



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 32 OF 2020

FRANK JOSEPH MWANGEMI.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF TAITA TAVETA.....1ST RESPONDENT

THE GOVERNOR COUNTY GOVERNMENT OF TAITA TAVETA.....2ND RESPONDENT

PUBLIC SERVICE BOARD TAITA TAVETA COUNTY.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th April, 2021)

RULING

The claimant filed the memorandum of claim on 20.07.2020 through E.M Mvoi & Company Advocates. The claimant's case is that he was nominated by the 1st respondent, vetted by the County Assembly of Taita Taveta and employed by the county government effective 07.11.2017 as the County Executive Member for Health Services on a five-year contract at a monthly consolidated gross salary of Kshs.269, 875.00 as at the time of termination. His further case is that the 2nd respondent terminated the contract of service on 30.10.2019 as per the letter dated 25.10.2019 and he was dismissed without any justification - in a manner that was disrespectful and degrading without sufficient reasons and without being afforded a fair hearing or an opportunity to defend himself. Further, he was not paid all his terminal dues and at termination he had 30 pending leave days. It is pleaded that the respondents did not inform the claimant the reasons for the termination and the premature termination was unfair, unprocedural, unlawful and unconstitutional as it was contrary to sections 41, 43, 44, and 45 of the Employment Act, 2007, section 40 of the County Government Act, 2012, section 4 of the Fair Administrative Action Act and Article 47 and 50 of the Constitution were not adhered to; the whole process was unfair and unlawful.

The claimant prayed for:

- a) Unpaid leave for November 2018 to 30.10.2019 thus 30days x Kshs. 10, 379.81 x 1 year Kshs. 311, 394.30.
- b) Unpaid public holidays for period 13.11.2017 to 30.10.2019 10days x Kshs. 10, 379.81 x 2 years Kshs. 207, 596.20.
- c) Compensation for unfair termination Kshs. 269, 875.00 x 12 months Kshs. 2, 796, 948.00.
- d) Unexpired contract Kshs.269, 875.00 x 12months x 3 years Kshs. 9, 715, 500.00.
- e) Total claim Kshs.13, 031, 438.50.

The claimant prayed for judgment against the respondent for:

- a) Payment of Kshs. 13, 031, 438.50 as particularized above.
- b) Certificate of service.
- c) Costs and interest.
- d) Any further relief and entitlement and or order that the Honourable Court deems fit.

The 1st and 2nd respondents filed the memorandum of response on 02.11.2020 and through John Bwire & Associates Advocates. The 1st and 2nd respondents prayed that the suit be dismissed with costs.

The respondents also filed on 11.09.2020 a notice of preliminary objection against the statement of claim dated 17.07.2020 and prayed that the same be struck out *in limine* with costs on the grounds that:

- a) The suit is a non-starter, incurably defective and cannot stand in law.
- b) The Honourable Court lacks jurisdiction to hear and determine the dispute pursuant to the mandatory provisions of section 12 of the Labour Relations Act, 2011.
- c) The 3rd respondent is not a proper party in this suit under sections 58 and 59 of the County Government's Act, 2012 and should be struck out of the proceedings.
- d) The claim does not disclose any reasonable cause of action against the respondents.
- e) The claim is an abuse of Court process, frivolous, vexatious and should be dismissed with costs *in limine*.
- f) The claim as preferred violates mandatory provisions of law and laid down procedures and cannot sustain prayers sought.
- g) Being a state officer under Article 260 of the Constitution, the claimant is not entitled to the reliefs sought.
- h) In light of the foregoing, it is clear that the claim has been filed prematurely and in any case, without jurisdiction and for this reason alone, the claim should be dismissed with costs.

Grounds of opposition to the preliminary objection were filed for the claimant on 02.11.2020. It was stated for the claimant as follows:

- a) The preliminary objection is totally without merit and is frivolous and an abuse of the Court process since section 12 of the Employment and Labour Relations Court Act, 2011 does not oust the jurisdiction of the Court to hear and determine the suit herein.
- b) The preliminary objection is totally without merit and is frivolous, vexatious and an abuse of the Court process since pursuant to sections 57 and 59 of the County Governments Act, 2012 the 3rd Respondent is a proper party in the suit.
- c) The preliminary objection does not raise pure points of law.
- d) The preliminary objection raises factual issues which can only be canvassed during the hearing of the suit.
- e) The filing of the preliminary objection amounts to violation of the claimant's constitutional right to expeditious, fair, and complete determination of the suit.

The respondents also filed on 05.11.2019 a notice of motion pursuant to sections 1A, 1B, 3A, of the Civil Procedure Act Cap 21 Laws of Kenya, Order 1 rule 10(2), order 2 rule 15 (1), order 40 rule 1&2, order 51 rule 1 of the Civil Procedure Rules, 2010, inherent powers of the Court and all provisions of law. The respondents prayed that the Honourable Court is pleased to strike out the suit against the 3rd respondent and the costs of the application be provided for. The grounds in support of the application as stated and as per the annexed supporting affidavit of Edwin Chahilu, the 1st respondent's County Attorney, were as follows:

- a) The letter of appointment dated 13.11.2020 on the terms of employment and termination clause was entered between the claimant and the 1st respondent.
- b) The claimant is a state officer per Article 260 of the Constitution and is not an officer under the County Public Service Board and county public service. The 3rd respondent has no authority in law to appoint, discipline or terminate the claimant's appointment.
- c) Accordingly, the memorandum of claim filed does not disclose a reasonable cause of action against the 3rd respondent.
- d) There exists no employment relationship between the claimant and the 3rd respondent.
- e) It is in the interest of justice that the prayers sought in the application are provided for.

The claimant opposed the application by filing on 20.04.2021 the grounds of opposition as follows:

- a) The application lacks merit because the 3rd respondent is a necessary party for the due determination of the claim herein.
- b) Pursuant to section 55 (a-j) of the County Governments Act No. 17 of 2012 the 3rd respondent is a key participant in the county hiring and firing process, as well as providing for proper human resource management and career development practices.

- c) Provisions of sections 55 and 59 of the County Government Act put the 3rd respondent in a controlling position such that if there was an unfair termination on the part of respondent, the same was caused by the actions or inaction on the part of the 3rd respondent whether by ill advising the 1st and 2nd respondent, or by failing to advise them at all on the manner which they should terminate their employees.
- d) Despite that the contract of employment relied on herein was signed between the claimant and the 1st and 2nd respondents, the 3rd respondent is an important party to the proceedings pursuant to provisions of section 59 of the County Government Act No.17 of 2012.
- e) The application is ill-conceived and it is otherwise unsustainable in law and ought to be accordingly dismissed with costs.

By consent of parties on 02.03.2021, it was ordered that parties file and serve their respective submissions on the preliminary objection and on the notice of motion. The Court has considered the submissions and the parties' respective positions and makes findings as follows.

The 1st issue for determination is whether the Court lacks jurisdiction in view of section 12 of the Labour Relations Act, 2011. The Court observes that the Act as relied upon by the respondents appears not to exist and on that account the ground must fail. As submitted for the claimant, section 12 as cited, assuming is reference to section 12 of the Labour Relations Act No.14 of 2007 relates to establishment of a trade union or employer's organization and which obviously is outside the matters in dispute in the instant suit. It is submitted for the respondents that the contract of employment herein is not ordinary because it is in the nature of a political appointment of the claimant by the 1st respondent. The respondents rely upon Tom Luusa Munyasya –Versus- Governor Makueni County & Another [2014]eKLR where the Court (Rika J) took the view that the members of the executive at both national and county levels are political appointees whose assumption of tenure and removal from office hinges on the political mandate granted to the appointing authorities by the people. The claimant relies on County Government of Garissa & Another –Versus- Idriss Aden Mukhtar & 2 others [2020]eKLR where the Court of Appeal (Karanja, Okwengu, and Sichale, JJ.A) stated thus, “...Section 3 of the Employment Act is clear that other than the categories stated therein, the Employment Act applies to all employees employed under a contract of service and provides minimum terms and conditions of employment. Therefore, although the employment of state officers is regulated by the Constitution and relevant statutes, the Employment Act applies to them and they are entitled to rights under the Employment Act, unless the Constitution, or the relevant statute, or their contract of service provide better terms. Given the relationship between the appellants and the respondents, and the matter having been filed in the Employment & Labour Relations Court, we find nothing wrong with the learned Judge being guided by Section 49(1) of the Employment Act in awarding damages.”

The Court has considered the submissions and finds that in the instant case it is pleaded and admitted for the respondents that there exist a contract of employment between the claimant and the 1st respondent. It should be clear, by that pleading, that the Court enjoys the jurisdiction to hear and determine the instant suit. In Mike Sonko Mbuvi Gidion Kioko –Versus- Clerk, Nairobi City County Assembly & 4 Others [2020]eKLR, (ruling delivered 23.10.2020) the Court held that state officers were in employment of the state within the definition of an employee under the Employment Act, 2007 because a state officer is paid a salary. The Court further held that the employment of a state officer is governed by the relevant constitutional and statutory provisions and where necessary, the provisions of the Employment Act, 2007. In that case, the Court further held thus, “Third, parties are in agreement that the Court's jurisdiction flows from Article 162(2) (a), Article 165 (5) (b) and the provisions of the Employment and Labour Relations Court Act, 2011. There is no doubt that the dispute is about whether the initiated impeachment proceedings are continuing in accordance with the relevant provisions of the standing orders and the Constitution. The Court has already found that impeachment is in the nature of a disciplinary process that may lead to the petitioner's removal from office as is clearly a human resource function that squarely falls under the jurisdiction of the Court and the Court enjoys the relevant jurisdiction. Section 12(1) of the Employment and Labour Relations Court Act, 2011 is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law. Section 12 (2) of the Act (which the parties appear to have failed to refer to) further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose – and by that provision, it is clear that in the instant petition the petitioner (as an employee) has by way of the petition lodged a complaint against the respondents. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. The Court finds that to be the case especially in view of Article 162(2) as read with Article 165 (5) (b) of the Constitution.”

Accordingly, and for the stated findings and reasons, the Court finds that it has jurisdiction to entertain the suit and the preliminary objection that the Court lacks jurisdiction will collapse.

The 2nd issue for determination is whether as per the preliminary objection and the application by the notice of motion, the 3rd respondent is not a proper party to the suit. The claimant admits that the contract of service was between the claimant and the 1st and 2nd respondents. However, it is submitted that the 3rd respondent is an important party to the proceedings pursuant to section 59 of the County Governments Act No.17 of 2012. The section provides for the functions of a county public service board. It has not been submitted for the claimant how the functions of a county public service board like the 3rd respondent specifically relate to the contract of service of a county executive member like the claimant. The Court has perused the memorandum of claim and no specific claims and prayers have been made against the 3rd respondent. In absence of any other material on record to implicate the 3rd respondent and looking at the pleadings in the memorandum of claim, the Court upholds the respondents' submission that the claimant has not established a reasonable or any cause of action against the 3rd respondent. Further, the Court finds that it is not alleged that the 3rd respondent was involved in the matters surrounding the present dispute one way or the other and it cannot be said that the 3rd respondent was a necessary party for the just, proportionate, complete and expeditious determination of the suit. The preliminary objection and the application will succeed to that extent.

To answer the 3rd issue for determination the Court returns that the other grounds in the notice of preliminary objection not having been

submitted upon by the respondents, the same are deemed abandoned. Looking at the parties' margins of success and the nature of the dispute, the costs of the preliminary objection and the application will abide the outcome of the main suit.

In conclusion the preliminary objection and the application herein are hereby determined with orders:

- 1) The Court enjoys the jurisdiction to hear and determine the suit in view of the contract of employment on record.
- 2) The 3rd respondent is struck out as a party to the suit and all subsequent pleadings and other documents filed for the parties to reflect as much and the pleadings on record deemed amended accordingly.
- 3) The costs of the preliminary objection and the application to abide the outcome of the main suit.
- 4) Parties to take steps towards the expeditious hearing and determination of the main suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 30th April, 2021.

BYRAM ONGAYA

JUDGE