



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1963 OF 2017

JEREMIAH MEPUKORI NAIROWUA.....1ST CLAIMANT
GLADYS SELEINA MARIMA.....2ND CLAIMANT
ALI DAUD LETURA.....3RD CLAIMANT
KESWE MAPENA.....4TH CLAIMANT
NANCY GATHAIYA.....5TH CLAIMANT
FLORENCE NDUNGE MUTUA.....6TH CLAIMANT

VERSUS

THE GOVERNOR, KAJIADO COUNTY GOVERNMENT....1ST RESPONDENT
KAJIADO COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimants' claim, as contained in their Memorandum of Claim dated 29th September 2017 and filed in court on 2nd October 2017, is based on what they term as unfair, illegal and/or irregular termination of their employment by the Respondents.
2. In response to the Claimants' claim, the Respondents filed a Response to Memorandum of Claim on 27th November 2018.
3. The parties urged their respective cases by way of written submissions.

The Claimants' Case

4. The Claimants state that they were employed into the Kajiado County Executive Committee in accordance with Article 179 of the Constitution of Kenya and Section 35 of the County Governments Act No 17 of 2012.
5. The Claimants further state that their respective contracts set out the terms and conditions of their employment. The said contracts were entered into on diverse dates as follows:
 - a. Jeremiah Mepukori Nairowua (1st Claimant) – County Executive Member for Water, Irrigation, Environment & Natural Resources appointed on 2nd August 2013 with the contract expected to end on 1st August 2018;
 - b. Gladys Seleina Marima (2nd Claimant) – County Executive Member for Health Services appointed on 12th June 2013 with the contract expected to end on 11th June 2018;
 - c. Ali Daud Letura (3rd Claimant) – County Executive Member for Land and Executive Planning appointed on 12th June 2013 with

the contract expected to end on 11th June 2018;

d. Keswe Mapena (4th Claimant) – County Executive Member for the County Treasury appointed on 15th July 2013 with the contract expected to end on 14th July 2018;

e. Nancy Gathaiya (5th Claimant) – County Executive Member for Public Service Administration & Citizen Participation appointed on 2nd August 2013 with the contract expected to end on 1st August 2018;

f. Florence Ndunge Mutua (5th Claimant) – County Executive Member for Trade & Cooperatives appointed on 3rd July 2013 with the contract expected to end on 2nd July 2018.

6. The Claimants accuse the Respondents of illegally and/or irregularly terminating their contracts prematurely.

7. The Claimants further accuse the Respondents of failure to pay them their terminal dues and to issue them with Certificates of Service.

8. The Claimants state that they dutifully and diligently rendered their services to the Respondents.

9. The Claimants' case is that it was unfair and unreasonable for the Respondents to unilaterally terminate the respective contracts of the Claimants vide a newspaper advertisement and/or through social media, without a formal termination notice.

10. The Claimants' prayers are as follows:

a. Severance pay for the remaining contractual period as per each respective contract;

b. Statutory dues & retirement benefits;

c. Annual leave allowance as per each respective contract;

d. General damages for premature, wrongful and unfair dismissal

e. In the alternative a permanent order of injunction restraining the 1st and 2nd Respondents from appointing and/or swearing in new persons to the various positions in the County Executive Committee, Kajiado County Government, to replace the Claimants;

f. Costs plus interest.

The Respondents' Case

11. In their Response dated 14th November 2018 and filed in court on 27th November 2018, the Respondents state that there are no issues in dispute because the Claimants ceased to hold office by operation of law. The Respondents therefore maintain that the Claimants cannot sustain a claim for unlawful or unfair termination of employment.

12. In this regard, the Respondents state that:

a. In accordance with the provisions of Section 42(2) of the County Governments Act, the 1st Respondent, as the County Governor elected into office pursuant to Article 180(1) of the Constitution, bears the duty and prerogative to constitute a new Executive Committee within twenty-one (21) days of the swearing in of members of the County Assembly;

b. The letters of appointment in respect of the Claimant's employment were by their terms, subject to the discretion of the appointing authority and the provisions of Articles 179(2)(b) and 179(7) of the Constitution and were unconstitutional to the extent that they purported to confer a duration of service longer than the tenure of the outgoing County Governor;

c. The Respondents are not bound by the appointments, having been made by the outgoing Governor and accordingly, the Claimants do not have any cause of action whatsoever, upon the said letters of appointment.

13. The Respondents' case is that the Claimants ceased to hold office by operation of law and their letters of appointment which purported to extend their duration of service beyond the incumbency of the appointing authority were illegal and incapable of enforcement by the Court.

Findings and Determination

14. The Claimants devoted a large portion of their written submissions to the '*pleasure doctrine*'. It seems to me however that the issue before the Court has nothing to do with this doctrine. Rather, the sole question for determination is whether the Claimants' appointments, as members of the County Executive Committee, could survive the change of guard in the office of Governor, Kajiado County.

15. Article 179(2) & (7) of the Constitution dictates:

(2) The county executive committee consists of-

(a) the county governor and the deputy governor; and

(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.

.....
....

(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.

16. With regard to transition from one county government to another, Section 42 of the County Governments Act provides as follows:

1. When a general election is held for a county government, the outgoing executive committee shall remain in office until a new county executive committee is constituted after the election.

2. The constitution of a new executive committee after an election under subsection (1) shall be finalized within twenty-one days of the swearing in of the members of the county assembly.

17. A plain reading of the foregoing provisions reveals that appointment to County Executive Committees is tied to the term of the sitting Governor.

18. The Claimants concede that the provisions of the Employment Act do not apply to them. In my considered view, appointment of County Executive Committee members is a political process, controlled by the Constitution and statute. The positions in County Executive Committees are not open to every citizen, as the Governor is given the leeway to nominate members of his cabinet, to assist in executing the agenda sold to the electorate by the Governor.

19. That being the case, it follows that a person who benefits from this restricted mode of recruitment cannot claim the procedural fairness safeguards provided by the Employment Act.

20. The courts have been consisted on this issue. In *Benard Ng'eno & another v County Assembly of Bomet & another [2019] eKLR* and *Francis Angueyah Ominde v Wilbur Ottichilo & others; Henry Mangogo Lumbasio & 20 others [2020] eKLR* it was held that the term of office of members of the County Executive Committee was pegged to the term of the appointing Governor.

21. From the foregoing, it is clear that the Claimants' appointment to various portfolios within the Kajiado County Executive Committee was tied to the term of the appointing Governor and once that term ended, these appointments lapsed by operation of law.

22. The corollary is that the appointment letters purporting to extend the Claimants' appointments beyond the term of the appointing Governor had no legal underpinning and were a nullity. Such letters could not therefore confer any rights to the Claimants.

23. For the foregoing reasons, I find and hold that the Claimants' claims for damages for wrongful dismissal are without basis and are disallowed.

24. The claims for severance pay, statutory dues, retirements benefits and annual leave allowance were not proved and are also disallowed.

25. On the whole, the Claimants' case fails and is dismissed.

26. Each party will bear their own costs.

27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OCTOBER 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Rono for the Claimants

Mr. Njoroge for the Respondents