



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO.64 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

**CAREN CHEPNG'ENO YOBOSI.....PETITIONER**

**VERSUS**

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

**COUNTY PUBLIC SERVICE**

**BOARD – BOMET COUNTY.....2<sup>ND</sup> RESPONDENT**

**TEACHER'S SERVICE COMMISSION..INTENDED 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. On 29<sup>th</sup> October 2018, interim orders were issued restraining the respondents from releasing the petitioner from her employment as the Director Education, vocational training and sports pending the hearing and determination of the petition.

2. The Petitioner prays for an order that confirms retention of the petitioner in that position and the action by the respondent be declared unlawful null and void.

**Facts**

3. The petitioner was initially employed by TSC and upon advertisement by the respondents for the position of the Assistant Director Education, vocational Training and Sports, like the other successful candidates the petitioner applied, was shortlisted, interviewed and was subsequently appointed to the position vide a letter of appointment dated 14<sup>th</sup> May 2014.

4. This letter is before Court and is on the letter head of County Government of Bomet and signed by one Anne C. Turgut (Mrs.). The letter opens thus:

5. *“ I am pleased to convey the decision of the Bomet County public service Board vide the letter dated 2/5/2014 that you be offered an appointment as an Assistant Director Job group ‘P’.”*

6. The terms of the appointment are stated in the letter dated 14/5/2014 and the appointment was subject to 6 months' probation only and was not on a fixed term contract.

7. The petitioner continued working and was by a letter dated 21<sup>st</sup> December 2016 promoted and appointed the Director in the same Department. The letter of promotion marked exhibit “CC43” again did not provide employment to the claimant on fixed term contract but was a continuation of the claimant appointment to the Assistant position upon release and secondment by TSC to the County Government by a letter dated 12/6/2014. The letter dated 2/12/2016 was written by Acting County Public Secretary and Head of Public Service.

8. By a letter dated 24<sup>th</sup> September 2018, Mr. Wesley K. Sigei Director, Human Resources wrote to the petitioner that:

9. *“ This is to convey the decision of the County Public Service Board vide a letter dated 7/8/2018 that you were not appointed to any position in the Bomet County Service by the said Board. You will therefore be released with effect from 31<sup>st</sup> October 2018.”*

10. This is the impugned letter that has led to the suit. The court is implored to declare it unconstitutional and a violation of the petitioner's rights guaranteed under Articles 27, 28, 43 and 47 of the constitution of Kenya 2010 and negation to the petitioner's legitimate expectation to natural Justice, due process and fair treatment.

11. The petitioner prays that the petition be upheld and prayers set out in the petition be granted.

### **Response**

12. The petition was responded to by a replying affidavit of Amb. Joshua Terer the chairman of the Bomet County Public Service Board sworn to on 26<sup>th</sup> November 2018 (2<sup>nd</sup> Respondent) and by a replying affidavit of the respondent sworn by Wesley Sigei the acting Director Human Resource for the 1<sup>st</sup> respondent.

13. The nub of the response is that the petitioner was never appointed by the Bomet County Public Service Board to the position of Assistant Director Education, Vocational Training and Sports and subsequent promotion to the position of Director in the same department as per the letters referred to earlier herein.

14. That Mrs. Anne Turgut and Mr. Geoffrey Langat the signatories of the aforesaid letters had no lawful powers to confirm the said appointments to the petitioner.

15. That the petition be dismissed with costs.

### **DETERMINATION**

16. Both parties filed submissions which the Court has duly considered. It cannot be denied that the petitioner was seconded by TSC to the County Government of Bomet by a letter dated 12<sup>th</sup> June 2014.

17. It is beyond peradventure that the petitioner applied to the advertised position of Assistant Director, was interviewed, recruited and appointed accordingly by a letter dated 14<sup>th</sup> May 2014. The petitioner served the 1<sup>st</sup> respondent for a period of over two years until he was promoted to Director Position by a letter dated 21<sup>st</sup> December 2016.

18. The letter of appointment dated 14/5/2014 and promotion dated 21/12/2016 were written to the petitioner to convey decisions of the 2<sup>nd</sup> respondent, County Public Service Board contained in letters dated 2<sup>nd</sup> May 2014 and 2<sup>nd</sup> December 2014 respectfully.

19. The issue being raised by the 1<sup>st</sup> Respondent in his replying affidavit is one bordering on serious criminal conduct by purported senior officers of the 1<sup>st</sup> respondent who unlawfully and without sanction of the 2<sup>nd</sup> respondent gave letters of appointment and promotion to the petitioner and others not mentioned.

20. The 2<sup>nd</sup> respondent states that the petitioner applied and was interviewed for the position of Assistant Director Education, vocational Training and sports. That she was not among the list of successful candidates whose names were forwarded for appointment by the 2<sup>nd</sup> respondent.

21. The purported list was referred to in the affidavit as Annex "AST 2" but was not attached to the replying affidavit. The 2<sup>nd</sup> Respondent stated that one Mr. Jacob Byegon was the best candidate for the position aforesaid.

22. The Respondents also do not allude to any reports made to any authority in the criminal justice system regarding the purported illegal appointments.

23. To the contrary, the petitioner was placed in the payroll of the respondents and earned salary while giving service to the respondents from May 2014 until September 2016 when the purported "release" was communicated to her.

24. The respondents do not purport to have conducted any investigations on the matter. They did not issue the petitioner with a notice to show cause nor did they call the petitioner to attend a disciplinary hearing regarding any misconduct on her part.

25. This is a case akin to the right hand blaming the left hand to punish the legs.

26. The petitioner has proved on a balance of probabilities that the respondents violated her rights of the petitioner to a fair hearing, fair administrative action and were involved in unfair labour practice.

27. These actions by the respondents violated Articles 27,28,41,43 and 47 of the constitution of Kenya 2010.

28. It is not alleged that the petitioner failed in any manner to deliver in her position. To the contrary, the petitioner was promoted to the position of full director in recognition of service rendered. TSC has not been loped in at all to allege any wrongful secondment of the petitioner by TSC to the respondents.

29. The conduct by the respondents is a gross violation of the Principle of legitimate expectation that would or is likely to render the petitioner job less for reasons beyond her control.

30. As was stated by *Mbaru J. in Nairobi E & L R C cause No. 1318 of 2017, Naim Bilal Yaseem – VS – Judicial Service Commission*, upon secondment, one needs to conclude a valid employment contract with the recipient employer since secondment is temporary transition in nature.

31. In the present case, a valid contract was concluded between the petitioner and the respondents and same was consummated for over two years before this dispute arose. The petitioner continues in that position following the interim order by the court.

32. The presumption of legality with respect to official documents in this matters is in favour of the petitioner and unfavorable inference is drawn as against the respondents by the court on the issue of the lawfulness of the employment of the petitioner.

33. In any event, Article 235 of the Constitution of Kenya 2010 read with section 86 of the County Governments Act, 2012 allows delegation of duties by the Public Service Board to the County Secretary who in the present case communicated the promotion to the petitioner.

34. Accordingly, the petition has merit and the petitioner is entitled to the reliefs sought.

35. In the final analysis the Court makes the following order as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents:

a. The petitioner is a legitimate employee of the respondent in terms of the letters of appointment and promotion.

b. An order of Judicial review is issued to quash the letter of release by the respondents dated 24<sup>th</sup> September 2018 directed to the petitioner and the petitioner is to remain in the position of Director V.T.I as duly appointment by the respondents and communication duly done to him by the County Secretary and Head of Public Service by a letter dated 21<sup>st</sup> December 2016.

c. The respondents to pay the costs of the petition.

**Judgment Dated, Signed and delivered at Nairobi this 28<sup>th</sup> day of May, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Mugumya For the petitioner

Mr. SIgei for 1<sup>st</sup> Respondent

Mr. Kipkoech for the 2<sup>nd</sup> respondent.