



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 106 OF 2019

CONSOLATA NABWIRE WAKWABUBI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF BUNGOMA.....1st RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF BUNGOMA.....2nd RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF BUNGOMA.....3rd RESPONDENT

COUNTY PUBLIC SERVICE BOARD,BUNGOMA COUNTY.....4th RESPONDENT

JUDGMENT

1. Consolata Nabwire Wakwabubi (the Claimant) was appointed as the Chief Officer, Public Administration through a letter dated 11 March 2014, by the County Public Service Board, Bungoma (the Board).
2. On 26 August 2015, the Governor, County of Bungoma, requested the Claimant to respond to certain allegations of fraud and on 3 September 2015, the County Secretary informed the Claimant of her suspension from office on the same allegations pending investigations.
3. An Ad Hoc committee was formed to conduct the investigations, and on 7 October 2015, it requested the Claimant to respond to the allegations in writing before 13 October 2015.
4. On 16 October 2015, the Committee invited the Claimant to appear before it, and on 5 December 2015, the Claimant learnt from the print media that her appointment had been terminated.
5. The Claimant challenged the investigations/disciplinary process in Kisumu Petition No. 33 of 2015, *Consolata Nabwire Wakwabubi & Ar v Governor, County Government of Bungoma & Ors* (consolidated with Petition No. 32 of 2015).
6. In a judgment delivered on 15 September 2016, the Court dismissed the Petition.
7. Upon the determination of the Petition, the Claimant wrote to the County Secretary on 29 December 2016, seeking the lifting of her suspension and payment of withheld salaries and benefits.
8. The Claimant also gave notice of resignation in the same letter.
9. The Board acknowledged the resignation notice through a letter dated 4 April 2017 and directed the Claimant to settle all the outstanding imprest before she could be cleared.
10. The Claimant was issued with a clearance certificate on or around 3 July 2017.
11. On 12 July 2017, the Claimant requested the payment of her gratuity.
12. The Board accepted the Claimant's resignation through a letter dated 31 July 2017, and also informed her that she had outstanding imprest of Kshs 1,100,000/- imprest and a loan of Kshs 4,067,976/- with Kenya Commercial Bank, which would be offset against her terminal dues.

13. On 12 September 2017, the Board informed the County Legal Officer that the Claimant was entitled to half salary and full house and medical allowances during the period she was on suspension and that she should be paid less the liabilities.

14. On 4 October 2017, the County Secretary released the Claimant to her former employer, the Teachers Service Commission.

15. The Respondents computed the Claimant's dues on or around 8 September 2017 and 11 October 2017, and the same were approved for payment save for the outstanding liabilities.

16. On 6 November 2019, the Claimant filed a Statement of Claim in Court, and she indicated the Issues in dispute as:

(i) Whether the allegations brought forth against the Respondents (sic) were a violation of the Claimant's rights and fundamental freedoms as construed under the Constitution?

(ii) Whether the Claimant is entitled to her terminal dues as prayed for in the Memorandum of Claim?

(iii) Whether the Claimant is entitled to an award of gratuity?

(iv) Whether the Claimant is entitled to any other relief as the Honourable Court may deem fit and just to grant?

(v) Whether the Respondents should pay the costs of this suit?

(vi) Whether the Respondents accorded the Claimant fair labour practices in investigating the allegations levelled against her?

17. Despite entering Appearance through the firm of Makokha Wattanga & Luyali Associates Advocates, the Respondents did not file a Response.

18. The Cause was heard on 14 June 2021.

19. Although a hearing notice was served, the Respondents did not attend the hearing.

20. Pursuant to Court directions, the Claimant filed her submissions on 13 July 2021.

21. The Court has considered the pleadings, evidence on record and the submissions and comes to the conclusion that it has no jurisdiction over the dispute and that if it were wrong on that conclusion, the Cause has no merit.

Jurisdiction (alternative dispute resolution)

22. The gravamen of the Claimant's case is unfair termination of employment through constructive dismissal and breach of contract.

23. In terms of Article 234(2)(i) of the Constitution, section 77(1) and (2)(b),(c),(e) and (f) of the County Governments Act and sections 85(b),(c) and (f), 86 and 87(2) of the Public Service Commission Act, a party aggrieved by a decision of a county public service board in regard to disciplinary control or terms and conditions of service should in the first instance appeal to the Public Service Commission..

24. In *Secretary, Wajir County Public Service Board v Hulbal Gedi Abdille (2017) eKLR*, the Court of Appeal held that a party could not bypass the provisions of Section 77 and come to Court before exhausting the dispute resolution mechanism put in place by the legislature (see also *Speaker of National Assembly v Njenga Karume (2008) 1KLR 425*).

25. The Claimant did not disclose whether she had exercised the right of appeal as set out in the law, and the Court declines jurisdiction.

26. On the assumption that the Court is wrong in declining jurisdiction, the Court will address the merit of the Cause.

Fair administrative action

27. The Claimant also asserted that her right to fair administrative action was infringed because she was not afforded an opportunity to be heard before the suspension, that no reasons were given for the suspension and that she was not paid half salary during the suspension contrary to the Public Service Regulations and or the County Public Service Human Resource Manual, May 2013.

28. The Claimant did not place the Regulations or Manual before the Court.

29. The Claimant was informed of the allegations against her in the Governor's letter dated 26 August 2015, the suspension letter dated 3 September 2015 by the County Secretary and the one dated 7 October 2015 by the Board. She was requested to make written responses and was also invited to an oral hearing before the Ad Hoc committee.

30. It is therefore not true that the Claimant did not know the allegations in place or that she was not afforded an opportunity to make representations.

31. Further, this Court is aware that suspension and interdiction pending disciplinary action are provided for within the public service.

32. Under section D.32 of the County Public Service Human Resource Manual, 2013, which the Court espied online, the suspension is envisaged, and there is no provision for a hearing before the suspension.

33. The suspension of the Claimant was not a sanction or punishment but facilitative of the anticipated disciplinary process, and therefore the right to a hearing may not be necessary.

Constructive dismissal

34. The Claimant contended that the Respondents forced her to resign by making the work environment hostile in that she was not paid a half salary and other applicable benefits during the suspension period.

35. When the Claimant brought to the attention of the Respondents the emoluments due during the suspension, they computed the same and informed the Claimant that she would be paid less any outstanding liabilities.

36. In the Court's view, this is not indicative of an employer who had made the work environment hostile to warrant the employee resigning and invoking the doctrine of constructive dismissal.

Conclusion and Orders

37. From the foregoing, the Court declines jurisdiction, and in case the Court were wrong on that conclusion, it would still have dismissed the Cause for lack of merit.

38. The Cause is dismissed with no order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 1st day of December 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ndalila & Co. Advocates

For Respondents Makokha Wattanga & Luyali Advocates

Court Assistant Chrispo Aura