and 4 hereof, the Respondent herein be cited for disobedience of lawful Court Orders and Warrants of Arrest be issued to bring them before Honourable Court for purposes of punishment and/or imprisonment.

6. The Honourable Court be pleased to grant such further and/or other Orders, that may preserve and/or protect the rights and/or interests of the claimants/applicants herein.

7. Costs of the application be borne by the respondents.

8. Such further and/or other Orders be made as the Court may deem fit and expedient.

2. The application is based on grounds 1 to 7 set out in the notice of Motion the nub of which is that the claimants/applicants, are casually deployed by the respondent and have worked for a long time. That the claimants have been given defective service contracts which they have refused to sign and are being threatened with dismissal. That the respondent has withheld salary of the claimants/applicants. That preservative Order be granted to preserve the status of the claimants/applicants.

3. That application is opposed by the respondent who has submitted that the subject matter of this suit and application is *resjudicata*, the matter having been heard and determined with the report on implementation of Court Order for case No. 189 of 2015 dated the 12<sup>th</sup> January, 2018 being adopted as an Order of this Honourable Court on 20<sup>th</sup> March, 2018.

4. The 1<sup>st</sup> respondent denies that he is in contempt of the said Orders and has ensured compliance with the implementation report that was adopted by the Court.

#### Determination

5. The Court has carefully considered the application and the preliminary objection raised by the respondent and is satisfied that the dispute herein deals with the same subject matter as the dispute already resolved by the Court in Cause No. 189 of 2015.

6. That the Parties in this suit and application are the same parties as in Cause No. 189 of 2015.

7. That the present application dated 14/5/2018 does not raise any new triable issue by this Court.

8. Indeed there is no prayer on the face of the Notice of Motion that seeks for an interim Order pending the hearing and determination of this suit.

9. The respondent further filed a replying affidavit on 30/7/2018 in which is reiterated the preliminary objection raised by the applicants in addition to traversing the deposition by the applicants on the facts of the case emphasizing that it has implemented the Orders of the Court pursuant to the settlement and recorded consent by the parties on 20/3/2018 in Cause No. 189 of 2015.

10. The Court relies on the Court of Appeal decision in the **Independent Electoral and Boundaries Commission –vs- Maina Kiai & 5 others, Nairobi Court of Appeal Civil Appeal No. 105 of 2017 [2017] eKLR**, Where the Court held:-

“Thus for the bar of *resjudicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms: -

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That the former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

11. All the above prerequisite of the plea of *resjudicata* have been satisfied and this application is not only dismissed for lack of any proper prayer for grant pending the hearing and determination of the suit but also for the fact that the suit itself is an abuse of the process of the Court, the same being *resjudicata* by fact of determination of all the issues in dispute in Cause No. 189 of 2015 on 20<sup>th</sup> March, 2018.

12. Each party to bear their own costs of the application and the suit.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of February, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Ogwe for Claimant the Claimant

Omboto for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Chrispo: Court clerk.