



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

ELRC CAUSE NO. 94 OF 2018

KILELSON MUTAI.....CLAIMANT

VERSUS

GOVERNOR COUNTY GOVT OF BOMET.....1ST RESPONDENT

COUNTY SECRETARY, GOVT OF BOMET.....2ND RESPONDENT

BOMET COURT PUBLIC SERVICE BOARD.....3RD RESPONDENT

JUDGMENT

1. The Claimant through Messers Chelule and Company Advocates filed this claim vide a Memorandum of Claim dated 19th September, 2018, alleging wrongful dismissal and unlawful termination from employment and non-payment of terminal dues against the Respondents and seeks the following orders:-

a) A declaration that conversion of terms of service from that of permanent appointment to contract was illegal, null and void.

b) An order stopping the respondents from replacing the claimant and or dismissing him from his job.

c) An order reinstating the claimant to his employment and directing the respondent to compensate the claimant from wrongful dismissal in the sum of Kshs. 15,601,996/- representing;

i) Two months' salary in lieu of notice Kshs 280,000 X 2= Kshs. 560,000/-

ii) Gratuity payment calculated at 30% of basic pay for each year of service; Kshs 30% of 180,000 x 12 x 5 = Kshs 3,240,000/-

iii) Damages for unfair termination 5 years' salary Kshs 280,000x12x5 = Kshs.16,800,000/=.

d) Costs of this Suit

ALTERNATIVELY, the claimant prays for judgment against the Respondents as follows;

a) Declaration that the conversion of terms of service from that of permanent appointment is illegal, null and void.

b) An order directing the Respondents to compensate the claimant for wrongful dismissal and judgment in the claimants favour in the sum of Kshs 60,674,160 representing;

i) The remaining salary for the years the claimant's letter of appointment under permanent and pensionable terms

Kshs 280,000 x12 x5 = Kshs 50,400,000/=

ii) Gratuity payment calculated at 30% of basic pay for each year of service, Kshs.30% of 180,000 x 12 x 20= Kshs 12, 960,000/-

iii) Damages for unfair termination 5 years salary

Kshs. 280,000 x 12 x 5 = Kshs 16,800,000/-

TOTAL Kshs. 80,160,000/-.

c) Costs of this suit.

2. The summary of the claimant's case was that, he was appointed the chief officer- Administration, under job group 'S' by a letter of appointment dated 7th October, 2013 which was based on permanent and pensionable terms. That according to the appointment letter, he was entitled to basic pay of Kshs 120,270/- together with house allowance, responsibility allowance, entertainment allowance, commuter allowance and leave allowance, which offer he accepted and commenced immediately.
3. He states that by a letter dated 10th April, 2014 he was re-deployed to the department of Energy, Tourism, Trade and industry still as the chief officer and later on 6th August, 2015 he was further re-deployed to the County secretary's Office to deputize the County Secretary while still the chief officer of department of Energy, Tourism, Trade and industry.
4. He avers that in March, 2018 he was appointed the acting County secretary a position that he held till 17th August, 2018 when he received a letter from the 2nd Respondent claiming that his contract had lapsed as the same was pegged to the former governor who had already exited office.
5. He contends that his employment was on permanent and pensionable terms therefore he was abruptly and illegally dismissed from employment.
6. The 2nd Respondent filed a statement of response through the firm of Omondi Abande and company advocates on 27th February, 2020 and denied the claimant's appointment and allege that if there was such an appointment then the same was illegal and unprocedurally done and against the law therefore the claimant is not entitled to any of the prayers sought.
7. The 3rd Respondent filed its Statement of response through the firm of K.N Mutai and Partners Advocates on 27th February, 2020 reproducing verbatim the response of the 2nd Respondent denying ever appointing the claimant as its employee and alleging that the said appointment if any was occasioned by an act of illegality as such the claimant is not entitled to the prayers sought in Memorandum of claim.
8. The matter herein proceeded for hearing on 4th March, 2020 where the Claimant, **Kilelson Mutai CW-1**, testified that he was employed by the respondents on 7/10/2013 as the chief officer, Administration on temporary basis for 3 months commencing 1/10/2013. that the county secretary wrote to the Public service board to consider his application and confirm the documents. Thereafter his name was placed before the county assembly for vetting which was approved and his appointment as the Chief officer administration was approved, while Simon Korir was appointed in charge of department of water while Paul Kimetto was rejected.
9. He testified that the Public service board and the county assembly approved his appointment and was therefore issued with the letter of appointment dated 7/10/2013 by the Governor and no objection was ever raised. That he served in the said position till April, 2014 when he was re-deployed to be the chief officer- Energy, trade and tourism which he served till August 2015 when he was again re-deployed to the office of the County secretary to deputize the County Secretary on the same terms which he served till March 2016 when he was appointed as the acting County secretary till the position was filled and he reverted back and continued serving till September, 2016 when he was interdicted pursuant to EACC case against him and other officer in the county of Bomet which he was acquitted in August, 2019 later after his dismissal by the respondents in 17th August 2018.
10. On cross examination by **Mr. Ongundi Advocate**, the claimant testified that his position was not advertised and averred that the office of chief officer is provided for under Section 45 of the County Government Act in that he was appointed by the governor with the approval of the county assembly and that he was interviewed by the Board sometimes in March, 2013.
11. On cross examination by **Mr. M.K. Mutai Advocate**, he confirmed that his position was not advertised neither was he competitively sourced. He testified that he was interviewed by the board but was not aware whether other people had been interviewed for the same position. He stated that he was placed in acting position as the county secretary by the 3rd Respondent by a letter dated 6/8/2015.
12. The 2nd Respondent called one witness, **Wesley Kosgei**, the director Human Resource Bomet County from January, 2014 to date. He adopted his witness statement filed on 27th February, 2020 and gave the procedure followed in filling positions of chief officer of the county. He testified that the position is advertised in three newspapers of national circulation, then the qualified candidates are shortlisted and then interviewed by the Board who will intern forward the preferred candidates for vetting by the County assembly and approval.
13. He alleges that the claimant's employment did not follow that procedure and the alleged suitability interview that the claimant alleged to have passed through is no longer followed. He testified that when the new governor came into office all the Chief officer were terminated and paid their dues. And that the claimant was not paid his dues since he is yet to clear with the Respondent upon his termination.
14. He testified that the letter of appointment by the claimant indicated that he was employed by the Governor on permanent terms a practice that is not procedural and the respondent changed the said position to that of contractual basis as per its letter of 24.3.2017 which the claimant was informed and failed to react to.

15. On cross examination by **J. Mutai**, He confirmed that the letter of 24.3.2017 was not addressed to the claimant as the claimant was not one of the person listed to receive the letter. he affirmed that according to records suitability interview was no longer in use and that no other Chief officer was employed through the said procedure. He testified that the governor is not supposed to appoint chief officer's and the letter of appointment does not emanate from his office. He testified that the other chief officers were terminated when the new governor took office.

16. The 3rd Respondent's Witness **Joshua Kipkemei Terer**, the former chairman of Bomet Public Service Board, who adopted his witness statement dated 27.2.2020 and testified that there is no permanent and pensionable position for chief officer Administration as they were all contractual. He stated that the claimant was not competitively sourced. Further that there was no position called Deputy County Secretary in Bomet county.

17. On cross examination by **J. Mutai**, he testified that he was the chairman of the Public Service Board of the 3rd Respondent and that he was the one that conducted the interviews of all appointees including the claimant who was interviewed for position of the Chief Officer Administration and his name was recommended to be forwarded for vetting by county assembly however the county secretary recommended him for approval which was against the procedure.

18. On cross examination by **Ms. Chepkoech** the witness testified that the claimant was interviewed for position of chief officer when he was already in employment as the acting Administrator at Bomet County.

Claimant's Submissions

19. The claimant's Counsel, submitted that the claimant was appointed by the governor Bomet County in accordance with section 45(1) of the County Governments Act, 2012 with the approval of the county assembly as evidence by the letter from the speaker dated 25th September, 2013 addressed to the Governor. That his appointment came about after his name was forwarded by a letter dated 13th August, 2013 to the 3rd Respondent for suitability interview who carried out interview and approved the claimant and forwarded the name back to the 2nd Respondent who forwarded to the county assembly for vetting and then to the governor by a letter dated 18th September, 2013 who approved his appointment and issued him the letter of appointment dated 7th October, 2013.

20. On the conversion of the claimant terms of employment from permanent to contractual, it was submitted that the said conversion was illegal and unilateral that led to his termination on alleged expiry of the contract pursuant to assumption of office of the new governor. He argued that the only offices that ceases upon the expiry of the term of the governor are those mentioned under Article 179(7) that is the position of CEC' s and that the Chief officer position are not pegged upon the term of the governor. He reinforced this position by citing the decision in **David Ogega Kebero-v- Kisii county public service Board & Another [2017] eKlr.**

21. Accordingly, it was submitted that the claimant is a public servant, whose employment is protected under Article 236 of the Constitution therefore the respondent can only terminate the claimant service in compliance with the Constitution and the Employment Act.

22. He thus urged this court to find that the claimant was unfairly dismissed from employment and granted the prayers as sought in the claim.

2nd Respondent's Submissions

23. The gist of the 2nd Respondent's submissions is that the claimant employment was not conducted in accordance with section 45(1)(a) of the County Government Act, in that the said position of chief officer was not advertised as required by law and that the claimant was not competitively sourced as envisaged in the act, therefore the procedure that was followed to employ the claimant was a sham that cannot be sanctioned by this Court. He relied on the case of **Agnes Wanjiku & 10 others -v- the chief registrar of the judiciary and another [2017] eKlr.**

24. Accordingly, he submitted that since due procedure was not followed in the recruitment of the claimant, then there was no employer/employee relationship and urged this Court to disallow the claim.

25. On the prayers sought, it was submitted that there was no position established referred as the Deputy County Secretary and that all officer that are established are done so in accordance with section 60 of the County Government Act.

26. It was also submitted that the claimant's prayer for reinstatement is time barred and the said prayer cannot lie.

27. He concluded and submitted that the claimant cause of action arose out of an unlawful employment contract that contravened the tenets of Articles 232 and 236 of the Constitution as read together with section 45 and part VII of the County Government Act and therefore urged this Court to dismiss the claim with costs.

3rd Respondent submissions.

28. The 3rd Respondent submitted that the recruitment of the claimant was illegal and the contract of employment is an illegal contract that cannot be legalized by this Court. He argued that the contract signed by the governor appointing the claimant was done in contravention of section 45(1) of the County Government Act and section 14(1) of the Bomet County Coordination of Government Functions Act, 2014 which vests the power of appointment on the 3rd Respondent herein. Further that the 3rd Respondent is empowered under section 75 to revoke any appointment and take correct action which he argues was legally done by the board when it realized that the claimant was illegally appointed on permanent basis.

29. The respondent further submitted that the claimant has not raised cause of action against it and therefore they should be discharged from these proceedings and the suit dismissed with costs.

30. I have examined the evidence and submissions of the parties herein. From the claimant's evidence, he was employed as chief officer Administration on 7/10/2013.

31. Section 45 of the County Government Act provides how a chief Officer can be appointed and a chief officer can be appointed and the provision is that the appointment will be done after persons are competitively sourced and thereafter appointed by the County Assembly.

32. Section 45 (1) (a) of the County Government Act prescribes the procedure and in my view competitive recruitment is key and this implies that advertisements must be made by the CPSB and qualified names sent to the Governor for nomination.

33. Thereafter the governor would refer his nominee to the County Assembly for vetting and approval before the Governor finally appoints.

34. The claimant avers that he was appointed by the Governor on permanent and pensionable terms on 7/10/2013 and that the County Assembly also approved his appointment on 25/9/2013.

35. He contends that he was also subjected to suitability interview by the 3rd respondent after his name was forwarded by the County Secretary to the County of Bomet.

36. The 3rd respondent on that part indicate that they never engaged or entered into a contract with the claimant.

37. The 3rd respondents aver that the recruitment of the claimant was not open nor was it advertised. There was competitive recruitment.

38. The claimant has actually not demonstrated how he was appointed by the Governor and steps proceeding this appointment. As the law stands, the claimant's position as Chief Officer was to be advertised and applicants invited to apply. No advert was ever placed and therefore it follows that there was no open, transparent recruitment of the claimant by the CPSB which has the mandate to handle the HR functions of the County.

39. It is therefore apparent that the appointment of the claimant by the Governor on permanent and pensionable terms was irregular and illegal and this court cannot be the source of sanctioning an illegality.

40. It is therefore my finding that the claimant's case cannot succeed. It is not merited and is therefore dismissed with no order of costs.

DATED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutai for petitioner – present

Mr. Chepkoech for 3rd respondent – present

Court Assistants – Fred and Wanyoike