REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 390 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KICHAMU LITTEN MUHENZI.....1ST CLAIMANT

RACHEL KADENYI MMBIHI.....2ND CLAIMANT

OLGA APONDI JAIMBO.....3RD CLAIMANT

NELIMA PHILID SAMITA.....4TH CLAIMANT

HEZEKIAH ODONDI MUSULWA.....5TH CLAIMANT

DAVID SIMIYU SAA SITA.....6TH CLAIMANT

JOSECK N. MMBOGA.....7TH CLAIMANT

KENNETH OCHIENG.....8TH CLAIMANT

LUCY ROSE WAFULA.....9TH CLAIMANT

RITA AMESO ORONJE.....10TH CLAIMANT

DENIS LIVUKU FRANKLINE.....11TH CLAIMANT

VIOLET KIZA.....12TH CLAIMANT

VERSUS

VIHIGA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

JUDGMENT

Vide a Memorandum of Claim dated 28th October 2015 as amended on 3rd June 2016, the claimants aver that they are male and female adult citizens of Kenya residing in Vihiga. They filed this suit against the County Public Service Board of Vihiga, established pursuant to the provisions of Section 57 of the County Governments Act as a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name.

The claimants aver that in the month of May and November 2015 the National Government of Kenya engaged on a 3 year contract, 2,000 Youth Polytechnic Instructors under the Economic Stimulus and Poverty Alleviation Programme through the Directorate of Youth Training in the former Ministry of Youth Affairs and Sports at a consolidated salary of Kshs.15,000.00 per month.

That by the year 2014 when the contracts of the first batch of instructors were nearing expiry a total of 1,866 instructors were still in service, the rest having left for various reasons including resignation.

That before the expiry of the contracts in March 2014 due to urgency of sustaining services of the instructors in supporting skills development among the youths in polytechnics, the Directorate of Youth Training through the State Department for Science applied to the Public Service Commission (PSC) for the renewal/extension of the contracts of the officers.

That the PSC vide a letter Ref. No. PSC/2/1/111 dated 16th April 2014 communicated its decision that the contracts be extended for (6) months subject to Treasury providing of the necessary budgeting allocation. That this pushed the expiry date of the contracts to November 2014 and May 2015 respectively.

That in the financial year 2014/2015 the Treasury under the Development Vote allocated Kshs.540,000,000/- to the Ministry of Education, Science and Technology to cater for the Economic Stimulus Programme staff personal emoluments and payment of service gratuity on the expiry of the contracts for the staff.

That the Youth Polytechnic Training function was subsequently transferred to the County Governments through Legal Notice No. 16 of February 2013 and Gazette Notice No. 116 of 9th August 2013 pursuant to the Fourth Schedule to the Constitution of Kenya 2010.

That at the advent of the County Governments, all the staff who were in the counties and performing devolved functions were deemed seconded to continue providing services. This included 590 Youth Polytechnic permanent staff and 2,000 contracted Economic Stimulus personnel.

That there arose numerous issues and challenges affecting/facing the transition of youth polytechnic staff. That following these numerous issues and challenges a consultative meeting was held on Tuesday 2nd December 2014 at Intercontinental Hotel Nairobi between the Ministry of Devolution and Planning, the Ministry of Education, Science and Technology and the Transition Authority on the management of the transfer of youth polytechnic functions and staff.

That at the consultative meeting it was agreed between the parties: -

a. That the County Government should make budgetary provisions to absorb the Economic Stimulus Program staff in their county establishments on permanent and pensionable terms in the next financial year on expiry of the Economic Stimulus programme.

b. That services of the Economic Stimulus Programme staff are still required in building skills in the Youth Polytechnics and terminating their contracts will adversely affect service delivery.

c. That in order to ensure continuity of Service Delivery the contracts of 1274 instructors whose contracts expired in November 2014 be extended to 30th June 2015.

d. That the Transition Authority do write a letter to the County Governments recommending their absorption in the next financial year on expiry of the programme.

That out of the 1274 instructors whose contracts expired in November 2014 and February 2015, and whose contracts were extended to 30 th June 2015, Vihiga County had about 50 instructors deployed to the various Youth Polytechnics within the county.

That on the 9th day of July, 2015 the Vihiga County Public Service Board advertised and invited applications for positions of instructors to be deployed in various Technical and Vocational Training Institutions within the county.

That the advertisement was done without special consideration of the contracted instructors under the Economic Stimulus Programme whose contracts were extended up to 30th June 2015 and who were to be absorbed by the County Government on permanent and pensionable terms.

That applications were received and several individuals were shortlisted for the interviews. That interviews were conducted and several individuals were selected.

That upon the selection being done several of the Youth Polytechnic Instructors engaged by the National Government in 2011 under the Economic Stimulus Programme including the applicants were left out.

That the respondent's acts of refusing to absorb the several youth Polytechnic instructors engaged in 2011 under the Economic Stimulus Programme was in defiance and direct contravention of the National Government's directive that they be absorbed by the County Governments in their county establishments on permanent and pensionable terms.

That the Economic Stimulus Programme officers were competitively recruited by the PSC with a possibility of being absorbed in the service upon expiry of the program if their services are still required.

That several other counties have absorbed some cadres of Economic Stimulus Programme Officers especially health workers and Youth Polytechnic Instructors while others were in the process of recruiting fresh staff to fill the gaps in Youth Polytechnic Training at the time of filing this suit.

That the claimants had not been paid their monthly salaries from the month of July, 2015.

The claimants aver that the respondent's conduct is unlawful, unprocedural and uncalled for and intended to deprive them access to their

lawful salaries and economically cripple them.

That the Respondents' actions violated the agreement reached at the consultative meeting held on 2nd December 2014.

The claimants aver that as a result of the respondent's unlawful, unprocedural and unjustified conduct, the claimants have suffered and continue to suffer considerable loss of income.

The claimants sought the following prayers –

a. A declaration that the advertisement and recruitment of Youth Polytechnic instructors for various Youth Polytechnics and other Vocational Training institutions in Vihiga County by the Vihiga County Public Service Board is illegal and un lawful.

b. An Order nullifying the recruitment of various Youth Polytechnic Instructors by Vihiga County Public Service Board carried out pursuant of the Thursday, 9th July 2015.

c. An Order compelling The Vihiga County Public Service permanent and pensionable terms the various Youth Polytechnic Instructors engaged by the National Government under the Economic Stimulus Program in the year 2011 and who were working within the county before the Youth Polytechnic Training was transferred to the County Governments, in particular the claimants herein before advertising the positions for any other members of the public.

d. An order compelling the respondent to reinstate the salaries of the claimants and to pay the claimants their salary arrears from the month of July 2015 to the date of Judgment in this claim.

e. Costs of the claim.

f. Interest on (d) and (e) above.

1. Any other relief that the court may deem just and fit to grant.

Upon hearing an application for conservatory orders filed together with the Memorandum of Claim, the court made the following orders: -

1. That the Respondent its agents, officers and/or persons acting under the instructions of the respondent is restrained from interfering with the employment of the Claimants or replacing the Claimants or otherwise interfering with the Claimants terms and conditions of employment pending the hearing and determination of this claim.

2. That the case be fixed for hearing on the 9th day of November 2016.

The Respondent filed appearance on 11th November 2015 but did not file a defence. The claim was heard in the absence of the Respondent on 9th November 2016 after the court confirmed that the Respondent was properly served and an affidavit of service filed in court.

While the claim was pending for judgment, the Respondent filed an application dated 10th November 2016 seeking the following orders: -

a) This application be and is hereby certified as urgent and be dispensed with in the first instance.

b) There be a stay of further proceedings pending the inter partes hearing of this application.

c) There be a stay of further proceedings thereafter the inter partes hearing and the hearing and determination of this application.

d) This Court be pleased to set aside and/or vacate the court order issued on 27th January 2016.

e) This Court be pleased to set aside the entire Court proceedings of 9th November 2016 and hereby grant leave to the respondent/ applicant to file its defence and defend the suit.

f) Costs of this application be provided for.

After hearing parties in the application, the court allowed the application in a ruling delivered on 22nd September 2017 in the following terms: -

1. That further proceedings in this case are stayed;

2. The applicant is granted leave to file defence out of time and in any event not later than 14 days from the date of this ruling;

3. The Claimant's case is reopened and the Applicant is granted leave to cross examine the Claimant's witness and to present the defence case;

4. The Applicant will have no audience unless and until it has complied with the orders of this court of 27th January 2017;

5. The Applicant will pay thrown away costs of Kshs.30,000 within 30 days;

6. Should there be non-compliance by the Respondent the orders herein will automatically lapse on the 30th day from the date of delivery of this ruling and the Claimants will be at liberty to move the court for appropriate orders.

The Respondent however did not comply with the directions given in the order and the claimants moved the court to vacate the orders. On 8th February 2018 the court made the following orders –

"Respondent has failed to abide by the ruling of the Court delivered on 22nd September 2017. The defence case is closed and judgment be delivered by Onyango J. on notice. Deputy Registrar to transfer the file to Nairobi for that purpose."

Claimant's Case

Denis Livuku Frankline, the 11th Claimant testified on behalf of all the claimants as CW1. He testified that there were two lots of instructors contracted by the Government in 2010 and 2011 respectively as Youth Polytechnic Instructors. That the claimants who were in the first lot were engaged in May 2011 on a 3-year fixed term contract ending in May 2014. That the second lot was engaged in January 2012 also on a 3-year fixed term contract to end in December 2014.

CW1 testified that while working the claimants received communication from the Ministry of Youth Affairs and Sports under the National Government extending the contracts for 6 months. The extended contract for the first lot was to end in November 2014 and in May 2015 for the second lot.

He testified that before the expiry of the extended contracts there was a stakeholders meeting and all functions of Youth Polytechnics were thereafter devolved to the County Governments vide Legal Notice No. 16 of February 2013 and Gazette Notice No. 116 of 9th August 2013. That the counties were advised to absorb the contracted instructors on permanent terms of contract. CW1 referred to appendix 1 and 2 in the claim, letters from the Transition Authority addressed to the Country Governments.

CW1 testified that they were thereafter called for suitability test by County Public Service Board and a list of all contracted instructors was compiled. That interviews were held on 23rd March 2015 and all the claimants attended. That while they were waiting for the results, the Respondent placed an advertisement for their jobs in the local dailies. A copy of the same has been appended at Appendix 4 of claim. The claimant testified that they were invited to apply when they went to inquire from the Respondent's Chief Officer's Office. That the Chief Officer informed them to apply as a formality.

He testified that they applied, were shortlisted and attended the interviews but did not get any communication on outcome of the interviews. That in the meantime they continued working.

He testified that other people were sent to take over their duties without any communication to them. That the last salary they were paid was for the month of June 2015.

He testified that they filed the instant suit to compel the Respondent to absorb them as directed by the Transition Authority, pay their salary arrears from July 2015 and pay their legal costs.

Determination

I have considered the pleadings on record as filed by the claimants. I have further considered the evidence on record as adduced for the claimants.

From the record, it is not in doubt that the claimants were employed as Instructors (Youth polytechnics) by the PSC through the Ministry of Youth Affairs and Sports on 23rd May 2011 on fixed terms contract of 3 years. All the claimants have appended the letters of offer of appointment dated 23rd May 2011.

It is further not in doubt that their contracts were extended as is evident from the letter dated 15th December 2014 from Kinuthia Wamwangi, the Chairman, Transition Authority, addressed to Prof. Collette Suda, the Principal Secretary, State Department for Science and Technology, Ministry of Education, Science and Technology (MOEST), Dr. Kamau Thugge, Principal Secretary, National Treasury, Mrs. Alice Otwalla Secretary/CEP, Public Service Commission and to All Country Secretaries.

The letter is reproduced below for its full tenor and purport –

"Dear All

<u>RE: ISSUE AFFECTING TRANSFER OF YOUTH POLYTECHNICS STAFF</u>

Following numerous issues and challenges, facing the transition of Youth Polytechnics' Staff, a consultative meeting was held on

Tuesday, 2nd December 2014. The parties included the Council of Governor (CoG), Ministry of Education, Science and Technology (MOEST), Ministry of Devolution and Planning, Transition Authority (TA), Directorate of Public Service Management (DPSM), the Country Public Service Boards Forum and Public Service Commission *(PSC).*

These issues include non-payment of salaries, expiry of contracts, contracts extension and payment service gratuities among others.

Consequently, it was agreed that: -

i. The County governments make arrangements to pay the permanent and pensionable PY staff totalling 590 across the counties with effect from September 2014 as per IPPD forwarded by MOEST since the budget for personnel emolument was transferred to the counties as part of County Allocation of Revenue Act 2013 after verification of their details.

ii. The MOEST in consultation with PSC and the National Treasury extend the contracts for 1,274 instructors whose contracts expired in November 2014 up to 30th June in order to bridge the shortfall of qualified teaching staff in youth polytechnics.

iii. The county governments to make budgetary provisions to absorb the ESP staff in their county establishments on permanent and pensionable terms in next financial year on expiry of the ESP Programme.

iv. The MOEST to expedite the payment of service gratuity for the 1274 whose contracts have expired.

v. The MOEST to release to the counties funds for capitation for YP trainees and for YP Board of Governors employed instructors as conditional grants to the counties.

The purpose of this letter therefore is to request you to take the necessary to ensure smooth transition of these staff to the County Governments and to avoid disruption of service delivery.

Yours sincerely

SIGNED

KINUTHIA WAMWANGI, EBS

CHAIRMAN"

It is further evident from the record that instead of absorbing the claimants (who had already been subjected to interviews by the PSC) into permanent employment as directed by the Transition Authority, the Respondent decided to replace them through fresh recruitment thus the Respondent failed to comply with the directive of the Transition Authority.

This Court having preserved the jobs of the claimants by its orders of 27th January 2016 and 22nd September 2017, I will treat the claimants as having lost their jobs unfairly through the acts of the Respondent, the same having been secured by the Transition Authority and the Court. They thus lost their jobs unfairly.

In the ultimate, I make the following orders: -

1. The claimants are deemed to have been in employment until September 2017 when the Respondent was granted conditional orders by this court. I accordingly award each claimant the sum of Kshs.405,000/= being salary from July 2015 to September 2017 at Kshs.15,000 per month to cover both arrears of salary and compensation for unfair termination and breach of legitimate expectation to be absorbed into permanent and pensionable employment.

2. The Respondent shall pay Claimants' costs of the suit.

3. Interest shall accrue from September 2017 to date of payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF DECEMBER 2020

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B** 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.

MAUREEN ONYANGO

JUDGE