



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.PET/4/2018

CITATION: FRANCIS CHEMWOR PSOKUMEN AND PSO MUKEN AND TWO OTHERS VS

THE SPEAKER TRANZOIA COUNTY AND COUNTY ASSEMBLY AND THREE OTHERS

RULING

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

PETITION NO 4 OF 2018

FRANCIS CHEMWOR

PSO MUKEN AND 2 OTHERS.....CLAIMANTS

VERSUS

THE SPEAKER TRANS-NZOIA COUNTY ASSEMBLY AND 3 OTHERS.....RESPONDENT

RULING

By an Amended Motion dated 15th January, 2021 the 16th respondent /applicant sought orders among others that: -

THAT while pending the hearing and determination of this application, this Hon, Court be pleased to stay the endorsement of the Judgement dated 30/10/2020 as against the five (5) applicants herein.

THAT This Hon. Court be pleased to review and vary the judgement of 30/10/2020 by clarifying that the said Judgement should not affect the employment of the applicants.

THAT upon granting the order on review, this Hon. Court be pleased to reinstate the applicants to their respective positions of employment since their employment has already been terminated pursuant to the Judgement of 30/10/2020.

THAT meanwhile, the 2nd and 4th respondents be ordered not to advertise the positions of the applicants or fill those positions before the hearing and determination of the present application.

The application was supported by the affidavit of Imelda Nelima who deponed among others that:

THAT on the 6th day of January, 2021 I was given a copy of a letter dated 30th December, 2020 written by 3rd Respondent indicating that following a judgement in this matter which was delivered on 30th October, 2020 and which was received by the 2nd Respondent belatedly

on the 21st December, 2020 I shall not be receiving my salary with effect from the date of the judgement of the Court unless and until the Court orders otherwise.

THAT I ascertained from the said letter dated 30th December 2020 that the judgement referred was delivered in the matter and on inquiring more from the Legal Department of the 2nd Respondent herein, I was told that from the pleadings served upon the said 2nd Respondent I was a Respondent number 6.

THAT I immediately rushed to my advocates M/s D.M Wanyama & Company Advocates Hussein House, Kitale to inform them about the development herein.

THAT I was informed by my said advocates which information I verily believe to be true, that as per the said letter 30th December, 2020 and the attached judgement, a petition had been filed by the 1st, 2nd and 3rd Petitioners herein and judgment had been entered against myself and others to the effect of terminating our employment with the 2nd Respondent.

THAT as I was not aware of any petition against myself, instructed my advocates to carry out the necessary search at the Respondent and Labour Relations Court- Eldoret to establish whether in fact any petition was filed against myself.

THAT I am informed by my advocates that they on 12th January 2021 embarked on the search where in they established that indeed I was introduced as a party on the petition herein through an amendment of the Petition after the Petitioner sought and obtained leave through the Notices of Motion dated 26th July 2019.

THAT I am informed by my advocates that the judgement was entered against myself and others on the basis of the amended Petitioner by the 1st, 2nd and 3rd together with the affidavits in support and only a Replying Affidavit by one Elkana Kipkurgar Korir on behalf of the 1st the 4th Respondent.

THAT I was unaware of this Petition as I have never been served with any pleadings or notices in this matter, especially the most important ones which were the said Notice of Motion dated 26th of July 2019 seeking to enjoin me to party through an amendment of the petition and the resultant.

THAT due to the aforesaid it was not possible for me to have instructed my advocates to come on record and/or file my response to the petition as I was not aware of any petition against myself.

THAT the proceeding leading to the said judgement proceeded erroneously as if I was being represented by the firm of M/s Kiarie & Company which was incorrect as I have never instructed the firm of Kiarie & Company advocates to act for me in this matter and neither have they ever filed any notice of appointment of advocates purporting to act for me.

THAT in the initial petition filed on or about the 4th day of August, 2016 I was not a party and the firm of M/s Kiarie and Company Advocates filed a Notice of Appointment of Advocates dated 15th

who did not include myself.

THAT that no directions were ever taken in the proceedings as how to proceed with the unrepresented parties and unserved parties who were yet to come on record like myself and the matter was thereafter fixed for mention to confirm the filling of final submissions.

THAT on the 28th day of July 2020 Ms Kiarie while present in Court, it was erroneously recorded that she saw appearing for the 5th to 48th Respondent, that is to mean including myself who never gave the firm of M/s Kiarie and Company Advocates or at all to come on record for me.

THAT the same 28th July 2020 was also a mention date to confirm filing of final submissions and the said firm of M/s Kiarie & Company Advocates again erroneously indicated that they were representing the 5th to 48th Respondent, who included myself as the 16th Respondent and these errors ought to be rectified by setting aside the entire proceedings and judgement.

The 1st petitioner filed a replying affidavit in opposition to the in opposition to the application in which he deposed on the main that: -

THAT the applicants' application is devoid of merit, misconceived and a clear abuse of court's process as it does not meet the threshold for the grant orders sought.

THAT the applicants have not placed any sufficient evidence to persuade the Court to review and vary its judgement delivered on the 30th day of October, 2020.

THAT the applicant was duly served with the amended petition dated 31st July, 2019 and return of service dated 31st July, 2019 was filed as evidence by the annexure hereto.

THAT there is no new and important matters or evidence which other exercise of due diligence was not within the knowledge of the applicants or could not be produced by then at the time the petition was filed and judgement delivered to warrant orders of review.

THAT though the applicants were aware of the contents of the petition ab initio they did not make any effort to respond to the issues raised therein.

THAT there is no error apparent on the record as contended by the applicants and the grounds for review are set out in vain.

THAT the judgement of this Honourable Court given on the 30th day of October, 2020 was on merit and based on evidence on record and is therefore regular.

THAT the applicants have contended that they were not among the respondents who got employed by the 4th respondent Service Board on Permanent and pensionable terms on 1/July/2016 however they have not annexed any advert or minutes employing them on a separate date prior to the job advertisement and shortlisting of successful candidates.

THAT the positions of the applicants were advertised on the 29th day of June, 2015 by the 4th Respondent County Assembly Service Board in the Daily Nation but did not clarify whether the same were to be on contract or on permanent and pensionable terms.

were shortlisted and their names were published on print media on 4th September, 2015 as per the evidence.

THAT the 4th respondent conducted interviews of the shortlisted candidates after which on the 26th October, 2015 successful candidates were appointed to various positions on 2 years renewable contract as evidence by the appointment of letter of Fwamba Moses Maina.

THAT the appointment letters dated 25th October, 2015 annexed by the applicants in their supporting affidavit purporting to employ them on permanent and pensionable terms without any advert is therefore curious and an afterthought because if they had proper and genuine letters of employment on permanent and pensionable terms, they would have used them to oppose the petition and the amended petition.

THAT the minutes annexed by the applicants in their supporting affidavit purporting to employ them on permanent and pensionable terms is irregular as the positions for employment on permanent and pensionable terms were created without advertisement.

THAT the employment of the applicants on permanent and pensionable terms is null and void ab initio as their employment was influenced by their relatives who were members of the 4th Respondent Service Board and who conducted the recruitment process as evidence by the minutes of 27th June, 2016 and 31st August, 2015.

In the submissions in support of the application Mr. Kiare, who stated he was representing the applicants' submitted that under section 16 of the Employment and Labour Relations Court Act, the Court had power to revise its judgement. Under rule 33 of the Court rules the grounds for review include mistake or error apparent on the face of the record or for any sufficient reason.

According to Counsel, the resolutions of the 4th respondent made at Sunset Hotel in Kisumu on 27th June, 2016 was the confirmation of up to 34 employees working on contract terms. The names of the applicants were not in that list. The resolution referred to 34 employees yet there were 36 in the list.

Further, although the names of the 5 applicants were included in the petition as Nos. 2,38,41,42 and 48 they were never the subject of the proceedings and decision of the respondent's service board of 27th June, 2016 at Kisumu.

Mr. Kiare further submitted that the Court in its judgement of 30th October, 2020 declared the appointment of the 5th to 48th respondent on 1st July, 2016 as employees of the 2nd respondent on permanent and pensionable terms, discriminative and amounted to unfair Labour practice. The Court therefore issued an order of certiorari quashing the proceedings and decision of the 4th respondent's service board of 27th June, 2016.

According to Counsel the applicants ought not to have been included in the order questioning the employment of those whose fixed term contracts were upgraded from fixed term contract to permanent and pensionable terms. The decision was only over a total of 34 employees as shown by the resolution of the 4th respondent of 27th June, 2016. Counsel therefore urged the Court to find that there was a mistake or error as concerns the inclusion of the applicants among those whose employment was upgraded from fixed term contract to permanent and pensionable terms.

Mr. Wanyama for the 16th respondent submitted that the 16th respondent had demonstrated that Notice of appointment of Advocates on 15th September, 2016 indicating the said firm had been appointed to act for the then 43 Interested Parties named in the initial petition. On or about 26th July, 2019, the 1st, 2nd and 3rd petitioners sought and obtained leave to amend the petition to add more content to the petition and also add more parties which included the 16th Respondent herein. It is this application for amendment that was never served upon the 16th Respondent.

Counsel further submitted that on 28th July, 2020 Mr. Kiare while present in Court with Ms Efedha erroneously indicated to the Court that the firm of Kiare & Company was acting for 5th to 48th Respondent which misrepresentation suggested the said firm was also acting for the 16th respondent yet the 16th respondent had never instructed the said firm to act for her.

From the foregoing it was the 16th respondent's submission that she had been in the dark about the proceedings that led to the judgement which caused her service to be terminated. This, according to her, was to be blamed on 1st, 2nd and 3rd petitioners who deliberately infringed on her right to be notified of the petition and every step of it as well as her right to answer to the claims herein.

Counsel therefore submitted that the 16th respondent had demonstrated that the judgement was not regular as against her hence the same should be set aside.

Concerning leave to defend the suit, Counsel submitted that the 16th respondent had not only ably demonstrated that the judgement against her was irregular but also that she had triable defense against the amended petition. The 16th respondent intended to challenge the

jurisdiction of the Court to determine the petition.

According to Counsel, the Amended petition raised matters outside the limited jurisdiction of the Court. Further that the petition was premature since the jurisdiction of the Court to determine a Constitutional Petition cannot be invoked if the appropriate dispute resolution mechanism has not been exhausted. The 16th respondent further sought that the Court determines whether the amended petition had in any way given particulars that her employment with the 2nd respondent was pursuant to any improper or corrupt practice.

Kraido for the petitioners submitted that the court delivered its judgement after considering the evidence on record. Therefore, the issues raised in the application dated 15th January, 2021 did not amount to error apparent on the face of the record. In support of what amounts to an error/ mistake apparent on the face of the record, Counsel relied on the case of Assistant Commissioner Income Tax vs Saura shtra Kutch Stock Exchange (2008), and Nyamego .v. Kogo (2001) E A 174.

According to Counsel, the judgement of the Court declaring the appointment of the applicants as employee of the 2nd respondent on permanent and pensionable terms to the exclusion of six employees as discriminatory and amounted to unfair Labour practice was proper as the employment of the applicants was not different from the rest of the respondents. Kraido further submitted that although the applicants contended that they had been employed on permanent and pensionable terms way before 27th June, 2016 and their names were not in the list of persons whose employment was upgraded from fixed term contracts to permanent and pensionable terms, they had not annexed any advert or minutes employing them on a separate date prior to the job advertisement and shortlisting of Successful candidates.

The appointment letters dated 26th October, 2015 annexed to their supporting affidavits purporting to employ them on permanent and pensionable terms without any advertisement was therefore curious and an afterthought.

With regard to the 16th respondent Counsel submitted that the order for stay was not available to the applicant because at the time of filing the application, and the order for stay given on 27th January, 2021 the decree of the Court had already been implemented and the 5th to 48th respondents served with termination letters on 14th January, 2021.

The Court in its judgement delivered on 30th October, 2020 observed that by an advertisement in the print media on 29th June, 2015 the respondent declared certain vacancies and invited applications from suitable candidates.

By another advertisement dated 14th September, 2015 the respondent shortlisted candidates and conducted interviews on 26th October, 2015 and those who were successful were appointed to various positions on two-year renewable contracts.

The Court however noted that whereas on the two-year renewable contracts, the transition to permanent and pensionable employees was never done through an open and competitive selection process. The respondent did not produce any advertisement whether internal or external asking for promotional or transitional interviews.

The decision of the Court concerned any one who was appointed as a result of the interviews conducted on 26th October, 2015 on a two-year renewable contract and upgraded to permanent and pensionable terms without following fair and transparent process. The order was general and the individual employees affected need not have been mentioned by name.

The order was in essence directed to the process and anyone who benefited from the impugned process was bound by the order of the Court.

As rightly observed by Counsel for the petitioners, the applicants did not produce any evidence separating their employment from the impugned process.

To this extent the Court finds the application without merit and the same is hereby dismissed with costs.

It is so ordered.

Dated at Eldoret this 11th day of June, 2021

Delivered at Eldoret this 11th day of June, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

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