



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 382 OF 2013

PATRICK KARIITHI WAHOME & 114 OTHERS.....CLAIMANTS

-VERSUS-

COUNTY GOVERNMENT OF LAIKIPIA.....1ST RESPONDENT

LAIKIPIA COUNTY,

PUBLIC SERVICE BOARD.....2ND RESPONDENT

THE TRANSITIONAL AUTHORITY..... 1ST INTERESTED PARTY

THE PUBLIC SERVICE COMMISSION..... 2ND INTERESTED PARTY

JUDGMENT

1. The Claimants herein filed a Statement of Claim dated 4th November, 2013 on even date and Amended on 14th January, 2014 claiming unfair termination and payment of salary arrears and to be reinstated back to employment.

2. The claimants at all material times were the employees of the Respondents acting in different capacities who were employed by the town council of Rumuruti and later absorbed by the Respondents in the various capacities upon transition to the county government.

3. The claimants aver that they were all terminated from employment on 24th October, 2013 without any reason or Notice, neither were they subjected to any disciplinary hearing.

4. They therefore contend that their termination was unlawful and prayed for judgment against the Respondents for;

a) That the Honorable Court be pleased to issue and order suspending Respondents decision to terminate claimants' employment and for an order reinstating the claimants to their respective capacities of work.

b) That the court be pleased to declare the Respondents mode of terminating the claimants' employment unlawfully and illegal.

c) That the Honourable court be pleased to issue an order directing the Respondents to pay claimants respective salary arrears.

d) The Honourable Court be pleased to declare the claimant are still employees of the 1st and 2nd Respondent.

e) That the Honourable Court be pleased to issue a permanent order restraining the Respondent from terminating the claimants' employment

f) That costs of this cause be provided for.

5. The 1st and 2nd Respondents filed a response to the claim on 6th March, 2014 and denied the entire claim terming it as baseless, frivolous, vexatious and does not disclose any reasonable cause against them.

6. The respondents herein denied ever employing the claimants and further averred that the 1st claimant does not have authority to bring this claim on behalf of the other 114 claimants.

7. It is stated that by the letter dated 27th September, 2012, the former permanent secretary for ministry of local government, Karega Mutahi, suspended any further recruitment and appointment by the town and county clerk in all municipal councils all over the Country to avoid bloating the wage bill and to ensure a smooth transition process to the devolved government.

8. The respondents averred that during the intervening period the then Rumuruti town clerk, Mr. Richard Nyakundi Kimanga in defiance of the directive by the permanent secretary proceeded to make further irregular appointment where the claimants together with other people were appointed as employees of Rumuruti Town Council.

9. It is contended that all the appointments made after the suspension notice of 27th September, 2012 are irregular and the same are null and void.

10. Pursuant to the irregular appointment, the said Mr. Richard Kimanga was summoned by the County Service Board and later interdicted for the irregular appointments and eventually was retired.

11. The Respondent stated that, the fact that there were no valid employment contracts held by the claimant, the Respondents were not obligated to issue the claimants with any Notices of termination.

12. The Respondents maintained that the contracts were illegal and therefore cannot be enforced by this Court and thus the claimants are not entitled to any reliefs.

13. The Honourable Attorney General entered Appearance on behalf of the interested Parties on the 16th December, 2014 however they did not file any response to the claim herein.

14. Subsequently, by an application dated 14th September, 2016, the 1st and 2nd interested parties sought to be enjoined as third party and served a Third Party Notice on Richard Nyakundi Kimanga. In the said Notice, the interested parties claim for indemnity and full contribution for any judgment/award that may be given in favour of the claimants on account of the manner in which Richard Kimanga flouted the recruitment procedures and hired the claimants without regard to law and failure to seek any authority from the local authority being Rumuruti Town Council. The Application was allowed on 14th September, 2015 by Justice Radido and the Honourable Attorney General acting on behalf of the interested parties was ordered to serve the third party Notice within 45 days. The Third party appeared in Court on 20th July, 2017 but did not file any documents in court neither did he participate in the proceedings thereafter.

15. This claim came up for hearing on the 30th April, 2015 before Justice Radido where the claimants called 3 witnesses. **Dorcas Chepkorir Chirchir (CW-1)** who testified that she worked for Rumuruti Town Council as a market attendant till 13.9.2012 when she was appointed as a clerical officer and issued with appointment letter dated 30th August, 2012 signed by Clerk to the then Town council where she worked continuously even when the County Government were rolled out till 24th October, 2013 when she reported to work as usual and before commencing on the days work, they were summoned by the Administrator one Mr. Kaparo for an urgent meeting that they were informed that the Public Service Board does not recognize all employees employed in 2012 and that they were Ghost workers. Subsequently they were directed out of the building and gates were locked. Despite them going to work every day for about a week, the gates remained locked and they were denied entry. She informed the Court that they were dismissed without any Notice or hearing. She then produced their appointment letters together with the National Identity cards as Ex-2 and further stated that they were lastly paid in September, 2013 and produced her payslips marked as EX-3.

16. On cross examination she testified that she was employed by a letter dated 30th August, 2012 which was signed by the then Town Clerk, Mr. Richard Kimanga in the position of clerical officer earning a salary of Kshs. 23,000/-. It was her testimony that when the County Government took over they continued working for the county government and even received salary from the County government. She stated that in May, 2013 they received an internal Memo from Human Resource Nanyuki who took a head count and requested to be supplied with documents for all the claimants which they submitted only to be dismissed on 24th October, 2013. However, others were called back to serve the County Government and none of claimants was called back.

17. The claimants' second witness **Patrick Kereithi (CW-2)** testified on 13th December, 2018 in absence of all Respondents and the interested parties together with their Advocates. He testified that he was employed by the Respondent by a letter dated 30th August, 2012 to report to Rumuruti station on 1st October, 2012 as junior market master which he worked till October, 2013 when the Respondent dismissed them from employment. He stated that the public service Board called all workers to a meeting and called out names of persons who had been absorbed by the County government and none of the claimants was in the list.

18. The third Claimants witness was **Aminga K. Kimanga, (CW-3)** testified that he was employed by the Respondent as a casual worker on 3rd September, 2012 where he worked till October, 2013 when he was dismissed from employment.

19. The fourth Witness, **Jane Wamuyu Gatimu (CW-4)** testified that she was employed by the Respondent in 2008 as a casual worker and taken up as Guard/county Askari in the year 2012 till October 2013 when her employment was terminated without notice. She testified further that he was lastly paid in June, 2013.

20. The Claimants then closed their case and sought to file submission and in absence of the Respondents and the interested parties the Court closed the Respondents case and a judgment date was allocated. Before judgment was delivered, the Respondents sought to be heard on a

preliminary objection filed on 25th June, 2019 which was allowed on condition that the Respondents pay costs to the claimant for the times the claimants attended court. Eventually the Preliminary Objection was dismissed. Subsequently, another application was made by the Respondents seeking to reopen the proceedings and for them to defend the suit which the Court allowed and now the Respondents case proceeded for hearing on 18th May, 2021 before this court.

21. The Respondent called 4 witnesses, the 1st witness, **Karanja Njora (RW-1)** testified that he is the secretary Laikipia County and testified that the appointment letters attached to the claimants list of documents are not formal having no reference numbers neither do they show the minutes that approved their appointment. RW-1 testified further that not all the 115 claimants were employees of the county, he told this court that only claimants number 24,35,42,51,64,80,92,96,100,103,105, and 112 were employees of the county government and the rest of the claimants do not appear anywhere in their records.

22. On cross examination he testified that he started working for the 1st Respondent in October, 2017 and his testimony is based on the records available in the respondent's office. He testified also that the appointment letters shows that Richard Kimanga the then Town Clerk, Rumuruti Town council, appointed the claimants while acting in excess of his powers, appointments having been suspended by the then Permanent Secretary ministry of Local Authority Karega Mutahi. He told this Court that the appointments were illegally made and therefore cannot be enforced by this Court.

23. The second witness, **Josephine Njoki Kamau (RW-2)** testified that she is the procurement officer in Laikipia County Government having been the Acting Treasurer in Rumuruti Town Council. She stated her duties was to pay the staff of Rumuruti Town Council who were 37 in number at the time and it was only the 37 employees whose names were forwarded to the 1st Respondent when the council transited to the county government.

24. On cross examination she maintained Richard Kimanga who had employed the claimants herein had no authority to do any appointment in light of suspension of further recruitment by Karega Mutahi. She also told this Court that only 5 claimants being claimant number, 2, 3, 4,8 and 19 were absorbed by the county government as per the integration payroll at page 124 of the list of documents.

25. The third Witness, **Shadrack Mwithania (RW-3)** testified that he is the payroll manager Laikipia County Government whose main role in the integration process was to consolidate the payrolls of all the four local authorities being Nanyuki, Laikipia, Nyahururu and Rumuruti town councils. He stated that he relied on February, 2013 payrolls to develop the county government payroll. He testified that county council of Rumuruti had only 37 employees in the payroll who were all integrated to the county government payroll. That he received the payroll from Rumuruti Treasurer who is the RW-2 herein.

26. On cross examination, he testified that the respondent's employees who were taken up by the 1st Respondent have all been paid and that those that were illegally employed by Richard Kimanga do not appear in the payroll of February, 2013 that was forwarded to him for the purposes of integration.

27. The last Witness **Charles Kiarie (RW-4)** testified on 29th June, 2021. It was his testimony that he is the assistant Human Resource manager for the 1st Respondent and by a letter of 1st November, 2016, the Public service Board in agreement with the recommendations of the County Human Resource Advisory committee resolved to retire Mr. Richard Kimanga for various allegations among them for undertaking irregular appointments as the former Town Clerk, Rumuruti Town Council which Kimanga appealed but the Appeal was disallowed by the Public service Board by its' letter referenced PSC/D/KI/1278(25) dated 2nd August, 2017. He also stated that the employees of Rumuruti Town council were not issued with any pay slips up to May, 2013 therefore any pay slips produced as evidence is a forgery.

28. On cross examination he testified and affirmed that Richard Nyakundi Kimanga is the course of all the problems and was not enjoined in this claim.

Submissions

29. The claimants submitted that they are employees of the 1st Respondent having been employed by the Town Clerk. Mr Richard Nyakundi Kimanga who had authority at the time to appoint employees for the town council as it were. It was argued that RW-1 challenged the appointment letters of the claimants however in cross examination he affirmed that some of the claimants were indeed employed by the Respondent, when the said appointment letters have all been structured in a similar manner.

30. It is the claimants' submissions that by virtue of employment by the then defunct municipal council, the 1st Respondent inherit the claimants as its employees therefore the Claimants become automatic employees of the 1st Respondent and their termination thereof ought to have been done with regard to due process. In this they cited the case of **Timothy Omollo and 79 others -v- Kakamega County Government and another [2013] eKLR** where the Court held that;

“Local Authorities were abolished when the Local Government Act was repealed, on the announcement of the final results of the County election. The function of Local Authorities are function of the County Governments. Staff of Local Authorities, who are public servants appointed by or under delegation from the PSC automatically become County Government staff”.

That being the legal position the relationship between the claimants and respondents cannot be terminated without due process. They remain employees of the County Government and they can only be separated after following due process.”

31. It is the claimants' submissions that they have established that the claimants were employees of Rumuruti Town Council who were inherited by the 1st Respondent. Therefore, the Respondents were obligated under section 41 of the employment Act to subject the claimants

to due process before their dismissal. They contend that the claimants' termination in this circumstances was unfair. They reinforced their argument by citing the case of **Benard Ngugi –v- G4S Security Services Kenya Limited [2013] eKLR**.

32. The claimants further submitted that the Respondent violated sections 17, 18(5), 41, 43(1), 44 and 45 of the Employment Act. They therefore urged this Court to allow the claim with costs to them.

33. The Respondent on the other hand submitted that the claimants have failed to prove their case on a balance of probability. It was argued that the claimants alleged employments are a product of an illegality having been appointed by Richard Kimanga who acted contrary to law and in defiance of an order by the minister in charge of the then local Authority Karega Mutahi. The Respondent pointed out that claimants' number 12, 78, 87, 102 and 103 did not produce any of the purported letters, while 29 claimants being claimants number; 2, 10, 24, 26, 33, 42, 47, 49, 51, 54, 55, 57, 59, 63, 64, 66, 75, 76, 84, 87, 90, 92, 95, 97, 103, 105, 106, 108 and 109 did not give their authority to Patrick Kereithi Wahome to swear the verifying Affidavit on their behalf therefore this claim by those claimants must fail. Further that the 1st claimant, Patrick Kereithi Wahome, was not an employee of Rumuruti Town Council therefore does not have locus standi to bring this Suit on behalf of the other claimants herein neither does he have locus standi to testify on behalf of the other claimants therefore the claim must fall in its' entirety.

34. It was also submitted that the payroll of Rumuruti Town Council at page 124 of the Respondent bundle of documents shows the employees of Rumuruti Town council as only 37 in number and among the 37 the names of claimants' number, 35, 42, 51, 64, 100 and 105 only appears to the exclusion of all the other claimants. They argued that this payroll was not objected by the claimants. After the payroll was forwarded to the 1st Respondent, it was argued that the 6 claimants who were in the payroll of Rumuruti Town Council were directed to furnish the 1st Respondent with their certificates to affirm their qualification which the claimants failed therefore losing their positions.

35. It was further argued that the few claimants who were in the payroll failed to avail their documentation to affirm their appointment therefore their appointment was illegal and the dismissal thereof is justifiable and this Court cannot be called upon to ratify an illegality. In this they cited the case of **Scott –v Brown Doering, MCNAB & CO (3)(1892) 2QB 724** where Lindley J held that;

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality it matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him.”

36. The holding in **Scott –v Brown Doering, MCNAB & CO (3)(1892) 2QB 724** was reinforced by Court of Appeal in **Kenya Airways Limited –v- Satwant Singh Flora [2013] eKLR**.

37. The Respondents concluded that the Claimants have failed to demonstrate first that they were legitimate/ regular employees of the Respondents and the termination that followed thereafter thus are not entitled to the reliefs sought.

38. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

- 1. Whether the claimant's case was prosecuted by the 4 claimants who testified.**
- 2. If yes, whether the claimants were properly in an employment relationship with the respondent.**
- 3. If yes, whether they were terminated fairly or justifiably.**
- 4. Whether the claimants are entitled to the remedies sought.**

ISSUE NO. 1

39. This claim was filed by 115 claimants on 4/11/2013 through their counsel Mwangi Kariuki & Co. Advocates. Accompanying the memorandum of claim was a verifying affidavit sworn by one Patrick Karuthi Wahome. The 1st claimant herein indicated that he had authority of his co-plaintiffs to swear the affidavit for and on their behalf.

40. The respondents have submitted that 29 of the 115 claimants have not demonstrated that they gave authority to Patrick Karuthi Wahome to swear the verifying affidavit, produce evidence and testify on their behalf. The respondents aver that the 29 claimants are No. 2, 10, 24, 26, 33, 42, 47, 49, 51, 54, 55, 57, 59, 63, 64, 66, 75, 76, 84, 87, 90, 92, 95, 97, 103, 105, 106, 108 and 109.

41. There is however no such evidence that there was no authority from these claimants.

42. By an order of this court on 9/10/2014 (J. Radido) direction were taken as follows;

“Pursuant to Rule 9 of the Industrial court (procedure) Rules 2010, 2 of the claimants to testify on behalf of the 115 claimant to save time and enable expeditious determination of the suit. Hearing on 20/11/2014”.

43. On 30/4/2015, when the matter was set for hearing again the claimant's counsel informed court that he wanted to call 3 out of the 115 claimants to the stand. These directions were adhered to and the claimant called several witnesses as directed.

44. The averment that the other 29 claimants didn't give authority for the ones who testified to testify on their behalf is therefore far-fetched as this direction was given by the court itself flowing from the law as at the time.

45. The witnesses No. 1 indicated she was producing documents on behalf of her co-claimants which the respondents objected to as per the proceedings of 3/4/15. The Honourable J. Radido overruled the objection relying on directions previously taken and noting that no prejudice would be suffered by the respondents as they would have time to cross examine the witnesses. The Honourable Judge also relied on Article 159 of the Constitution and indicated the issue was a mere technicality which will not affect the substance of the case.

46. At the instance of the respondent's some claimants were also called for cross examination as requested by the respondents who didn't turn up in court and so the witnesses proceeded and testified on 13/12/2018.

47. On this issue, I therefore find that the claimants case was presented by their co-claimants who testified as per the law and directions given by this Honourable Court.

ISSUE NO. 2

48. On issue of employment of the claimants, the claimants testified and produced documents to show that they had been employed by the Municipal Council of Laikipia before the establishment of the County Government of Laikipia.

49. In the list of documents filed by the claimants on 4/11/2013 are several letters appointing the claimants in several cadres. The letters are dated 30/8/2012 signed by the Town Clerk of the Town Council of Rumuruti.

50. The respondents submitted that the claimants were not bonafide employees of the Town Council of Rumuruti as they submitted as payroll of the said Town council as at February 2013 which show that the claimants were missing from the payroll.

51. To counter this stand, the vouchers and receipts to show that they were being paid by the defunct Municipal Council of Laikipia the claimant Dorcas Churchir (pg 100 of the claimant's bundle of documents filed 4/11/2013 – Claimant No. 100) even exhibited her payslips from the Town Council of Laikipia showing that she was an employee.

52. The respondent averred that these claimants were employed when there was a suspension of employment as per the letter from the PS dated 24th September 2012. However, it is shown that the claimants had been employed prior to this letter in August 2012.

53. The respondent called 4 witnesses who testified on this issue and these witnesses were unable to produce any evidence to dispute the validity of the employment letters produced by claimants DW2 who was the then Town Treasurer admitted in cross-examination that the claimants were appointed and that Kimanga, the then Town Clerk had authority to appoint the claimants except 5 i.e No. 2, 3, 4, 8 and 19.

54. Having considered the evidence above, it is my finding that the claimants were appointed with authority of the Town Clerk of Laikipia Town Council as indicated by RW2.

ISSUE NO 3 – Termination of the claimants

55. The claimants were verbally terminated on 24/10/2013. No termination letter were issued to them by the respondents who contended that they were not employees of the 1st & 2nd respondent and so were not entitled to any termination letters.

56. I have determined at 2 above that the claimants were employees of the 1st & 2nd respondents and they were therefore entitled to fair administrative action before termination as per the Judgment of this court in Timothy Omollo & 19 others VS Kakamega County Government & another (2013) eklr where the court stated as follows;

“That being the legal position, the relationship between the claimants and the respondents cannot be terminated without due process. They remain employees of the County Government and they can only be separated after following due process”.

Local authorities were abolished when the LGA was repealed on the announcement of the final results of the County election. The function of the Local Authorities and function of the County Government Staff of Local Authorities who are public servants appointed by or under delegation from the PSC automatically become County overnment Staff.”

57. The claimants having been appointed under the repealed Local Government Act, became employees of the County Government of Laikipia. They could only be terminated as per the provision of the County Government Act and upon following due process.

58. The claimants were never subjected to any due process. It is therefore my finding that the termination was illegal, null and void.

3. REMEDIES

1. This court vide court's Ruling stayed the alleged termination of the claimants on 4/11/2013.

2. That being the case, the claimants have continued being in the employment of the respondents to date.

3. I therefore find for the claimants herein and declare them still employees of the 1st & 2nd respondents.

4. The claimants are also entitled to payment of any salary arrears owing.

5. These claimants who left the service of the respondents by any other means save by the termination through the respondents are deemed to have left on their own volition and so are not entitled to salary arrears from the time they may have taken up any other appointments elsewhere.

6. The 1st & 2nd respondents will pay costs of this suit.

DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Awuor for Claimant – present

Respondent - absent

Court Assistant - Fred