



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CONSTITUTIONAL PETITION NO 15 OF 2017**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS AS ENSHRINED UNDER ARTICLES 3, 10, 19, 20, 21, 22, 23, 28, 29, 41, 47, 258**

**AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**SECTION 38 OF THE COUNTY GOVERNMENT ACT**

**BETWEEN**

**THOMAS MUGAMBI NTHIGA.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF EMBU.....1<sup>ST</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD, EMBU.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner filed suit against the Respondents for failure to absorb him into permanent employment and for violating his constitutional rights and the doctrine of legitimate expectation. The Petitioner averred that he was employed on 1<sup>st</sup> August 2009 by the then Municipal Council of Embu now the County Government of Embu as a Programme officer for HIV and AIDS pursuant to a Memorandum of Agreement between the Municipal Council of Embu and German Development Service now GIZ Kenya. The Petitioner asserted the contract of employment was for 5 years renewable subject to satisfactory performance and that he was earning a salary of Kshs. 65,000/-. The Petitioner averred that in the agreement, DED was to pay the Petitioner's full salary for the 3 years, finance 75% in the 4<sup>th</sup> year and the Municipal Council 25%, in the 5<sup>th</sup> year DED and the Municipal Council were to pay 50:50. The Petitioner averred that in the subsequent and successive years, the Municipal Council of Embu was to cater for his salary as he would have been employed on permanent and pensionable basis. The Petitioner averred the donors then wrote a letter on 19<sup>th</sup> September 2011 before expiry of his contract recommending for a permanent employment. The Petitioner averred the Municipal Council of Embu Finance Staff and General Purposes Committee held a meeting on 2<sup>nd</sup> May 2012 and resolved to retain the Petitioner at job grade 10 and guided by the CBA. The Petitioner averred that the minutes were fully adopted by the full Council Meeting on 18<sup>th</sup> December 2012. The Petitioner averred that as per his contract of employment and memorandum of agreement he was to have monthly salary increments as follows - in 2012-2013 – Kshs. 8,000/- per month and in 2013-2014 – Kshs. 15,000/- per month. The Petitioner averred that the increments were delayed but the Respondents later settled them. The Petitioner averred that on 30<sup>th</sup> July 2014, a Staff Performance Appraisal Report was prepared by the Respondent's officers and the Petitioner was recommended for permanent employment. The Petitioner averred that he wrote follow up letters several occasions to try fast track the matter as the Respondents had failed and/or neglected to act promptly, he also kept on visiting the Respondents' offices enquiring when he would report to work but he only received promises that he would be reinstated soon. The Petitioner averred that despite demand through his advocates that he be reinstated as recommended, the Respondents kept assuring him that the issue will be considered. The Petitioner averred that the Respondents budgeted for his position since 2014. The Petitioner averred that the rest of the employees on contract like the ICT Officer, driver, teachers and doctors were all confirmed and employed on permanent basis and that the Respondents therefore discriminated against him contrary to Section 27 of the Employment Act. The Petitioner averred that his retirement benefits were not paid during his 5 years employment as per the law. The Petitioner averred that the delayed reinstatement as caused him a lot of emotional anguish as he ought to have been absorbed as a permanent employee by virtue of Section 138 of the County Government Act and Sections 56, 57 and 58 of the Urban Areas and Cities Act. The Petitioner averred that the Respondents failed to treat him with deserved dignity as stipulated under Article 28 of the Constitution as he was subjected to several violations of his rights. The Petitioner averred that he was subjected to

psychological torture contrary to Article 29(d) of the Constitution as he was given hopes of being reinstated by the Respondents only for the said employment to be delayed for a period unjustifiably long which amounted to unfairness at the place of work. The Petitioner averred that the Respondents also failed in their administrative duty to expeditiously inform the Petitioner the reason for the delay and failing to ensure that the Petitioner was employed on permanent and pensionable basis thus violating Article 47 of the Constitution. The Petitioner thus prayed that this Honorable Court be pleased to issue the following orders:-

- i. A declaration that the Petitioner had a legitimate expectation of being employed on permanent and pensionable basis
- ii. A declaration that the Petitioner ought to have been maintained as an employee of the County Government by virtue of the Constitution, County Government Act and the Urban Areas and Cities Act.
- iii. A declaration that the Constitutional rights of the Petitioner as provided for under Articles 27, 28, 29, 41 and 47 of the Constitution were violated by the Respondents.
- iv. Damages for each of the violation of his Constitutional rights.
- v. General damages for the delay in appointing the Petitioner on permanent basis
- vi. Reinstatement of the Petitioner herein to his former position and on permanent basis
- vii. That the Respondents do pay the unpaid salary from the date the Petitioner's contract expired to date
- viii. Payment of the 5 years gratuity owed to the Petitioner.
- ix. Costs of the Petition.

2. In defence, the Respondents filed a replying affidavit sworn by Johnson Nyaga the Country Secretary to the 1<sup>st</sup> Respondent and the head of the 2<sup>nd</sup> Respondent. In the reply he denied that the Municipal Council of Embu undertook to take over the position and continue to pay the Petitioner's salary and/or to have the Petitioner on permanent terms and conditions. The Respondents averred that contrary to the Petitioner's assertions, the recommendation contained in the letter dated 19<sup>th</sup> September 2011 and marked 'TN3' in the Petition was restricted for the remainder of the period of employment of the Petitioner up to 31<sup>st</sup> July 2014 when the contract was to expire. The Respondents averred that whereas the Ordinary Finance Staff and General Purposes Committee meeting of 2<sup>nd</sup> May 2012 minutes whereof are marked 'TMN 5' in the Petition, recommended for the retention of the Petitioner on job group scale 10. It was deponed that of note, the said recommendation or the minutes of the said meeting were not adopted in the Ordinary Full Council meeting of 18<sup>th</sup> December 2012 as per the annexure marked 'TMN 6' contrary to the allegations by the Petitioner. The Respondents objected to the Petitioner's reliance on 'TMN 8b' and 'TMN 13' as they were private and confidential internal communication and asserted that the Petitioner was not entitled to the confidential information contained therein at the stage he obtained it. The Respondents averred that since Article 22 of the Constitution places an obligation on the Petitioner to request for information from the State, the use of 'self-help' or clandestine means by the Petitioner to obtain the subject information in the face of clear Constitutional mechanisms is unwarranted. The Respondents asserted that the subject documents not only fall short of the criteria established under the Constitution but also under Section 35 and 83 of the Evidence Act since they are not certified in accordance with the law. The Respondents assert therefore, it follows that this court cannot rely on them because they are not admissible and they thus urged that the documents be expunged from the record *in limine*. The Respondents asserted that they did not at any time give the Petitioner any assurance as to reinstatement to employment and in any event, the impugned internal memos were not addressed to the Petitioner, who, were it not for the clandestine means of acquiring them, would never have known of their contents. The Respondents' averred that the Petitioner is not justified to claim legitimate expectation in reference to the renewal of his contract and/or to be hired on a permanent basis given that labour laws do not contemplate automatic renewal of employment contracts. The Respondents' assert the Petitioner's fixed term contract did not carry any expectation of renewal upon its expiry on 31<sup>st</sup> July 2014. The deponent asserted that that the law does not place any obligation on the Respondents to give reasons as to why the contract would not be renewed and or why the Petitioner would not be hired on permanent basis. The Respondents assert requiring an employer to give reasons would be tantamount to requiring an employer to give reasons to a potential employee on rejecting the employee's job application. The Respondents assert that the instant suit raises no cause of action against them and does not rise to the required threshold to warrant grant of the reliefs sought therein, is unmerited and is in essence an abuse of the court process. The Respondents urged that the suit be dismissed with costs to the respondents.

3. The Petitioner testified and called one witness in support of his case. The respondent failed to call a witness and did not appear in court to cross-examine the witnesses. The Petitioner adopted his supporting affidavit and the annexures as his evidence in chief. The Petitioner testified that he was employed by the Municipal Council of Embu in 2009. He stated that the German NGO called DED was to support projects as per the agreement between the NGO and the County Government of Embu. He said that it was their agreement that after the expiry of the 5-year contract, the Municipal Council of Embu would employ the Petitioner on permanent basis. He testified that he had his first meeting with the Council Clerk before signing the agreement and the Clerk assured him that the position would be permanent. He stated that when DED and INWARD merged with GIZ, the obligations of DED were taken over by GIZ and the Deputy Director GIZ wrote to the Town Clerk to indicate the work of the HIV/AIDS program officer was good and strongly recommended the permanent employment of the Petitioner. He testified that the merger was explained to the Councilors on 15<sup>th</sup> March 2012 and they also discussed the Petitioner's contract referring to clause 8 of the Memorandum of Agreement. The Petitioner testified that this was another assurance that he would be employed on permanent basis. He said that the committees deliberated and resolved and minutes were sent to the finance committee where they discussed and made a resolution which was forwarded to the Full Council and was made law. He stated that these were standing orders of the Council. He said that the chief officer of the Ministry of Gender, Culture and Social Services also wrote a letter recommending the Petitioner for permanent employment and the staff appraisal also recommended for the same. He testified that there are other employees who were absorbed after the County Government came into place. He stated that his non-absorption amounted to discrimination as all the procedures were followed. He stated that he worked up to July 2014 but from July to December 2014 he worked without pay. He said that he was always promised employment sooner than later. He stated that he failed to understand the delay and failure to respond to the recommendations to

employ him. He testified that after he instructed his lawyer to write a demand letter, the HR manager met him and assured him that he would be reinstated and even the County Attorney gave his input and recommended that the Petitioner be reinstated. He said that the County Attorney concurred that the Petitioner's constitutional rights were being violated. He testified that his position has always been budgeted for even though it is not yet filled and he therefore requested the court to reinstate him.

4. The Petitioner's witness was Mr. Josephat Kariuki Ndwiga who testified that he served as the Chief Officer Finance in the County Government of Embu before he left employment to pursue business. He stated that he also doubled as the Acting County Secretary from February 2017 till June 2017. He testified that the Petitioner used to visit the County offices and around the month of April he visited his office with a demand letter from his advocate threatening to sue the County for failing to reinstate him to his previous position. He said that he perused the Petitioner's file and realized that there was a recommendation from the Human Resource and the County Attorney that the Petitioner be reinstated. He stated from the recommendation he could tell that the Petitioner's rights were being violated since they ought to have absorbed him as they had absorbed the rest of the employees of the defunct Municipal Council. He testified that the Petitioner's case was a clear case of discrimination since no reason was given for the failure to absorb the Petitioner yet the department he was supposed to be working for continued to budget for his salary. He testified that he wrote a letter to the HR and advised him to forward the matter to the Public Service Board advising them to reinstate the Petitioner. He said that in reply to the demand letter he wrote a letter to the Petitioner and requested him not to move to court as the matter was being looked into. He said he did not see a reason as to why the Petitioner was not included in the payroll of the County Government. He testified that the Petitioner's case is a pointer to violation of the Petitioner's rights brought on by a misunderstanding of the existing contracts and the County Government should not be allowed to absorb some people and leave the rest without reason.

5. The Petitioner submitted that he was employed pursuant to a memorandum of agreement between the Municipal Council of Embu (MCE) and German Development Services (DED), now GIZ Kenya. He submitted that Clause 8 of the said document which is relevant to this court stated "*MCE agrees to take over the position of the HIV and AID Programme Officer after the 5 years of support and cover the all costs*". He submitted that it was clear from this clause that DED was to share with MCE payment of the Petitioner's salary for 5 years and after the 5 years MCE would take over the position and continue to pay the required salary and further have the petitioner employed on permanent basis. The Petitioner submitted that the MCE Committee on HIV and Aids held a meeting and discussed about his contract of employment and the Committee together with the Finance and General Purposes Committee resolved to retain the Petitioner even after the expiry of the contract at job grade "scale 10 and guided by the CBA". He submitted that as required by law the recommendations were fully adopted by the Full Council. The Petitioner submitted that the Chief Officer Gender, Culture, Children and Social Services' Staff Performance Appraisal Report, the former County Secretary, the current Human Resource Advisory Committee all resolved to reinstate the Petitioner. The Petitioner submitted that the Respondents discriminated against him in violation of Article 27 of the Constitution and that his rights were infringed by granting all of its employees permanent employment to the exclusion of the Petitioner. The Petitioner submitted that the Respondents failed to treat him with deserved dignity as stipulated in Article 28 of the Constitution as he was subjected to several violations of his rights which shows lack of respect to his inherent human dignity. He submitted that the Respondents raised his hopes of being employed on permanent basis only for the said employment to be delayed for an unjustifiably lengthy period in gross violation of Article 29(d), he submitted that he had therefore been subjected to psychological torture. The Petitioner submitted that the Respondents failed to adhere to the transitional provisions in the Constitution, County Government Act (Articles 55, 63, 67, 71, 74, 85 & 89), and the Urban Areas and Cities Act by failing to absorb the Petitioner into the County Government even after recognizing that he was a former employee of the Municipal Council of Embu. The Petitioner submitted that the assurances given to him during the commencement of the contract doubled with the many recommendations, clearly shows that there was a legitimate expectation created by the Respondents assuring the Petitioner of permanent employment. He relied on the case of **R v Principal Secretary Ministry of Mining Ex parte Airbus Helicopters Southern Africa Pty Ltd (2017) eKLR**. The Petitioner submitted that he worked for a period of 6 months after expiry of his contract when the salary stopped streaming in and he then decided to first have the issue regularized as promised. He submitted that therefore, the issue of expiry of contract should not arise as he continued working for about 6 months and never was he issued with a notice of non-renewal of contract. The Petitioner sought the award of general damages for each violation of his rights at Kshs. 1,000,000/- and the damages for continuous delay to employ him on permanent basis at Kshs. 3,000,000/- as this will cater for all the emotional distress that was caused to him all along waiting to be re-engaged.

6. The Petitioner was a former employee of the defunct Municipal Council of Embu and he was not retained despite promises to do so. The Memorandum of Agreement applicable to his employment provided that he would be retained in employment upon the take-over of the project. The costs would be covered for 5 years. It was recommended in the Council's Finance Staff and General Purposes Committee meeting held on 2<sup>nd</sup> May 2012 to retain the Petitioner at job grade 10 and as guided by the CBA. The recommendation was adopted by the Full Council on 8<sup>th</sup> December 2012 which in effect placed the Petitioner as an employee of the Respondents. It was therefore an abridgement of his rights to bar him from assuming the office that had been promised him in memos and internal communication. Despite the Respondents asserting there was reliance on documents the Petitioner ought not have relied on being the memo asserting he was to be paid arrears and for his absorption, there is nothing on the documents to show that it was confidential or privileged information. They are bare in as far as privilege or confidentiality is concerned. He had every right to access them and since there is nothing to suggest they were obtained in any manner other than legally they will be relied on for their full effect. The Petitioner has proved his case on a balance of probabilities and is only entitled to the following reliefs:-

- a. A declaration that the Petitioner had a legitimate expectation of being employed on permanent and pensionable basis
- b. A declaration that the Petitioner ought to have been maintained as an employee of the County Government by virtue of the Constitution, County Governments Act and the Urban Areas and Cities Act.
- c. A declaration that the Constitutional rights of the Petitioner as provided for under Articles 27, 28, 29, 41 and 47 of the Constitution were violated by the Respondents.
- d. Damages for the violation of his Constitutional rights assessed at Kshs. 1,000,000/-.
- e. General damages for the delay in appointing the Petitioner on permanent basis – Kshs. 1,000,000/-

f. Costs of the Petition.

g. Interest on the sums in d) and e) above at court rates from date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 24<sup>th</sup> day of February 2020**

**Nzioki wa Makau**

**JUDGE**