

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 194 OF 2017

VIRGINIA WANJIKU MWANGI.....CLAIMANT

VERSUS

DAVID MWARA CHIIRA,

HEAD TEACHER NDIMAINI PRI. SCHOOL.....1ST RESPONDENT

BOARD OF MANAGEMENT

NDIMAINI PRI. SCHOOL.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for the alleged wrongful, unlawful, and unfair dismissal from employment. In her memorandum of claim filed on 25th May 2017, the Claimant averred that she was employed as an ECDE Teacher at Early Childhood Development Education Centre attached to Ndimaini Primary School. She averred that she enjoyed a social contract between herself and the parents whose children she taught and who are responsible for her remuneration. The Claimant averred that she was orally terminated from her services by the 1st Respondent on 7th April 2017 subjecting her to re-application for the same job she was substantially holding. The Claimant further averred that the Respondents' acted unprocedurally and in violation of the provisions of Section 41 of the Employment Act. The Claimant averred that the 1st Respondent being an employee of Teachers Service Commission and an administrator at the primary school level and not pre-primary did not have any legal mandate under any written law to govern pre-primary which is a devolved function pursuant to Section 9 of Part 11 of the 4th Schedule of the Constitution of Kenya. The Claimant averred that there is no employer-employee relationship between the her and the Respondents, that she is not on the Respondents payroll and that the Respondents therefore lack moral and legal powers to fire, or discipline her in any way since Section 55 of the Basic Education Act makes provision that the primary school BOM shall be separate from pre-primary BOM. The Claimant averred that hers was a summary dismissal since it was effected without due notice and in contravention of Sections 44(4) and 45 of the Employment Act. The Claimant averred Respondents' actions violated her rights under Article 41(1) of the Constitution. The Claimant averred that she was not afforded a hearing either in person or through a union representative as required by Section 41 of the Employment Act. The Claimant sought a declaration that the termination wrongful and unfair, an order of reinstatement in the capacity she served before dismissal, an order prohibiting the Respondents from handling the levies payable by the ECDE parents in anyway, an order to regularize her terms pursuant to Section 37 of the Employment Act, an order for the Respondents to compensate her a sum of Kshs. 250,000/- for deliberately causing her loss of income. She also sought costs of the suit.

2. The Respondent filed a response to the claim and averred that the 1st Respondent's joinder to this suit is bad in law and that his name should be be struck out from the claim as the matters complained of were the acts of the Board of Management. The Respondents averred that Ndimaini Primary School is a public institution and for the Claimant to purport that she was entitled to operate a private entity (ECD) is against the provisions of the Basic Education Act. The Respondents averred that the County Government of Nyeri had not taken over the operations of the ECD centre. The Respondents averred that upon recommendations and resolution that the ECD teachers posts be advertised, applications were received and the Claimant who was one of the applicants was not the best scorer after the interview of 2nd May 2017. The Respondents averred that the best applicant was hired. The Respondents averred further that if at all there was no contractual relationship between the Claimant and the Respondents and that neither the BOM nor the Head teacher had any control over the operation of the ECD Centre, the Claimant ought not to have been operating the ECD centre within the premises of a public institution. The Respondents thus prayed that the claim be dismissed with costs.

3. The Claimant testified as did the Respondents' witness David Mwaura Chira the headteacher of the 2nd Respondent. The Claimant stated that she had worked as an ECD teacher since 2000 and that she was qualified and registered with the Teachers Service Commission. She stated that she had worked with up to 5 headteachers with no issues but she had issues with the current headteacher since he wanted to make changes regarding to ECD teachers. She testified that she and her colleague were summoned to the head teachers' office on 7th April 2017 and they were told that the positions will be advertised as they were not qualified. She said that they were asked to submit their certificates and she complied. She stated that there was no advertisement but 5 applicants availed themselves and an interview was carried out in vernacular on 2nd May 2017. She said that it never seemed like an interview but one of the applicants was recruited immediately. She testified that she sued after the recruitment was done and she was reinstated. However, when she reported to work on 13th July 2017 the other teachers were told to go home and she was left alone with kids but with no teaching materials. She stated that on 20th July 2017 at around 1.00pm the BOM chair and the Deputy Head teacher moved in and took out the students to another classroom and she was left with an empty classroom. She said that she was never paid her salary to date. In cross-examination she confirmed that she was employed by the head teacher who was working the BOM. She said that the ECD was run by the BOM but the parents used to pay her and that she was aware the ECDs were to be taken over by the County Government but by that time they had not been taken over and the employer was the parents of the students. She confirmed that at times she would be paid by the school.

4. The Respondents' witness testified that there is only one BOM in the school which governs both the primary and the ECD as per the Basic Education Act. He testified that the ECD applicants who attended the interview after the advertisement were diploma holders while the Claimant was a certificate holder. He stated that parents came and removed students and since there was a court order he did not know what to do. He confirmed that he was not the employer and that he was not aware if the Claimant was employed by the BOM. He stated that the county government took over and employed ECD teachers. He testified that the decision to conduct the interview was by the BOM and was mandated by a meeting of the BOM. That marked the end of oral testimony and parties were to file written submissions.

5. The Claimant submitted that the 1st Respondent is a head teacher whose description under Section 2 of the Teachers Service Commission Act provides that he is a lead educator or administrator in a primary school level educational institution. It was submitted that there is no mandate conferred by the employer of the head teacher (TSC) upon the 1st Respondent to manage ECDE. She submitted that Section 59 spells out the functions of the BOM and pre-primary is not one of its functions under the provision. The Claimant submitted that the head teacher who is also a public officer and who should earn mandate from a written law irregularly awarded himself powers unreasonably and that he was therefore sued in his personal capacity for acting *ultra vires*. The Claimant submitted that the County Director of Education was directed by this Honorable court to give expert advice on the governance and management of ECDE and that the report however was erroneous and misleading. The Claimant submitted that part of the report however was right to indicate that though the Basic Education Act provides for every level of education to have a distinct BOM, it has not been done and therefore *status quo* ought to be preserved. The Claimant submitted that the procedure employed by the BOM to declare her redundant and the Respondents' interference with her work even after this Court reinstated her violated her right to fair labour practice. The Claimant submitted that from the foregoing reasons she is entitled to compensation for loss of income since she has never been paid from the month of May 2017 to date and as well the court to order the Respondents the projected pending wages at the rates in the current gazetted Minimum Wages Order at Kshs. 11,926.40 from May 2017 to date.

6. The Respondents submitted that the report by the County Director of Education which the Claimant purports to be misleading gives a clear status of Ndimaini ECDE Centre. It submitted that whereas the Claimant used to share the monies with other teachers as she deemed fit, there was no appointment or termination letter. It submitted that the Claimant did not recognize the Respondents at all to have any role in what she was doing. The Respondents submitted that if there was no employer-employee relationship as indicated by the Claimant in her pleadings, then this court has no jurisdiction to entertain the claim and that the Claimant ought to have petitioned the Constitutional court to determine her status where she has a social contract with the parents vis-à-vis a third party who is alleged to have interfered with the social contract wherein the aggrieved party is operating with the premises of the third party. The Respondents submitted that with the promulgation of the new Constitution in 2010, the ECDE Centre was supposed to be taken over by the County Government of Nyeri and be managed by its Board of Management or management committee. The Respondents submitted that County is yet to take over the Centre and the structures at the primary schools remains the same. The Respondents submitted that the manner in which the Claimant was running the centre made her believe that the 2nd Respondent had no role to play in the Centre. The Respondents submitted that the functions of the BOM whether for pre-primary or primary schools are outlined in Section 58 and 59 of the Basic Education Act and includes promoting the best interests of the institution and quality education. The Respondents submitted that not being qualified after conducting an interview cannot amount to termination of service by a body which in the first place had not employed the Claimant. The Respondents submitted that if the Claimant did not recognize the interview by the 2nd Respondent, she ought to have declined and sought for orders to have them declared a nullity. The Respondents submitted that joining the 1st Respondent who was an agent of the 2nd Respondent in his private capacity was mischievous and legally untenable. The Respondent submitted that she had confirmed that the 1st Respondent was not paying her, had no control over her, was not supervising her and he never signed any document whatsoever relating to the Claimant's work as the 1st Respondent's role was only being a member of the panelist that conducted the interview. The Respondents prayed that the suit be dismissed with costs.

7. The Claimant was an early development child educator. She was employed under a loose arrangement with parents at the 2nd Respondent a Primary School presently under the rubric of the County Government of Nyeri. From the report filed before the Court, upon devolution the set up of early childhood development was to change to a system where the individual centres would have their own distinct BOM or management committee. As this was to be actualized, the Claimant asserts that she was terminated by the Respondents whom she averred had no employee-employer relationship with her. As such, her suit was misplaced as this is the Employment and Labour Relations Court whose mandate is set out under Article 162(2)(a) of the Constitution. In other words, the Employment and Labour Relations Court is established for the purpose of settling employment and industrial relations disputes and for the furtherance, securing and maintenance of good employment and labour relations. Its mandate therefore does not extend to disputes between people who do not fit within this prism. She is bound by her pleadings and as she maintained she had no nexus with those she alleges dismissed her she cannot have any action against them before this court. Having come to that conclusion it would be an academic exercise and waste of judicial resources to explore what remedies she would have had had she been an employee of the Respondents unlawfully terminated. The suit is fit for dismissal as I hereby do albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 13th day of February 2020

Nzioki wa Makau

JUDGE