



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU
CAUSE NO.268 OF 2018

ERICK OTIENO OGADACLAIMANT

VERSUS

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

PUBLIC SERVICE BOARD,

COUNTY GOVERNMENT OF NAKURU 3RD RESPONDENT

JUDGEMENT

The claimant is a male adult. The 1st respondent is an office established under section 44 of the County Government Act, (CGA). The 2nd respondent is a county government established under Article 176 of the Constitution, 2010. The 3rd respondent is established under section 57 of the CGA.

The claim is that the claimant was an employee of the respondents engaged as a Principal Administrative Officer in the department of lands, Housing and Physical Planning.

On 2nd February, 2001 the claimant was appointed as Clerical Officer III with Kisumu Municipal Council, Engineering Department, in the year 2002 he was transferred to Municipal Treasurer’s department and in the year 2007 he was transferred to the Municipal Council of Nakuru.

In March, 2007 the claimant was transferred to the now defunct Ministry of Local Government to the Municipal Council of Nakuru where he was deployed to various departments.

Upon the promulgation of the new constitution, the claimant was deployed to the 2nd respondent and lastly posted as Principal Administrative Officer in the department of Lands, Housing and Physical Planning.

In the year 2016 the claimant resigned from his position with the respondents with effect from 8th February, 2017 when he sought nomination during the 2017 general elections as required of public servants.

On 14th April 2017 the claimant sought for reinstatement in the same position he held prior to his resignation. The claimant served the respondents until the month of March, 2018 when his employment was unfairly terminated and his monthly salaries withheld without any prior notice and in violation of Article 41 of the constitution and section 45 and 46 of the Employment Act.

The respondents have retained the due monthly salary from March, 2018 and continues to withhold the same without giving any reason(s). There was no hearing, notice or payment of the owing dues. The salaries paid to the claimant were subjected to statutory deductions including NHIF, NSSF, and LAPFUND, Check off loan and PAYE and which deductions have since been cut off by the respondents.

The claim is for a declaration that the dismissal and or termination of employment as wrongful, unfair unconstitutional and null and void; an order for reinstatement or re-engagement of the claimant to employment with back pay and with no loss of seniority and benefits.

In the alternative, the claimant is seeking compensation for unlawful and unfair termination of employment; in the alternative payment in lieu

of notice, compensation and general damages for unfair termination of employment, the payment of salaries retained for the months following unfair termination of employment; an order directing for the payment of and remittance of all statutory deductions on the claimant's salaries to their respective accounts and costs of the suit.

The claimant testified that was initially employed under the defunct Local Authority in Kisumu and then transferred to Nakuru and where he worked in various departments and capacities and upon the promulgation of the constitution in the year 2010 he was deployed within the 2nd respondent and posted to various stations with his last position being that of Principal Administrative Officer in the Lands department.

As the general elections approached, he resigned from his employment with the respondents vide letter dated 7th November, 2016 to contest the Nakuru West Parliamentary position pursuant to the requirements placed upon civil servants. He contested under the Orange Democratic party (ODM).

The resignation was approved by the 1st respondent on 17th November, 2016.

The claimant also testified that following the landmark ruling in Kericho ELRC Petition No.1 of 2017 the court allowed those civil servants who lost in the party nominations to return to work. This meant that his resignation to pursue politics was null and void,

Upon the court ruling he wrote to the respondents noting he did not succeed in the nominations and wanted his employment reinstated vide letter dated 14th April, 2017.

On 18th April, 2017 the respondent received his letter and there was reinstatement. In November, 2017 all salary arrears were paid from the date of resignation to February, 2018. He was retained on the same position held before resignation. He also applied to the 1st respondent to be moved from the lands department which was done but before he could sign letter of acceptance the salary was stopped. Upon follow up with the payroll manager he was referred to the 1st respondent and since there is no communication.

The last salary was paid in February, 2018. In January, 2018 he was paid leave travelling allowance. The due statutory dues were also stopped. There is no remittance.

The claimant also testified that he resigned on his own accord. It was voluntary and the respondent accept it and taking effect on 8th February, 2017. The contract of employment ended.

The claimant then applied for reinstatement which was accepted and salary restored and all unpaid salaries paid. The court orders in Kericho ELRC Petition No.1 of 2017 restored his employment status as before resignation.

In the letter of resignation, the claimant does not state the reason(s) for his action.

it was common knowledge that he was contesting the elections.

For the period of February to April, 2017 he was not in office during the campaigns. He lost and applied through the 1st respondent for reinstatement and when he was paid his salary he knew the reinstatement had taken effect. the letter was received by the payroll administrator for and on behalf of the chief officer and was paid for the entire period including the period not at work. There was a presumption that he was at work.

The claimant also testified that he did not attend work from February to April, 2017 and was paid.

Upon re-employment he was to be issued with new terms and be deployed. There was no communication on the reinstatement. The payment of salary was sufficient to confirm reinstatement.

The claimant also testified that he is aware of Kericho ELRC petition No.1 of 2017 there was an appeal, **civil Appeal No.162 of 2017 (Nyeri)** and by the time of the appeal he had been reinstated earning a salary and where there was a stay of execution of the judgement work had been restored. He reported to the Chief Officer Public Service for work allocation and since his last position had been allocated he applied for a transfer but there was no reply. He however remained at the service of the respondents.

Defence

The defence is that the claimant was an employee of the 3rd respondent from the year 2010 to 7th November, 2016 when he resigned from his employment. The letter and notice of resignation was received and approved by the 1st respondent effectively ending the employment relationship between the parties.

The claimant was absorbed by the 3rd respondent upon the promulgation of the new constitution, 2010. The respondents are strangers to the averments that the claimant resigned from his employment to seek nominations in the 2017 general elections. There was no information in this regard.

The respondents were not aware that the claimant had been reinstated. There was no letter of authority, sanction or approval for reinstatement.

The alleged letter seeking reinstatement never reached the respondents as this was addressed to the chief officer , public service management and the payroll manager. The letter was wrongly approved by the purported chief officer when in fact the said chief officer, Mr Sigei was on terminal leave at the time of the purported reception. This resulted in fraud and illegality. The matter is currently under investigations to establish the exact unscrupulous parties who aided the unlawful reinstatement of the claimant.

The claimant was therefore never the employee of the 3rd respondent as he resigned on 7th November, 2016.

Upon the irregular reinstatement of the claimant, the 2nd respondent declared the same null and void pursuant to section 75 of the CGA and in the best interests of the people of the County of Nakuru. Any reinstatement was the mandate of the 2rd respondent and approval by 1st respondent for the 3rd respondent. the respondent thus acted within the law to stop the irregular payment of salaries to the claimant. The claim made are without merit and should be dismissed with costs.

Philip Rono Kiplagat the human resource director with the respondents testified that the claimant was an employee of the respondents and by letter dated 7th November, 2016 he resigned which was accepted and effectively ceased working for the respondents as of 8th February, 2017.

The claimant did not give any reason for his resignation. He did not offer to be reinstated and was willing to be called for consultancies during the transition. Upon resignation the claimant was cleared and therefore not allocated any duty.

On 14th April, 2017 the claimant sought to be reinstated by the Chief Officer. The letter was submitted to the payroll manager and not to the respondents. It was later discovered that the claimant was paid salary for several months irregularly and without a letter of reinstatement or work allocation. This was contrary to the human resource policy of the respondent of communication to the County secretary or the 3rd respondent which offices are legally required to manage the employees of the county.

Mr Kiplagat also testified that The basis of the claimant's letter seeking reinstatement was Kericho ELRC Petition No.1 of 2017 that civil servants who contested in the general elections should be reinstated. The suit related to persons who had resigned to join politics but the claimant was not. His letter of resignation did not relate to him seeking for political office and the referenced petition cannot relate to him. the Court of Appeal at Embu – County Government of Embu & others versus Erick Cheruiyot & 15 others Civil Appeal No.62 of 2017 has since overturned the judgement the claimant is relying upon.

Mr Kiplagat also testified that the remedies sought by the claimant cannot issue and should be dismissed with costs. He resigned on his own accord and was cleared by the respondents. The claimant has not applied for re-employment as a new employee and the court cannot compel the respondent to employ the claimant. The reinstatement back on the payroll was irregular and has since been addressed and the claimant should pay back what was paid to him upon the irregularity.

Mr Kiplagat also testified that upon the judgement in Kericho ELRC Petition No.1 of 2017 Civil Appeal No.62 of 2017 had the ruling delivered on 27th September, 2017 and the claimant had relied on the judgement tin the petition and before the matter was adjudged by the Court of Appeal.

When the claimant was reinstated the 3rd respondent had not been reconstituted until January, 2018. The position held by the claimant was for the 3rd respondent to appoint and thus it was irregular to have him reinstated by the chief officer and the payroll manager without the authority of the respondents. The procedure under the CCGA in the reinstatement of the claimant was not followed and thus unlawful.

At the close of the hearing both parties filed written submissions.

On the pleadings, the evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there is unlawful and unfair termination of employment;

Whether the remedies sought are due; and

Who should pay costs.

It is common cause that by letter dated 7th November, 2016 the claimant resigned from his employment with the respondents and taking effect on 8th February, 2017. The letter noted as follows;

RE: RESIGANTION

Please accept this letter as official notice of my resignation from my position as Principal Administrative Officer effective 8th February 2017.

Thank you for all the opportunities for professional and personal development presented to me during my time as one of your employees. ...

The respondents vide letter dated 17th November, 2016 accepted the claimant's request to resign. This was under the hand of the 1st respondent. this approval and confirmation/acceptance is copied to the respondents.

Effectively, the employment relationship between the parties ceased through the voluntary action of the claimant as of 8th February, 2017. The respondents by letter.

By letter dated 14th April, 2017 the claimant applied for *reinstatement of employment status*. This request connotes existing employment which was not the case. The employment relationship between the parties had since ceased effectively on 8th February, 2017 as noted above.

Under the provisions of the CGA section 63 only the entity of 3rd respondent has the statutory mandate to make appointments including promotions in respect of offices in the county public service. the claimant having resigned from office and thus ended the employment relationship, only an appointment through the respondents pursuant to the provisions of the CGA could be lawful.

The claimant has sought to rely on the judgement delivered in Kericho ELRC Petition No.1 of 2017. That the court allowed persons who were civil servants and had resigned to join politics for the general elections in the year 2017 to be reinstated.

In his letter dated 14th April, 2017 the claimant applied as follows;

RE: REISNTATEENT OF EMPLOYMENT STATUS

...

Following the ruling in the Employment and Labour Relations Court of Kenya sitting at Kericho declaring that all resignations consequential prior to nomination for elections as unconstitutional, unlawful, null and void. I wish to request your office to consider my ruination as per the ruling and reinstate my employment benefits as they were. ...

First the judgement in Kericho ELRC Petition No.1 of 2017 in my humble view adjudged that the public officers who vacated office to contest in the general elections should be reinstated. The claimant resigned for his employment without giving any reasons. Whether he contested for political office as claimed, such matter was not available to the respondent to surmise from his letter of resignation dated 7th November, 2016. Even where such letter made any such reference, which is not the case here, there is since **Civil Appeal No.62 of 2017** setting aside the judgement in Kericho Petition No.1 of 2017 in its entirety. Parties were returned to the position subsisting before the subject judgement.

Secondly, under the provisions of section 63 of the CGA read together with section 10 of the Employment Act, 2007 there was no new appointment of the claimant nor was he issued with a contract of service. upon application for reinstatement, the competent authority to appoint and issue him with approval and terms of service was not completed. This was not the function of the chief officer or the payroll manager to take. Sec 59 (1) (b) of the CGA provide that;

.....the function of the County Public Service Board shall be, on behalf of the County Government, to-...

....(b) appoint persons to hold or act in offices of the County Public Service including in the Board of cities and urban areas within the county and confirm appointments;

In the case of **Jackson Cheruiyot Rono versus County Secretary Bomet & another [2017] eKLR**

....It was always the mandate of the County Public Service Board to recruit and deploy the claimants in terms of his authority under sections 57, 58,63, 66 and 67 of the County Governments Act, 2012. This also agrees with Article 232 (1) (g) of the Constitution of Kenya, 2010 which requires fair competition and merit in appointment to public office. These were not met in the circumstances of this case.

Appointments within the County Government for a position previously held by the claimant as the Principal Administrative Officer, the 3rd respondent held the mandate to recruit and place employees and where necessary ensure delegated authority upon the office of the 1st respondent.

More fundamentally, the gist of the Court of Appeal ruling gin **County Government of Embu & another versus Eric Cheruiyot & 15 others [2017] eKLR** was that;

.....We agree with the applicants that it is arguable whether an employee who resigns in circumstances such as those enumerated in this ruling can walk back to the previous employer and say: “Although I resigned my position, you cleared and paid my dues and replaced me with another officer, I have changed my mind and I want my job back”. That is certainly an arguable point. ... The applicants having satisfied both limbs of the principles we earlier set out in this ruling are entitled to stay of execution pending appeal.

Even where the claimant was not covered under this ruling as his resignation was not conditional or pegged on his political career, to rely on the petition cited above, the subject therein addressed on the reinstatement of civil servants who had resigned to contest for political office was stayed. Thus addressed he cannot justify his claims on the subject petition.

More fundamentally, upon the claimant’s letter and application for reinstatement, there was no written response by the respondents. The payroll officer simply returned him to the payroll which irregularity has since been addressed by the respondents. For the claimant, without a letter of appointment, he testified that he was not allocated work, his previous position having been filled and would

report and make himself available to the respondents but no work was allocated. Precisely, and for this reasons, the salaries paid were without any returns for labour given. This is the reason why the claimant wrote and applied for assignment of duty as no work had been allocated.

Effectively, the claimant's letter and application for reinstatement, was not addressed. The receipt of the letter by the payroll manager for the Chief Officer, Public Service Management and Administration, Nakuru County was without authority as the substantive office holder had not addressed the request and application for him/her to give directions and authority to the payroll manager to act for his/her behalf and address the claimant with acceptance and return him to the payroll. Such action looked at within the realms of fair labour practices was to act without authority and criminal conduct by reinstating a person not employed by the respondents to the payroll without the due consideration of the application for employment by the 3rd respondent.

Without an employment relationship between the parties under the provisions of the Employment act, 2007 or the CGA, the remedies sought cannot issue. the court is denied jurisdiction.

Equally, section 17 and 19 of the Employment Act, 2007 allow the employer to deduct from an employee wages wrongly paid within the realm of an employer and employee relationship. Without there being an employment relationship, where the claimant received payments of a *salary* without their being employment or work undertaken for such *salary* to be due, such monies paid irregularly cannot be recovered in the current suit. This must be addressed separately and outside the court.

Accordingly, without jurisdiction, the court must down its tool. The suit is hereby struck out. Each party shall bear own costs.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of: