



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1729 OF 2015

GLADYS NJERI MAINA.....CLAIMANT

-VERSUS-

THE CABINET SECRETARY MINISTRY OF AGRICULTURE,

LIVESTOCK & FISHERIES.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 29.09.2015 through Mohammed Muigai Advocates. The claimant prayed for judgment against the respondents for:

- a) Kshs.3, 461,500.00 being withheld salary for the period August 2013 to May 2014.
- b) Kshs.1, 038, 450.00 being 3 months in lieu of notice.
- c) Kshs. 4, 153, 800.00 being 12 months compensation for unfair dismissal.
- d) Kshs. 4, 153, 800.00 being 12 months compensation for wrongful dismissal.
- e) Interest on (a) at commercial rates from August 2013 until payment in full.
- f) Interest on (b), (c), and (d) at court rates until payment in full.
- g) Costs of the suit.
- h) Any other relief the Honourable Court deems fit to grant.

The respondents filed the response to the memorandum of claim on 21.04.2016 through Wanjiku Mbiyu, Chief Litigation Counsel, for the Attorney General.

The claimant's case as pleaded is as follows:

- a) On 17.07.1979 she was employed by the Government and posted to the Ministry of Agriculture as an Agricultural Officer. She was placed on permanent and pensionable basis effective 01.08.1991. She was deployed to serve in various agencies such as Kenya Agricultural Research Institute (KARI) and the Kenya Plant Health Inspectorate (KEPHIS).
- b) Around 01.08.2007 the claimant was appointed to serve as the Managing Director of the Pest Control Products Board (PCPB) for

3 years and the term was renewed on for further three years effective 16.09.2010.

c) By the letter dated 01.08.2013 the respondent declined to renew the claimant's contract with PCPB and she was directed to report to the Ministry of Agriculture. As at 05.08.2013 the claimant's gross salary was Kshs.346, 150.00 per month.

d) On 05.08.2013 the claimant reported to the Ministry's Permanent Secretary one Sicily Kariuki and despite numerous requests the Ministry failed, refused, or otherwise neglected to assign any work to the claimant and she says she was not paid remuneration per her contract of service.

e) Beginning September 2013 the Permanent Secretary engaged in a campaign of harassment against the claimant through humiliation and belittlement and was not assigned any duties. The claimant continued to report at work and in May 2014 the claimant was ordered to clear her effects from her desk and work station. She was ordered to out of the office and she completed a form handing over office furniture and equipment. The claimant's 35 years of public service was thereby terminated.

f) The claimant alleges constructive dismissal on account of the serious misconduct by the 1st and 2nd respondents. She pleaded the particulars of breach and misconduct to include failure by the 1st respondent to assign her duty; failure to remunerate the claimant for the period August 2013 to May 2014; 1st respondent permitting her humiliation, belittlement and harassment; and the 1st respondent denying her a desk and work station on 19.05.2014.

g) The claimant alleges that the alleged constructive dismissal was unfair and wrongful hence the prayers made for her in the memorandum of claim.

The respondents have pleaded as follows:

a) The claimant's first appointment was as Assistant Agricultural Officer II Job Group H on temporary terms of service. She was deployed to National Agricultural Laboratories, a department of the Ministry of Agriculture. By the 2nd respondent's letter dated 07.11.1984 the claimant's terms of service were translated from temporary to permanent and pensionable terms effective the date of the temporary appointment. Effective 01.07.1989 and by the letter dated 13.02.1990, the claimant was transferred to KARI which was then under the Ministry of Research, Technical Training and Technology and by letter dated 03.05.1995 she was confirmed in appointment and admitted to permanent and pensionable establishment as Agricultural Officer I, Job Group L.

b) The claimant was offered permanent appointment by KARI and admitted to KARI's permanent and pensionable establishment as a Research Officer on 01.01.1995 and she effectively joined KARI pension scheme. The respondents' case is that the claimant thereby effectively became an employee of KARI and ceased to be an employee of the 1st and 2nd respondents.

c) Effective 01.07.1998 the claimant left KARI and joined KEPHIS. KARI transferred the claimant's pension contributions to KEPHIS for the period 01.01.1995 up to 30.06.1998. She served at KEPHIS as Assistant Director, Quality Control as appointed by the letter dated 30.12.1998. In 2002 the claimant was appointed General Manager at KEPHIS and she served until July 2007 and she voluntarily opted for early retirement from KEPHIS effective August 2007. The claimant was paid Kshs.928, 340.00 for her service with KEPHIS and has continued to enjoy monthly pension since then. Her pension for 01.01.1995 to 30.06.1998 being Kshs.87, 251.00 for the service at KARI was paid as per the letter dated 15.07.2008.

d) The claimant was subsequently appointed the CEO for PCPB effective 01.08.2010 for a term of 3 years lapsing on 31.07.2013. She was paid service gratuity of Kshs.1, 441, 658.60 for that 3 years' service. On 31.07.2013 the Ministry through the Cabinet Secretary conveyed that the claimant's contract as CEO of PCPB would not be renewed. The Ministry requested the 2nd respondent to appoint the claimant to the position of Deputy Director of Agriculture Job Group R to assist the ministry steer forward the devolution process. By the letter dated 21.08.2013 the 2nd respondent replied declining the request on the basis of a freeze on recruitment as per Treasury Circular No. 9/2013 dated 26.07.2013.

e) The claimant was then appointed as a member of the taskforce to operationalize the Agriculture, Fisheries and Food Authority (AFFA) by Gazette Notice No. 1363 of 28.02.2014 and served until March 2015. For that service she was paid a sum of Kshs. 990, 000.00.

The claimant testified to support her case and the respondent's witness (RW) was Nyabuto Oonge, 1st respondent's Principal Human Resource Officer. The Court has considered the material on record and makes findings as follows.

The **1st issue** for determination is whether the 1st and 2nd respondents were in employment relationship with the claimant upon the lapsing of the claimant's service as CEO of PCPB on 31.07.2013. The claimant does not dispute that the Cabinet Secretary declined to renew the lapsing contract. RW testified that the claimant was asked to handover and report to the Ministry immediately as per the letter dated 01.08.2013. Thereafter the evidence is that she was not assigned any duties except as a member the taskforce to operationalize the Agriculture, Fisheries and Food Authority (AFFA) by Gazette Notice No. 1363 of 28.02.2014 and she served until March 2015. The further evidence is that the 1st respondent requested the 2nd respondent to appoint the claimant to the position of Deputy Director of Agriculture Job Group R but the 2nd respondent declined in view of the prevailing circular by Treasury imposing a freeze against such recruitment. The claimant testified that she reported at the Ministry as directed in the letter dated 01.08.2013 and she was allocated an office on 7th Floor at the Ministry where she reported from 05.08.2013 to 19.05.2014 when she was ordered out and further that for that period she was not assigned duties or paid. The Court finds that the 2nd respondent having declined to appoint the claimant to the position of Deputy Director of Agriculture Job Group R as had been requested for, the claimant has failed to establish the contractual basis for the period 05.08.2013 to 19.05.2014. The claimant has further confirmed that she was not assigned duties throughout that period and the Court returns that by that

evidence it was clear that parties knew that they were not in a contract of service and further that without work having been done, the claimant has failed to justify pay over that period. While making that finding the Court considers that there was no dispute that the 2nd respondent was entitled within its constitutional powers and functions to decline the request to appoint the claimant as was requested and there was no evidence that the 2nd respondent had exercised its discretion unreasonably or unlawfully.

To answer the **2nd issue** for determination the Court returns that the claimant and the respondents having not been in a contract of service, it was misconceived for the claimant to allege constructive dismissal. The Court holds that it should be obvious that a contract of service that never existed could not be available for termination, constructively or otherwise.

To answer the **3rd issue** for determination, the Court returns that in view of the findings in issues 1 and 2 above, the claimant has failed to justify the remedies that she prayed for. The same will therefore fail. The court has considered that the claimant was asked to report to the Ministry and she was thereby misinformed to believe that the 1st respondent was going to employ her in its service. In consideration of that unjustified conduct on the part of the 1st respondent, the Court returns that each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondents against the claimant for the dismissal of the suit with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 6th March, 2020.

BYRAM ONGAYA

JUDGE