



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

PETITION NO 11 OF 2020

EVALYNE CHEROTICH RONOPETITIONER

VERSUS

COUNTY GOVERNMENT OF BOMET AND OTHERS....RESPONDENT

J U D G E M E N T

1. Through a petition dated 12th May, 2020 the petitioner alleged among others that: -

i. THAT the Petitioner was appointed that County Secretary of Bomet County Government vide an appointment letter dated 23rd October, 2017, and she was to serve in this capacity until a new county executive is constituted after the next general elections.

ii. THAT the Petitioner's appointment letter clearly provided for a Termination clause which provided the grounds which the contract may be terminated, ground that that were never cited to justify the actions of the 1st Respondent.

iii. THAT the Petitioner avers that the 1st Respondent and some members of the 2nd Respondent have been aggressively pursuing a malicious scheme of instigating her unlawful and unfair suspension, termination and /or removal from her position as the County Secretary.

iv. On 2nd April, 2020 the Petitioner received a letter dated 1st April 2020 purporting to release her to the National Government and directing her to clear with the human resource management.

v. The Petitioner avers that the 1st respondent is in the process of recruiting and/or nominating person to replace her, a process that has been marred by irregularities, lobbying collusion and deceit perpetrated by the Respondents.

vi. The Respondents have since the 24th March 2020 locked the petitioner out of her office and instructed their agents and servants to bar the Petitioner from entering the premises of the County at all without any justification.

vii. The Petitioner is still the substantive County secretary of the County Government of and the actions of the Respondents to bar her from accessing her office in essence imply that she has as well been barred from performing her official duties as the County Secretary without issuing her an official communication to that extent.

viii. The Petitioner avers that any decision that was made by the Respondents vide the letter date 1st April,2020 with caption heading. Release to the National Government should as such be rendered null and void.

2. The petitioner consequences sought orders that; -

i. A Declaration that the Respondents engaged in a malicious scheme of orchestrating the irregular and unlawful removal from office and termination the appointment of the Petitioner as the County Secretary of Bomet County Government. A further declaration that the actions of the respondents of seeking to terminate the petitioner's employment is malicious, illegal, unfair, unlawful and therefore null and void.

ii. A Declaration that the letter dated 1st April,2020 amounted to constructive dismissal of the petitioner and that all its contents altering the employment status of the Petitioner are null and void.

iii. This Honourable Court be pleased to issue an order of CERTIORATI to remove to this Honourable Court to be quashed the decision of the Respondents to terminate the appointment of the Petitioner as the County Secretary of Bomet County Government.

iv. An order compelling the respondents to pay the petition punitive damages for breach of contract.

v. Any other relief that court may deem just and expedient in the circumstance.

3. The 1st and second respondent in opposition to the application deponed through Dr. Hillary Barrack that: -

i. THAT I am a male adult of sound mind, disposition and the Governor of the County Government of Bomet sued herein as the 1st Respondent thus competent to swear this affidavit on my behalf and on behalf of the 2nd Respondent.

ii. THAT vide a letter dated 30th August,2018 from the office of the Attorney General 7 Department of Justice the Petitioner herein was seconded by the Secretary Public Service Commission for a period of three (3) years, effective 24th November, 2017.

iii. THAT upon the said secondment the Petitioner was issued with a contract of employment which stipulated her terms and conditions of service.

iv. THAT even though the Petitioner entered into an employment contract upon secondment with the 2nd Respondent the said employment contract did not render the original contract with the Public Service Commission invalid as the same remained in force.

v. THAT even though the Petitioner entered into a contract with the 2nd Respondent on 23rd October,2017 with new terms and conditions of service, the same was a secondary contract and cannot supersede the secondment letter made pursuant to her primary contract with the Public Service Commission and the terms therein.

vi. THAT it is true that on 1st April, 2020 I communicated to the Petitioner about the 2nd Respondent's decision to release her to the National Government wherein she was seconded from.

vii. THAT further I also wrote a letter to the Chairman Public Service Commission on the 2nd Respondent's decision to officially release the Petition back to the National government.

viii. THAT the said release of the Petitioner back to the National Government was dully and procedurally done in accordance with the terms of her secondment letter dated 30th August,2018.

ix. THAT the said release of the petitioner back to the National Government was done in line with Section 73 (3) of the County Government Act and in line with the Public Service Commission Guidelines on Secondment in the Public Service.

x. THAT the said release of the petitioner back to the National Government was done in the best interest of the petitioner and the 2nd Respondent.

xi. THAT the release of the Petitioner to the National Government is not a termination but a procedural release on account of an officer who was on secondment indeed, such an officer does not have to remain on secondment until the period expires but her/she may be released back to the office he/she held prior to the secondment by the receiving entity.

xii. THAT the contention by the Petitioner that she had been appointed on a fixed contract and that she genuinely believed that she would work for the County Government for a period of five years is in direct conflict with her letter of secondment which clearly indicates three years tenure in the service of the 2nd Respondent.

xiii. THAT it is useful to note from the able advice of the Advocates on record for the 1st and 2nd Respondent that paragraph 2.0(ii)of the Guidelines on secondment in the Public Service, October, 2016 states that secondment of Officers to other Public Service Organization shall be for a period not exceeding three (3) years, non-renewable. Thus, the contestation of a five year tenure can therefore not hold any water.

4. In support of the petition Counsel for the petitioner Mr. Sang submitted among others that the letter dated 1st April, 2020, releasing the petitioner to National Government was in total disregard of the fact that the petitioner was entitled to sufficient reason and due process prior to any adverse actions affecting her.

5. According to Counsel the respondent excluded the petitioner from all arrangements leading to her removal from office as the County Secretary Bomet. Mr. Sang further submitted that section 43 of the Employment Act places the burden on the employer to prove the reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act.

6. According to Counsel the appointment of County Secretary is anchored in Section 44 of the County Government Act. Section 44(1) © provided that the County Secretary may subject to the conditions and terms of appointment be dismissed by the Governor.
7. However, the petitioner's letter of appointment provided that termination of the contract could be as a result of serious violation of the Constitution or other written Law including contravention of Chapter 6, gross misconduct, physical or mental incapacity, incompetence or bankruptcy.
8. According to counsel none of these grounds contained in the petitioner's letter of appointment were stated in the letter dated 1st April, 2020 terminating the petitioner's employment as County Secretary. The only ground relied upon was "prevailing circumstances which were unknown to the petitioner.
9. Mr. Sang further submitted that in terms of article 260 of the Constitution, a County Secretary is a public officer and hence entitled to the protection of article 236 of the Constitution which provided that a public officer could not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of Law. The petitioner was removed by the Governor from office vide the letter dated 1st April, 2020. The termination was to take immediate effect. The Governor ought to have followed due process.
10. The 1st and 2nd respondent on its part submitted that secondment referred to temporary leave of absence from service of the principal employee to serve any other employer as the parties may agree. Mr. Otieno further submitted that Section 138 of the County Government Act on the issue of Secondment should be wholesomely interpreted vis-à-vis the meaning under article 187(2) read together with article 189(1)(b) of the Constitution.
11. Further it was clear from Public Service Human Resource Policies and Procedures Manual that secondment period should be for a period of not exceeding three years.
12. Accordingly, the letter of secondment dated 30th August, 2018 from the primary employee clearly provided that in secondment periods for the petitioner was for a period of three years effective 24th November, 2017.
13. Mr. Otieno further submitted that the release of the petitioner to the National Government was not a termination but procedural release on account of an officer who was on secondment.
14. This dispute was presented to court as a Constitutional petition however the Court having carefully considered the same does not consider it to have raised serious issues which constitute violation of the Constitution. The issue is simply whether the petitioner having been issued with a five-year contract by the 1st and 2nd respondent, could be terminated prematurely on the basis of three-year secondment policy contained in PSC Human Resources. Policy and Procedure Manual and whether the Governor was right to remove the petitioner in the manner he did through the letter dated 1st April, 2020.
15. These issues are adequately covered by the County Government Act, Employment Act and Public Service Act hence do not need the invocation of the Constitution. It is however becoming a trend by Advocates to rush into moving the Court through Constitutional petitions even where the issues involved are ordinary and adequately covered by existing legislation.
16. The petitioner was an employee of the respondent through a letter of appointment dated 23rd October, 2017. This letter was preceded by one dated 30th August, 2018 from the Office of the Attorney General seconding the petitioner to the County Government of Bomet for a period of three years.
17. According to the appointment letter dated 23rd October, 2017 the petitioner's term of office was to last until a new Executive Committee was constituted after the general election. That is to say, 2022. The letter further provided that the appointment could be terminated at any time on grounds among others, serious violation of the Constitution or any other written Law including contravention of Chapter six, gross misconduct, physical or mental incapacity to perform functions of office, incompetence or bankruptcy.
18. The letter dated 1st April, 2020 which purported to release the petitioner to national government cites the reason for release as "due to prevailing circumstances". The letter further informs the petitioner the Human Resource department would process her dues upon successful clearance. Whereas the respondent denied terminating the claimant's service, this letter by any manner of interpretation, effectively brought to an end the contract dated 23rd October, 2017 between the petitioner and the respondents.
19. The respondent has contended that the contract of 23rd October, 2017 could not override the letter of secondment dated 30th August, 2018 which according to the respondent was in line with PSC Human Resource Policy and Procedures Manual, 2016 which provided that officers on secondment serve for three years.
20. According to the respondent by 1st April, 2020 when the petitioner was released to national government, she had served the requisite three years.
21. Assuming the above contention was correct, the Court does not seem to understand why the 1st respondent in his letter to the petitioner dated 1st April, 2020 did not state so but instead relied on same undisclosed "prevailing circumstances".

Clause B 33(1) of the PSC Human Resource policies and Procedures Manual provide as follows: -

“Secondment of officers from the public service to other organizations is application to pensionable Officers for a period not exceeding (3) years and may be renewable once.”

22. A plain reading of this Clause does not yield the interpretation which the respondents want to assign to it. The respondent was not obligated to release the petitioner back to national government upon expiry of 3 years where such release amounted to unprocedural termination of the contract between the respondents and the petitioner.

23. If there existed and which has not been disclosed, before the Court, a reason for the premature termination of the petitioner’s service the respondent was bound to disclose the same to the Claimant and subject her to the requisite disciplinary process provided for in the Employment Act.

24. The abrupt termination of the petitioner’s contract and for no disclosed reason or valid reason was disproportionate and unfair and would in the Court’s view attract maximum compensation for unfair termination of service.

25. In conclusion the Court awards the petitioner as follows: -

- (a) One month’s salary in lieu of notice 272,500
 - (b) Twelve month’s salary for unfair
Termination of service. 3,270,000
 - (c) Prorata gratuity for 12 months. 1,013,700
- 4,556,200**
- (d) Items (a) and (b) and (c) shall attract Taxes and statutory deductions.

It is so ordered.

Dated at Eldoret this 30th day of October 2020

Abuodha Jorum Nelson

Judge

Delivered this 30th day of October 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.