



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 68 OF 2018

(Formerly Nyeri ELRC Cause No. 353 of 2017)

ALISON MUGAMBI MUCHEKE.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY PUBLIC

SERVICE BOARD.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking redress for the alleged unlawful termination of his employment. He averred that he was employed as support staff supervisor on permanent and pensionable terms. He averred that his contract was terminated on 8th September 2017 ostensibly on account of effluxion of time. The Claimant averred that the letter was illegal, malicious, discriminatory, unfair, wrongful and irregular for want of form and procedure. The Claimant sought a declaration that the notice of 8th September 2017 was unfair, irregular and unprocedural, an order of injunction against the Respondents restraining them from removing/sacking the Claimant from his post and in the alternative, an order of payment of all salaries, allowances and all other dues payable to the Claimant for the remainder of his term of employment and general damages for the wrongful termination from employment.

2. The Respondents filed a defence in which it was averred that the term of the Claimant was dependent on when the first elections under the new Constitution would take place and that since he served the Governor personally, his contract thought indicated to be for 5 years was varied by operation of law to a period during when the Governor would serve as such. The Respondents aver that the terms of the contract were such that the term of the Governor who appointed him dictated the end of the contract and since the former Governor lost the elections on 8th August 2017, the Claimant's contract terminated automatically as the personal services rendered by the Claimant could not be transferred to the current Governor. The Respondents thus urged the dismissal of the suit asserting that the Claimant had no cause of action against them.

3. He testified and stated that he was hired as a security officer and that he served with diligence in the position that was permanent and pensionable. He thus sought payment the grant of the prayers in his claim. In cross-examination by the Respondent's counsel, he testified that he was employed by the office of the Governor. He stated that he did not know when the 2nd Respondent came up and that it found him already employed. He did not apply for the job and was posted at the County Governor's offices to guard the premises. He testified that he was confirmed in employment by the 2nd Respondent as a support staff. He was re-examined by his counsel and he stated that he was employed on contract in 2013 and was issued the letter of confirmation in appointment in November 2016. He stated that he was on permanent and pensionable terms from 24th January 2014.

4. The Respondent called Stephen Mitugo the chair of the 2nd Respondent. He stated that the board came into effect in July 2013 and that the letter by Kenneth Kanga dated 21st January 2013 was at a time when the 2nd Respondent was not in place and the Claimant was supposed to sign in acceptance of the offer of employment. He testified that there was no record of the acceptance of offer to the letter which was from the Governor. He stated that even the letter of confirmation was from the chief officer of the 1st Respondent who is not a member of the 2nd Respondent. He was cross-examined and he testified that the Claimant was on permanent and pensionable terms per the letter of appointment. He stated that the confirmation was irregular and the document issued inconsistent. He admitted that the Claimant was not given any notice at the time of termination and he was just served with the letter informing him of the termination. That marked the end of oral testimony.

5. Parties were to file submissions and the Claimant submitted that the termination was unlawful as it was stated to be under the pleasure doctrine which was no longer applicable. He placed reliance on the case of **Jones Munene Mpathia v Tharaka Nithi County Government & Another [2018] eKLR** where the court dismissed the pleasure doctrine as archaic. He placed reliance on the provisions of Article 47(1) of the Constitution of Kenya and Section 41(1) of the Employment Act which guarantee fair administrative action and the provision of a notice to show cause before termination respectively. He submitted that he was entitled to the grant of the reliefs he had sought in his claim.

6. The Respondent submitted that per the provisions of Section 59(1) of the County Governments Act 2012, it was only the 2nd Respondent that had the capacity to appoint anyone to an office in the county government. They relied on the case of **Republic v Secretary, County Public Board & Another ex parte Hulbal Gedi Abdille [2015] eKLR** where Odunga J. held that there is no valid contract of employment in the county governments if there is non-compliance with the provisions of the County Government Act in respect of the appointment per Sections 65 and 66 of the Act. The Respondents submitted that the court should not enforce an illegal contract and relied on the rule in **Mapis (supra)** and also cited the cases of **Stephen Munene Njagi & Another v Tharaka Nithi County Government [2017] eKLR** as well as **Macfoy v United Africa Company Limited (1961) 3 All ER 1179** on the issue of illegal contracts. The treatise by **Cheshire, Fifoot & Furmson's Law of Contract 16th Edition** pages 450-501 was cited for the argument that at common law a contract to commit a crime or tort or fraud on a third party is not enforceable. The Respondents asserted that it was a maxim of law that no man shall take advantage of his own wrong. The Respondents also cited the cases of **Stephen Munene Njagi & Another v Tharaka Nithi County Government [2017] eKLR** as well as that of **Macfoy v United Africa Company Limited (1961) 3 All ER 1179** on the issue of illegal contracts. The Respondent further submitted that the court lacked jurisdiction as the Claimant was bound to first seek remedy from the Public Service Commission in terms of Section 77 of the County Governments Act. The Respondents relied on the case of **James Tinai Murete & Others v County Government of Kajado & 22 Others [2015] eKLR** and argued that the Claimant ought to have sought the interposition of the Public Service Commission instead of coming to court. The Respondents urged the dismissal of the Claimant's claim.

7. The Claimant's employ was not under the 2nd Respondent and he therefore was not a county public service employee in the strict sense of the term. He was therefore not bound by the County Governments Act necessitating his approach to the Public Service Commission prior to coming to court. As admitted by the Respondents' witness, the Claimant was employed outside of the scope of the 2nd Respondent and the letters issued to him except for the one the 2nd Respondent owned up to, were the work of officials in the Governor's office. He was dismissed without notice as confirmed in evidence by both witnesses. Whereas it was said his service was to terminate at the time the former Governor left office, this was not expressly stated in his contract and he had a legitimate expectation that the Respondents would honour his contract as they had done for the duration of his service to the 1st Respondent. He was summarily dismissed and thus is entitled to notice and 2 months compensation for the abrupt and unfair dismissal. He will also have costs of the suit.

- a. One month notice
- b. 2 months salary as compensation
- c. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 31st day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the original

DEPUTY REGISTRAR