

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 264 OF 2017

JOSEPH GITONGA WACHIRA & 41 OTHERS.....CLAIMANTS

VERSUS

NYERI COUNTY GOVERNMENT.....1ST RESPONDENT

NYERI PUBLIC SERVICE BOARD.....2ND RESPONDENT

MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY....3RD RESPONDENT

JUDGMENT

1. The Claimants sued the Respondents asserting that they were all youth polytechnic instructors in the establishment of the 1st Respondent. The Claimants averred that they were engaged by the National Government on diverse dates and others by the Boards of Management of the respective Youth Polytechnic institutions in Nyeri County under instructions of the National Government otherwise known as Grant Instructors and were receiving a grant of Kshs. 2,790/- each month. The Claimants averred that they no longer received the grant payment by the National Government since the advent of devolution as Youth Polytechnic Training was placed under County Governments under the Constitution of Kenya 2010. The Claimants averred that following a consultative meeting of stakeholders on 2nd December 2014 being the Ministry of Education Science and Technology, Public Service Commission, Council of Governors, County Public Service Forum and Transition Authority, it was agreed that the payroll of the Claimants be transferred to County Governments and the Counties should make arrangements to pay the permanent and pensionable youth staff totalling 590 across the Counties with effect from September 2014 as per IPPD data forwarded by the Ministry of Education, Science and Technology as the budget for the personal emolument was transferred to the Counties as part of the County Allocation of Revenue Act 2013 after verification of details. The Claimants contend that the 1st Respondent failed to implement the aforesaid terms of the agreement voluntarily entered into on 2nd December 2014 which agreement is binding on the 1st Respondent. The Claimants averred that they continued to render services to the 1st Respondent without any payment whatsoever. The Claimants averred that the 1st Respondent had refused to absorb them into its payroll and harmonise their salaries and allowances with those of the Youth Polytechnic Economic Stimulus Programme Staff rendering services in the same institutions as the Claimants. The Claimants averred that the 1st Respondent continues to discriminate and treat them as lesser employees compared to their colleagues who serve in the same Youth Polytechnic institutions in the 1st Respondent's establishments. The Claimants thus sought absorption of all of them into permanent and pensionable terms of service, salaries and allowances arrears from 1st July 2015 to the date of filing suit, costs of the suit and interest on the salary arrears as well as any further order as the court may deem fit and just.

2. The 3rd Respondent filed a preliminary objection to the suit asserting that it offended the mandatory provisions of Section 13A of the Government Proceedings Act (Cap 40 Laws of Kenya) and that the suit did not disclose any cause of action against the 3rd Respondent and the Claimants have not sought any remedies against the 3rd Respondent. The 3rd Respondent also filed a memorandum of response in which it admitted that there was a consultative forum held on 2nd December 2014 and that it transferred the payroll details to the Counties as agreed whereupon the 1st Respondent was to make budgetary provisions to absorb the Claimants on permanent and pensionable terms with effect from 1st July 2015. The 3rd Respondent averred that it had contracted the Claimants for 3 years under the Economic Stimulus Programme and upon expiry agreed to extend the contracts to 30th June 2015. The 3rd Respondent averred that the Claimants had not established any cause of action as against the 3rd Respondent and averred it would seek to be struck out from the proceedings.

3. The 1st and 2nd Respondents defence was that the transfer of the functions of the youth polytechnics to the County Governments did not obligate the County Governments to continue paying the top up grant to the grant instructors. The 1st and 2nd Respondents admitted that the Claimants upon being employed by the boards of management of the Youth Polytechnics were to be paid by the said boards of management save for the top up grants and that the Ministry of Education, Science and Technology was to release funds for capitation which was to be a conditional grant to the Counties. The 1st and 2nd Respondents averred that the averments in the claim regarding the permanent and pensionable staff did not apply to the Claimants who were grant instructors. The 1st and 2nd Respondents denied the averments by the Claimants and averred that they have not in any way failed to honour the agreement entered into on 2nd December 2014 by the relevant stakeholders. The 1st and 2nd Respondents averred that there is no discrimination against the Claimants as there are different categories of youth polytechnic instructors and the Claimants voluntarily agreed to serve as grant instructors which category has its distinct terms and conditions.

4. Before the hearing of the main suit, the 3rd Respondent successfully raised a preliminary objection on its joinder and was struck out of the suit vide a ruling on 29th April 2018. That left the 1st and 2nd Respondents in the suit and the parties attempted unsuccessfully to settle the suit and ultimately the Claimants witness Mr. George Gitonga was heard. He testified that he was an instructor at Thangathi Youth Polytechnic. He testified that he had been an instructor from the 1980's to date and that he was familiar with the issues of instructors. He

stated some are permanent and pensionable, the other is salaried by the National Government. He testified that there are those employed by the respective Boards of Management and that the BOMs do it on behalf of the National Government. He stated that the BOMs work for the Ministry of Education and that they are given the salary from the National Government by the BOM. He was referred to the documents in the bundle and stated that the contracts were entered into with the respective youth polytechnics on behalf of the National Government and that there were different terms for BOM and the other employees but the work is the same. He testified that the resolution in the meeting with the Transition Authority related to BOM employees and there were resolutions in respect of the other cadres. He stated that the ones for National Government were employed by the Ministry of Education, Science and Technology and the Ministry of Housing and Social Services. He stated that the ones from BOM were paid top up grants which was stopped by the National Government after July 2015. He testified that it was stopped by the National Government and it was to be paid by the County Governments which failed to honour the letter. He stated that the County Government was to pay from July 2015 after County Allocation Revenue Act 2015 which is where the funds were to come from.

5. It was apparent that the Claimants were employed by the National Government initially and received a top up grant while some of the Claimants were employed by the respective BOMs of the various Youth Polytechnics as evidenced by their documents. The fact that their services were to be devolved meant that the National Government stepped out of the picture and the County Governments took over. From the Claimants' witness testimony, the Claimants were employed by various Youth Polytechnics and not the Ministry of Education, Science and Technology or the Ministry of Housing and Social Services. Neither were they employed by the BOMs on behalf of the Ministry. This would run counter to the very idea of devolution. Devolution under the 2010 Constitution did not envision retention of control by the National Government and no single shred of evidence was led to suggest that the National Government was to continue paying the top up through the BOMs. In any event, the Claimants' remuneration was varied as there were those who were permanent and pensionable and those who were grant instructors. They enjoyed different schemes and could not be on the same footing. The Claimants thus were misplaced in seeking redress on the wages issue in 2017 as the wages paid were a continuing injury in terms of Section 90 of the Employment Act and ought to have been raised in 2016. Their acquiescence to the payment by the County Government at the rate they detest is not one for which they can seek redress due to limitation. The Claimants' suit is thus dismissed but I make no order as to costs.

6. As the decision is rendered during the Covid 19 pandemic, in keeping with the directives of the Chief Justice and the National Council on the Administration of Justice and the guidelines issued by the Chief Justice in the Gazette Notice scaling down court operations, the decision will be automatically stayed for 14 days so as to permit parties who may otherwise be in quarantine to take any requisite action prior to any adverse action being taken such as commencement of execution and the like.

It is so ordered.

Dated and delivered at Nyeri this 27th day of May 2020

Nzioki wa Makau

JUDGE