



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

PETITION NO. 1 OF 2019

(Before Hon. Justice Mathews N. Nduma)

KENYA COUNTY GOVERNMENT WORKERS UNION

BUNGOMA COUNTY BRANCHPETITIONER

BUNGOMA COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA.....2ND RESPONDENT

JUDGMENT

1. The petition Was filed by the union on 1st April 2019 praying for:

- (a) A declaratory Order compelling the respondents pursuant to *Section 37 (a) and (b) of the employment Act Cap 226 (2007)* to issue to the petitioner's affected members working for the respondents on casual terms, letters for appointment on permanent and pensionable terms.
- (b) A declaratory Order compelling the respondents to place the affected employees on payroll.
- (c) The respondents be ordered to compensate the petitioner's affected members in respect of their salary arrears due to them.
- (d) Costs of the suit.

Facts

2. The facts relied upon by the petitioner are set out under paragraph 3 of the petition and may be summarized as follows:

3. The grievants on whose behalf the petition has been brought were employed on casual terms and issued letters of appointment by the then local governments on various dates before the promulgation of the present constitution 2010. The local governments are now defunct and replaced by the County Government of Bungoma. The County Government in its discretion only confirmed some of the said casual employees to permanent and pensionable terms. That there is no justification given for leaving out the rest of the casual workers in the same place as those confirmed. That the discrimination may only be explained by nepotism, and favoritism contrary to the provisions of *Articles 2,3,10,22,27,41,47,48, 50 and 73 of the Constitution of Kenya 2010.*

4. That the grievants who are members of the petitioner have remained on casual terms for the last seven years contrary to the provisions of the Employment Act and in particular this situation violates *Section 35 and 37 of the Employment Act Cap 226 of 2007* under which employees hitherto employed as casuals and have worked for periods of more than 3 months and are paid wages on a monthly basis or are involved in work that does not end within a period of three months are deemed to have converted to protected permanent employees and are entitled to the protection and benefits under parts II, III, IV, V and VI of the Act.

5. That the respondent has unlawfully recalled erstwhile letters of appointment given to the non-confirmed employees thereby occasioning discrimination, psychological trauma, and unending tribulations in various forms, including delayed pay, inferior terms of service and general hopelessness.

6. That the situation is dehumanizing and in violation of *Articles 28 of the constitution* under which human dignity to any person is guaranteed. Further this contravenes *Article 232 of the constitution* under which principles of public service are spelt out.

7. The petitioner prays that the petition be allowed and reliefs sought granted.

8. The petition is further premised on supporting Affidavit of one Moses Maelo Muyundi the coordinator and shop steward of the petitioner.

Response

9. The respondents filed a replying affidavit sworn on 12th June 2019. The respondents also filed a supplementary affidavit sworn on 2nd December 2019.

10. The nub of the opposition to the petition is that the petitioner has no collective agreement with the county government of Bungoma. That the county government of Bungoma did not issue letters of appointment to the grievants who are alleged to be members of the petitioner. That the county government has employed only a few of the alleged grievants including Dickson Wamalwa Makitoni and Emmanuel Muse Rajab. That the said duly executed collective bargaining agreement does not disclose Kenya County Government Workers Union as a party to it neither does it disclose the 1st and 2nd respondents as parties to it.

11. The said CBA does not also disclose the grievants as eligible members of the petitioner. That casual workers hitherto employed by defunct local governments were absorbed by the respondents upon application and on merit as was the case with Dickson Makitoni/S/No. 75 and Emmanuel Muse Rajab S/No. 113 who applied for employment and on merit are in employment with the respondents and on payroll to date.

12. That the criteria used to confirm some of the casual employees who were employed by the defunct Bungoma County Council was purely on application and on merit. That nepotism and favoritism was not applied at all in that regard.

13. That all casual employees are working with pay and those who apply in case of a vacancy or chances are normally confirmed to permanent and pensionable terms.

14. That the petitioner has not disclosed to court names and details of the alleged grievants due for confirmation. That there are no members of the petitioner who are still working for the respondents who work without pay and are not on the payroll.

15. That the attached photographs are foreign to the respondents; the attendance list does not disclose its subject while the witness statements contain mere allegations. That it is not true that the respondents confiscated employment letters of the grievants. That the said Bungoma County Assembly Public Administration and ICT Committee report does not demonstrate how and to which extent any violation of Article 32 of the constitution of Kenya 2010 was violated.

16. That the respondents have not violated any constitutional right or freedom of alleged grievants and no such prove has occurred in this matter. That the petition be dismissed for want of proof and lack of merit.

17. The petitioner filed supplementary affidavit in which it states that the respondents' replying affidavit raises no triable issues and it ought to be struck out summarily. That the petitioner is the lawful union and represents all past members of Kenya Local Government Workers Union and the then association of local government employers. It is apparent that there is a recognition agreement and CBA between the petitioner and the respondents by virtue of the automatic takeover of all the defunct local governments.

18. That all past employees of local governments transited to the present county governments. That it is not true that some of the employees and in particular Dickson Wamalwa Makitoni and Emmanuel Muse Rajab have been placed on payroll. That the respondents have not demonstrated the criteria used to confirm some of the casual employees and leave out others. That the petition be allowed and reliefs sought be granted.

19. The parties filed written submissions and list of authorities.

Determination

20. The issues for determination are as follows:

(a) Whether the petitioner has proved on a balance of probabilities that the respondents have violated the stated constitutional rights of the grievant members.

(b) Whether the petitioner is entitled to the reliefs sought.

21. It is a moot point that the petitioner took over from the erstwhile Kenya Local Government Workers Union and represents employees taken over from the defunct local authorities by the county governments.

22. The Recognition Agreement and CBAs concluded in the pre-2010 constitutional arrangements apply in respect of the petitioner and the respondents. The only issue for determination *strictu sensu* is whether the respondents have in their employ casual workers who have satisfied the requirements of *Sections 35 and 37 of the Employment Act* who continue to be treated as casuals in breach of the law.

23. In this regard, attached to the supporting affidavit of Moses Maelo Muyundi the coordinator and shop steward of the petitioner is a long list of letters of appointment of workers on casual basis by the erstwhile local governments for three months renewable depending on performance. These appointments were done after the Employment Act Cap 226 of Laws of Kenya, 2007 became operational in August 2008 and the practice has continued post promulgation of the constitution of Kenya 2010 by the local authorities until the said local authorities became moribund in the year 2012 and were taken over by the present county governments, including the respondents herein.

24. The deponent has also attached a list marked MMM (3b) containing 463 names of employees of the respondents employed from time to time on casual basis and who have served for periods of more than three months; do jobs which do not expire; are paid salary on a monthly basis even though they at times are not paid for prolonged periods because they are not on the payroll of permanent and pensionable employees of the respondents and do not enjoy the minimum terms and conditions of employment guaranteed to them under parts II, III, IV, V and VI of the Employment Act, 2007.

25. It is the petitioner's case that these employees' human rights guaranteed under the constitution and set out in the petition have been continuously violated by the respondents as long as they remain under the inferior casual terms and conditions of employment whereas a few of them for reasons of discrimination based on nepotism and favoritism have been confirmed to the lawful status of permanent and pensionable employees.

26. The respondent has not succeeded to demonstrate that this long list of 463 employees are not in their employ as casuals for prolonged periods exceeding 7 years. The respondents have not succeeded to explain why despite clear provisions of *Section 5, 35 and 37 of the Employment Act, and Articles 27, 28, 41 and 236 of the constitution of Kenya 2010*, they have continued to employ such large number of persons on terms that blatantly violate their statutory and constitutional rights in breach of the law of the land.

27. Section 37 of the Employment Act no. 11 2007 provides:

“37(1) Notwithstanding any provisions of the Act, where a casual employee:

(a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) Performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service”

28. Section 37 goes on to provide:

“37(4) Notwithstanding any provisions of this Act, in any dispute before the industrial court on the terms and conditions of service of a casual employee, the industrial court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act”.

29. From a reading of the foregoing provisions of the Employment Act 2007, one need not invoke the constitutional regime of rights and file a petition instead of bringing a simple claim before E&LRC for the recognition of the status of affected casual employees by the court in terms of Section 35 and 37 of the Act.

30. The court hastens to add that Section 5 of the Employment Act provides:

“5(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

5(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee:

(a) On grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.

(b) In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment”.

31. By their very nature, petitions are more complex to hear and determine as opposed to the simple equitable claims brought before E&LRC under the simplified E&LRC Court (procedure) Rules 2016. That is why the filing fees of petitions in this court and the High Court is much higher than the minimal filing fees paid in respect of simple claims.

32. Without appearing to denigrate the efficacy of constitutional petitions in employment and labour related cases such as the present one, the court encourages parties to adopt the simplest modes of resolution of Employment and Labour disputes provided in our statutory law. This shall enhance capacity of courts to achieve the overriding objective of the courts to deliver justice expediently to all regardless of their station or status in the society.

33. Having said that and following the authority in ***Kenya County Government Workers Union vs County Government of Nyeri and another Petition No. 10 of 2015; 2015 eKLR per Ongaya J. and Francis Ndirangu Wachira vs Betty Wairimu Maina E&LRC at Nyeri Cause No. 252 of 2017; (2019, eKLR per Njoki Makau J.*** the court finds that the petitioner has established that the treatment of the grievant members of the petitioner listed in this suit is in violation of *Sections 5, 35 and 37 of the Employment Act, No. 11 of 2007 and Articles 27, 28, 41 and 232 of the constitution of Kenya 2010.*

34. The petition succeeds and the court grants the following reliefs to the petitioner:

(a) The court declares that the continued employment of the listed 463 grievant/members of the petitioner by the respondents on casual basis is in violation of *Sections 5, 35 and 37 of the Employment Act, NO. 11 of 2007* and violates *Articles 27, 28, 41 and 232 of the constitution of Kenya 2010*.

(b) The court directs the respondents to place all the affected employees, referred to above on payroll and apply to each one of them the minimum terms and conditions of service provided under parts II, III, IV, V and VI of the Employment Act, 2007.

(c) The respondents to compute, file and pay arrear salary due and owing to all the grievants, named in this petition under their employment within 60 days.

(d) Costs follow the event.

Judgment Dated, Signed and delivered at Nairobi this 13th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment 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. Wamalwa for the petitioner

Mr. Olado for the Respondents

Chrispo – Court Clerk