



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 831 OF 2017

MARIANNE J. KITANY.....CLAIMANT

VERSUS

- 1. CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE**
- 2. PUBLIC SERVICE COMMISSION**
- 3. ATTORNEY GENERAL.....RESPONDENTS**

JUDGMENT

1. The Claimant, Marianne J Kitany instituted the Claim herein in May 2017 and later filed an Amended Statement of Claim dated 17th December 2019 against the Chief of Staff and Head of Public Service, The Public Service Commission and The Attorney General. She avers that she was employed on 4th July 2007 as the Information Systems Manager at Kenya Railways Corporation and that on or about 24th April 2013 she entered into a contract of employment with the Executive Office of the President for a period of 5 years. That the terms and conditions of service contained in a letter to her were clear that she was appointed by his Excellency the President as Chief of Staff in the Office of the Deputy President (in the Executive Office of the President (EOP)). She further avers that she diligently worked for the Respondents until she received a letter of termination on 24th December 2015, effective from 25th November 2015 purportedly occasioned by the reorganization of government and reconstitution of the Cabinet and appointment of Principal Secretaries by the President. That she was earning a net monthly salary of Kshs. 924,000/= by the time she left the Respondents' employment. The Claimant avers that the decision to terminate her services was unlawful, without justifiable cause and without following the due process and amounted to unilateral termination of her services contrary to rules of natural justice and legitimate expectation as she had been assured to be in employment for a fixed period of five (5) years. She contends that the reorganization referred to in her letter of termination only affected Cabinet and Principal Secretaries and did not abolish the office of the Chief of Staff in the Office of the Deputy President. That her term of contract was tied to the tenure of the Deputy President and that she was never subjected to a disciplinary hearing before her termination. The Claimant wherefore prays that the Court order a declaration that the Respondents are in breach of the employment contract entered with the Claimant and that they be ordered to pay the Claimant: the remainder of her 5 year contract, gratuity pay, damages for unlawful termination and 30 days leave. She further seeks for interest at court rates on the payments, costs of the suit and such other or further relief as this Honourable Court may deem just to grant. The Claimant states in her Witness Statement that she was forced to quit her job at Kenya Railways when she was appointed Chief of Staff in the Office of the Deputy President and that the appointing authority copied her appointment letter to Kenya Railways. That she was not permitted to be employed in any other work or business and hence had a reasonable and legitimate expectation to serve her five-year term on the presumption of certainty of law and the general duty of good faith in the law on the performance and enforcement of contracts. She asserts that all correspondence relating to her appointment clearly demonstrated that she was part of the Executive Office of the President and that subsequent to her letter of appointment, she received her terms and conditions of service from the Public Service Commission vide a letter dated 17th April 2014. She states that she received the termination letter from the 1st Respondent and has subsequently not been able to secure other employment and that she has been subjected to untold suffering, hardship and embarrassment due to the Respondent's wrongful withholding, neglect and/or failure to pay her dues.

2. The Respondents filed a Response to Statement of Claim dated 20th June 2017 admitting that the Claimant had been appointed to serve as the Chief of Staff at the Office of the Deputy President but which appointment terminated due to the reorganization of the Government and reconstitution of the Cabinet and appointment of Principal Secretaries. That upon termination of her contract the Claimant was to be paid Kshs 7,798,560/- as a total package after statutory deductions having been eligible to the following terminal dues:

- a) Payment of the monthly remuneration package up to and including 24th November, 2015.
- b) Three months gross salary in lieu of Notice.
- c) Service gratuity at the rate of 31% of 60% of your monthly remuneration package calculated on a prorate basis.

d) Commutation for cash for the unutilized leave days.

3. The Respondents further avers that the claim herein is premature, baseless, lacks merit and an abuse of the court process because the Respondents followed due process in the termination of the Claimant's contract. The Respondent also filed a Witness Statement dated 18th May 2018 by Dido Jillo Gababo, the Director, Human Resource Management and Development in the Office of the Deputy President. He states that the Claimant's initial appointment was at the pleasure and discretion of His Excellency the President and her termination was thus exclusively the prerogative of His Excellency, the President. He further states that her termination was part of an internal re-organization of the Presidency which comprises State House and the Office of the Deputy President. He prays that the Claimant's suit be dismissed with costs to the Respondents.

4. The claim was heard by way of *viva voce* evidence tendered vide the electronic system in place for virtual hearing due to a surge in the incidences of Covid cases. Initially it had been slated for an in-person hearing. The Claimant testified that she prays for the relief in the amended claim and seeks a sum of Kshs. 35,876,484/-. She stated that she was appointed by H.E. Uhuru Muigai Kenyatta and her termination was by Dr. Kinyua and that she never received anything at all upon termination. She further stated that her job was taken over by a Mr. Osundwa who replaced her. The Claimant stated under cross-examination that her contract had a fixed term of 5 years or during the tenure of the Deputy President and that her position is equivalent to Job Group 'V'. That the appointment letter from the President did not have a term limit but the letter from PSC gave her a term limit of 5 years and that the President only shuffled the Principal and Cabinet Secretaries and never reorganised his office as planned. In re-examination she stated that the appointment letter referred her to PSC who then gave her the letter dated 14th April 2014 which had the terms and conditions as Chief of Staff to Deputy President. The Claimant also asserted that the payment in her termination letter was not correct and that it should not be only up to 24th November 2015.

5. The Respondent's witness, Dido Jillo Gababo produced his filed witness statement and the bundle of documents dated 22nd March 2018 filed in support of their case as evidence before Court. He stated in Court that the terms of service as per the letter of PSC dated 17th April 2014 are that the President has mandate to terminate the employee and that the principal document is the appointment letter by the President of Kenya. RW1 admitted under cross-examination that they were yet to pay the Claimant her dues as prepared and in re-examination he stated that they prepared the voucher but have not remitted the said payment. He further stated that the terms of employment are given by the PSC.

6. Parties filed written submissions and in her submissions, the Claimant submitted that her appointment by the President did not fall within the ambit of Article 132(2) of the Constitution which provides for the nomination, appointment and dismissal of various persons by the President and further, State or public officers whom the Constitution requires or empowers the President to appoint or dismiss. That the said provision does not apply to the personal staff of the President and that this Honourable Court has the jurisdiction to entertain this suit and would therefore not be questioning the mandate of the President under Article 132(2). She submitted that her appointment was in accordance with Article 234(2) and (4) of the Constitution which provide as hereunder:

Article 234(2) The Commission shall -

(a) subject to this Constitution and legislation-

(i) establish and abolish offices in the public service; and

(ii) appoint persons to hold or act in those offices, and to confirm appointments;

(4) The Commission shall not appoint a person under clause (2) to hold or act in any office on the personal staff of the President or a retired President, except with the consent of the President or retired President. (emphasis theirs)

4. She relies on the Court's decision in **Kenya National Chamber of Commerce & Industry-Machakos Branch & Another v Music Copyright Society of Kenya (MCSK) & 3 Others [2019] eKLR** wherein Justice G.V Odunga held that any provision purporting to limit the jurisdiction of the High Court must derive its validity from the Constitution itself, and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. She submitted that the Respondents' Notice Preliminary Objection has been brought to this Court very late in the day and lacks merit on all grounds and relied on the case of **Waithira Kimondo & Another v Vigilant Auctioneers & 2 Others [2019] eKLR** in support her contention. She prays that the same be dismissed with costs. In her Supplementary Submissions filed after service of the Respondent's submissions, the Claimant submitted that even though she was appointed by the President, her contract was duly signed by Mrs. Margaret Kobia, the Chairperson of the Public Service Commission. That her appointment was therefore in accordance with the constitutional provisions relating to the appointment of public servants and that she was not a State Officer but a Public Officer by dint of the definitions set out under Article 260 of the Constitution. That she is thus entitled to the protection of public officers assured under Article 236 of the Constitution to effect that she was not to be victimised or discriminated against for performing the functions of office, dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law and cited the case of **Lillian W. Mbogo-Omollo v Cabinet Secretary Ministry of Public Service and Gender & Another [2020] eKLR**.

5. On the main suit, the Claimant submitted that it is trite that the Courts will look at the procedural and substantive fairness of a termination in determining whether the termination of employment was fair. That to that effect this Court ought to consider the provisions of Sections 41, 43, 44(3) and (4) and 45 of the Employment Act. She cited the case of **Justus Mutahi Ihaji v Kenya Airways Limited [2018] eKLR** to bolster her arguments on the termination process. She further submitted that from the Speech delivered by the President on the 24th November 2015 (*document number 7 on the Claimant's List and Bundle of Documents*) the 2nd paragraph on the last page of the speech was particularly clear that any such reorganization of the Executive Office of the President, under which the Claimant served, was to be done on a separate date. That she testified in Court under cross-examination that no such reorganization was conducted within the Executive Office of the President and neither was there any notice of the same. That the termination of her employment was thus abrupt and without any notice and/ or justifiable cause and she relies on **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where

Radido J. observed that the employer has an obligation to hear and consider any representations by the employee before making the decision to dismiss or give other sanction. It is her submission that termination of her employment was done in contravention of Sections 41, 43, 44 and 45 of the Employment Act and is therefore wrongful, unprocedural, unfair and unlawful. The Claimant submitted that the Respondents will attempt to persuade this Honourable Court that she served under the pleasure of His Excellency the President by virtue of her appointment by the President and further submitted the Pleasure Doctrine is not a defence in law and thus fails. That the Court has been reluctant to enforce the pleasure doctrine in Kenya with the Court of Appeal in **Civil Appeal No. 74 of 2014 - Narok County Government & Another v Richard Bwogo Birir & Another [2015] eKLR** finding that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010 and further, that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. It is the Claimant's submission that pursuant to the terms and conditions of service issued to her by the Public Service Commission, it was her legitimate expectation that she would serve for the period of Five (5) Years stipulated therein. That the Court has through various decisions expressed itself in such instances that in fixed term contracts, the general principle is that they carry no expectation of renewal and she in this expected to conclude the five years. She further submitted that the decision to abruptly terminate her contract of employment was thus cruel and inhumane contrary to Articles 28 and 29(e) of the Constitution and her legitimate expectation. The Claimant submitted that the Court in **Jane Kiongo & 15 Others v Laikipia University & 6 Others [2019] eKLR** relied on various decisions in upholding the principle of legitimate expectation such as that of **National Director of Public Prosecutions v Phillips and Others. [2002] (4) SA 60 (W) at para 28** where Hehe J. listed the requirements for legitimacy of the expectation to include:

- (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';
- (ii) The expectation must be reasonable;
- (iii) The representation must have been induced by the decision-maker;
- (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

6. She also cited the Supreme Court's decision in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR** where the Court similarly discussed the principle of legitimate expectation at paragraphs 263 – 269 of the decision. The Claimant submitted that in light of the foregoing instructive authorities she has met the requirements for legitimacy of the expectation and is entitled to all her benefits for the remainder of her term. The Claimant further submitted that she suffered discrimination arising out of political expediency because she was immediately replaced and which proved that her position was not abolished. That the termination of her employment was discriminatory in nature contrary to Article 27(4) of the Constitution and section 5(3) of the Employment Act and nothing can explain her loss of employment other than being discrimination on account of political expediency. She urged this Honourable Court to adopt the decision in the case of **Pravin Bowry v Ethics & Anti-Corruption Commission [2013] eKLR** where the Court awarded the claimant salaries for the remainder of the contract period pursuant to the principle of legitimate expectation coupled with the finding by the court on the issue of discrimination. She further submitted that she is entitled to service gratuity pursuant to her terms and conditions of service and prays for service gratuity for the entire 5 year term. That having demonstrated that termination of her employment was wrongful, unprocedural, unfair and unlawful, she prays for maximum compensation at 12 months' salary pursuant to Section 49 of the Employment Act. She also prays for leave allowance as leave commutation for unutilized leave days and for costs and interest as she has made a case against the Respondent, whose witness confirmed to this Honourable Court that no payments have been made to the Claimant following termination of her contract of employment. It is her submission that since the Respondent has not challenged her computation of the claims due to her, she is entitled to the said prayers as prayed. The Claimant submitted in her Supplementary Submissions that she relies on the Court of Appeal case of **County Government of Garissa & Another v Idriss Aden Mukhtar & 2 Others [2020] eKLR** where the Court held that 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. The Court of Appeal consequently found that there was nothing wrong with the learned Judge being guided by Section 49(1) of the Employment Act in awarding damages.

7. The Respondents submitted that the Court should as a matter of procedure deal with the Preliminary Objection which is properly filed and that in **Lemita Ole Lemein v Attorney General & 2 Others [2020] eKLR**, Karanja J.A. stated that the issue of jurisdiction being a point of law can also be raised at any stage; in the trial court, first appeal or even on second or third appeal. The Respondent further relied on the case by the Supreme Court of Nigeria in **Petrojessica Enterprises Ltd & Another v Leventis Technical Co. Ltd [1992] 5 NWLR, (Pt. 244) 675** which discussed the importance of jurisdiction being raised at any stage of a case. The Respondents submitted that the Employment Court is not clothed with jurisdiction to question the Constitutional mandate of the President under Article 132(2)(g) of the Constitution to wit; - *in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss*. Further, that there is no employer - employee dispute in the present suit as under Section 12(1) of the Act, to call for the determination of this Honourable Court or at all and that the jurisdiction of this Court is limited to the matters provided for in the statute the Respondents cited the Supreme Court case of **Republic v Karisa Chengo & Another [2017] eKLR**. The Respondents also relied on the case of **John Harun Mwau v Attorney General [2015] eKLR** where the Court held that a court ordering a President, present or past, to exercise his discretion in a particular way would be wholly irregular and akin to taking away discretion that is reposed only in the President. They further cite the case of **Tom Luusa Munyasya & Another v Governor, Makueni County & Another [2014] eKLR** where Rika J. held that:

“39. Article 236 of the Constitution...was not intended to take away the prerogative of the Governor, and the President in dismissing their Cabinet Secretaries and Members of the Executive Committees. Otherwise the laws which grant the respective CEOs the power to remove their appointees when they deem it appropriate or necessary, would have no meaning. An interpretation of Article 236, which would require the Governor or the President to give reasons or impose other procedural requirements would infringe the tenets of pure Presidential System at both levels of the government.”

7. The Respondent submitted that from the foregoing jurisprudence, the appointment and removal of the Claimant being political was in accordance with Article 132(2)(g) of the Constitution for which the President was performing an executive function. That this Honourable

Court being a creature of the statute has no jurisdiction to therefore review and set aside the decision of the President. That the Court of Appeal has previously held in **County Government of Nyeri & Another v Cecilia Wangechi Ndungu [2015] eKLR** that the Employment Act does not apply to State Officers and the Respondents submit that the same does not apply to the Claimant's case in the instant suit because her appointment was made in exercise of the President's executive functions. The Respondents further submitted that the court determining the political controversy herein would be infringing on the principles of separation of powers and they urge this Court to not depart from the binding decision of the Court of Appeal in the **Mumo Matemu** case as relied on by Makau J. in **Mwenda Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs & 2 Others [2019] eKLR** and to not sit in appeal over the decision of the President to change persons he appoints as he deems fit. The Respondents pray that the objection is merited and it be allowed with costs to the Respondents. The Respondents submit that should the Honourable Court be inclined to disallow the objection, it should reject any attempt to analyse that the Claimant's termination of employment was unprocedural and unfair. They note that the Claimant's Claim is very neutral she does not say that the President or the PSC terminated her contract. The Respondents cited the case of **Miguna Miguna v Permanent Secretary, Office of The Prime Minister & Another [2011] eKLR** where Warsame J. held that the applicant's appointment was not by the Public Service Commission but by the President of the Republic of Kenya, which appointment was not underpinned by the statute or by Public Service regulations and that he applicant cannot expect to be subjected to a process outside his employment contract. It is the Respondents' submission that it is common ground that the jurisdiction or power of the PSC to make appointments is limited to offices in the Public Service only. That in this case since staff to the Executive Office of the President are not offices in the public service, the contention by the Claimant that the PSC appointed her is misconceived and must fail for being based on a false or erroneous premise. That the Claimant is estopped from accepting her appointment by the President and turning around to claim her appointment was by PSC when the contract is terminated. They urge this Court to arrive at the conclusion made in **Civil Appeal No. 72 of 2017-National Bank of Kenya Limited v Hamida Bana & 103 Others [2017] eKLR** that a party cannot be permitted to blow hot and cold, fast and loose or approbate and reprobate and that a person who knowingly accepts the benefits of a contract is estopped to deny the validity or binding effect of such a contract. The Respondents submitted that the Claimant was given reasons for the termination of her contract by His Excellency the President to be because of reorganization of the Executive Office. That this Court should disregard the authorities relied on by the Claimant as they are irrelevant to her case and none is similar to the facts in this case. That the Claimant has refused to clear for her terminal dues to be released to her and they pray that the allegation of unfair dismissal be dismissed. On the issue of legitimate expectation, the Respondents submit that the Claimant cannot expect to complete a 5 year term nor claim that her term was tied to the term of the Deputy President since the President and Deputy President are elected and can be removed through the procedures provided for under the Constitution. That the Claimant's allegation of breach of her legitimate expectations is against Article 132(2) (g) of the Constitution which gives the President the powers to appoint and dismiss as he deems fit. The Respondents further submit that the Claimant never pleaded the issue of discrimination either in her amended memorandum of claim, documents produced in evidence, witness statement or oral evidence given in Court. That as was asserted in **Civil Appeal No. 1 of 2016 - Justice Kalpana H. Rawal v The Judicial Service Commission & 3 Others [2016] eKLR**, this Court cannot determine or base its decision on issues not pleaded. They note that the person holding the position previously held by the Claimant is currently one Mr. Ken Osinde, which shows that the President keeps changing such persons as he deems fit. That for argument sake the issue of discrimination should be disallowed as the Claimant has not produced any evidence on the same. The Respondents submitted that the Claimant is not entitled to any damages because the President is immune from civil litigation and the Claimant has not cited any law or case law that compels the President to compensate appointees who are relieved of their duties. Further, that there was no term in the contract between the President and the Claimant that the Claimant would be paid for the remainder of the contract in the event of termination of employment and that such relief is also not provided for under section 49 of the Employment Act. They urge the Court to be persuaded by the Court of Appeal decision in **Richard Erskine Leakey & 2 Others v Samson Kipkoech Chemai [2019] eKLR** where the superior court had awarded the respondent the remainder of his contract as Ambassador together with all allowances but the appellate court set aside the said judgment in its entirety and held that a constitutional office is not an item of personal property. The Respondents pray that the prayer for salaries for remainder of the term be dismissed and that since the Employment Act does not apply to the Claimant's case, damages for unlawful termination under the Act cannot issue.

8. The first issue to determine is whether this Court is clothed with jurisdiction to deal with the matter. As rightly pointed out by the Respondents, jurisdiction is everything. Without it a court cannot take any step. The Respondents argue that the Employment Court is not clothed with jurisdiction to question the Constitutional mandate of the President under Article 132(2)(g) of the Constitution to wit; - *in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss*. Further, the Respondents argue that there is no employer - employee dispute in the present suit as under Section 12(1) of the Act, to call for the determination of this Honourable Court or at all and that the jurisdiction of this Court is limited to the matters provided for in the statute. The Employment and Labour Relations Court is clothed with jurisdiction to deal with Constitutional issues that may arise in a suit before it. This was held as such by the Supreme Court in the **Republic v Karisa Chengo**, what is frowned upon is this Court exercising a mandate that is the preserve of the High Court or the Land and Environment Court. Just to correct the Respondents, Kenya is a constitutional democracy underpinned by the 2010 Constitution. The President of Kenya is NOT immune from being sued while in office. He however enjoys qualified immunity against certain actions while he exercises the functions of his office. Otherwise, no President in this Republic would be sued in an election petition after a presidential election where he was a candidate. Having said that, does the Claimant's claim name the President as a party? As clearly enumerated at page 1 of this Judgment the parties sued are the Head of the Civil Service, the Public Service Commission and the Hon. The Attorney General. The preliminary objection as framed by the Respondents therefore falls flat on its face and is only fit for dismissal as I hereby do.

9. The Claimant asserts that she had a legitimate expectation to serve the full tenure of 5 years per her contract with the 2nd Respondent. Granted she was appointed to serve under the Executive Office of President (EOP) she was to serve under the Deputy President of the Republic of Kenya. As pointed out by the Respondents, there was no guarantee that the President and his Deputy would serve more than 5 years though in fact they have. This means that the Claimant's tenure like other appointments by the President in certain capacities is amenable to changes such as replacement. She was in service until her removal in November 2015 on account of reorganisation of Government. She expected the reorganization to follow the President's speech and not take effect immediately. As pointed out earlier in this decision, there is no guarantee an appointment by the President would last the full term specified in the appointment. It is only fit and proper that there be some degree of latitude permitted to the President to appoint and remove from appointment staff he personally appoints in his capacity as President. The Claimant having taken an appointment under such circumstances cannot now plead legitimate expectation. Her case is distinguishable from the decision of **Pravin Bowry v Ethics & Anti-Corruption Commission (supra)** as in that case Mr. Pravin Bowry had been competitively recruited after interviews for the position of a Deputy Director at the Ethics & Anti Corruption Commission. The Claimant from all accounts was not interviewed for the position. If that had been the case a legitimate expectation argument could have successfully been floated. In the premises, as the Claimant's termination was under reorganisation of Government and did not require the application of the provisions of Section 41, the Claimant cannot recover for the removal from office as she did not plead or demonstrate

discrimination or the factors under Section 41 that would entitle one to compensation. As she was to be paid a package upon clearance with the 2nd Respondent, I direct that she clears with the Respondent within 14 days of today and the Respondents to ensure payment of the sums calculated as her dues within 14 days of her clearance. In default of payment as indicated herein, the Claimant will be at liberty to move Court to enforce the decision of the Court. Each party will bear their own costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 2nd day of June 2021

Nzioki wa Makau

JUDGE