



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CASE NO. 75 OF 2018

(Formerly Nyeri ELRC Cause No. 513 of 2017)

JUDE RIZIKI KARIUKI.....CLAIMANT

VERSUS

1. THARAKA NITHI COUNTY GOVERNMENT

2. THARAKA NITHI PUBLIC SERVICE BOARD.....RESPONDENTS

JUDGMENT

1. The Claimant sued the Respondents for her dismissal from service on 8<sup>th</sup> September 2017. She alleged that her dismissal was unfair, wrongful and illegal. She averred that she was appointed on 1<sup>st</sup> July 2016 as a clerical officer II in the establishment of the 1<sup>st</sup> Respondent effective 1<sup>st</sup> June 2016. She served in that capacity and was lawfully discharging her duties when she received the letter of dismissal from the 2<sup>nd</sup> Respondent. She averred that in the dismissal letter, the chairman of the 2<sup>nd</sup> Respondent alleged that her employment terminated on the basis of the regulation that all staff serving in the office of the Governor would have their services ending with the term of the sitting Governor. She averred that her appointment was permanent and pensionable. She thus sought the declaration that her termination was unfair, an immediate and unconditional reinstatement to employment and payment of all outstanding salaries and allowances withheld by the 1<sup>st</sup> Respondent, one month salary in lieu of notice, one month salary for the unutilized leave for 1 year, costs of the suit plus interest at court rates.

2. The Respondents averred that the Claimant had no cause of action against them and that the suit was an abuse of the court process. The Respondents further assert that the claim fell under the rule in **Mapis Investments (K) Ltd v Kenya Railways Corporation [2006] eKLR** which forbids the enforcement of illegal contracts when the illegality comes to the attention of the court. The Respondents averred that after the new Governor was elected, he undertook a review of the operations of the Respondent during the stewardship of the former Governor S. M. Ragwa and discovered that the Claimant was one of the former employees who had fraudulently obtained purported letters of appointment. The Respondents admitted sending the termination letter dated 8<sup>th</sup> September 2017 and denied that the Claimant was entitled to any remedy from the court. The Respondents averred that the Claimant was not an employee of the 1<sup>st</sup> Respondent and as such cannot claim that she was entitled to due process as her status ceased upon the general elections held in August 2017. The Respondents urged the dismissal of the Claimant's claim with costs.

3. The Claimant testified as did the Respondents' witness Stephen Nthiga Mitugo, the chair of the 2<sup>nd</sup> Respondent. She stated that she was employed as an intern on 23<sup>rd</sup> February 2016 as a clerical officer and served till she received the letter stating her termination was on account of effluxion of time. She was confused as the term permanent and pensionable meant till retirement. In cross-examination, she testified that she was an intern at first in the department of communication before being posted as a clerical officer. She stated that the County Public Service Board appointed her and that she had not graduated at the time. The appointment was effective 1<sup>st</sup> June 2016 though the letter was dated 1<sup>st</sup> July 2016. She was issued duties as a clerical officer and was serving under Mr. Kaunda in the Governor's office where she had interned. She accepted the offer and signed returning a copy to the 2<sup>nd</sup> Respondent. She stated that her appointment would have lapsed had she not accepted the appointment. She testified that she was not shortlisted for post and they deemed it okay to appoint her. She stated that she went through probation and was confirmed after the 6 months of probation. When she was hired she had a transcript but degree was given later and her qualifications were in place. In re-exam she testified that she was never called by the 2<sup>nd</sup> Respondent to be questioned about her credentials and the certificates were never an issue even in the letter of dismissal. She stated that the letter of acceptance was left in the office of the 2<sup>nd</sup> Respondent.

4. The Respondent's witness testified that the 2<sup>nd</sup> Respondent did not issue such letters as the one the Claimant was appointed with and in order to regularise them, the procedure would be a correction through a minute. He stated that the Claimant was a clerical officer II and that there was no acceptance letter and that if a contract is not accepted it is deemed revoked. He presumed she did not take the offer. He testified that Kenneth Kanga was the secretary to the 2<sup>nd</sup> Respondent and was not on interdiction because of gross misconduct and that the criminal issues touched on some of the issues such as the irregular letters. In cross-examination he testified that he got the issues from the Directorate of Criminal Investigations and that is why some issues are mentioned in his statement. He stated that what he had stated was not in relation to the Claimant but to others. He said the dismissal was on account of the regulation on the end of the Governor's time. He testified that the 2<sup>nd</sup> Respondent had the power to revoke per Section 75 of the County Government Act and the revocation must be within procedures and that is why the Board sat to make the decision. In re-exam he stated that certain paragraphs in his statement touch on Mr. Kanga's criminal case and the irregularities. He stated that the Claimant's contract had some irregularities and was a nullity. That marked the end of oral testimony.

5. The parties were to file written submissions and the Claimant filed submissions on 22<sup>nd</sup> November 2018 whereas the Respondent filed

submissions on 30<sup>th</sup> November 2018. The Claimant submitted that the issue of her qualifications only arise during testimony and was not part of the Respondent's pleadings. She submitted that her termination was unlawful as it was stated to be under the pleasure doctrine which was no longer applicable. She placed reliance on the case of **Jones Munene Mputhia v Tharaka Nithi County Government & Another [2018] eKLR**. The Claimant cited the provisions of Article 47(1) of the Constitution of Kenya and Section 41(1) of the Employment Act that guarantee fair administrative action and the provision of a notice to show cause before termination respectively. She submitted that the upshot of the foregoing was that she was entitled to one month's pay in lieu of notice, 12 month's pay as compensation under Section 49(1) (c) of the Employment Act and reinstatement to employment and payment of outstanding salaries withheld as from 8<sup>th</sup> August 2017. She urged the court to grant her prayers.

6. The Respondent submitted that the case was fit for dismissal as the Claimant was not qualified at the time of her appointment as she graduated in December 2016 while she was employed in July 2016 and that on that ground alone her suit was for dismissal. The Respondent submitted that the power to appoint officers of the 1<sup>st</sup> Respondent lay in the 2<sup>nd</sup> Respondent and that there was a procedure to be followed in the recruitment which was lacking in respect to the Claimant. The Respondent relied on the case of **Republic v County Public Service Board & Another ex parte Hulbai Gedi Abdille [2015] eKLR** for the proposition that an office in the county government must be established per Section 62 of the County Governments Act and that because the provisions of Section 62, 65 and 66 of the Act were contravened the suit was for dismissal. The treatise by **Cheshire, Fifoot & Furmson's Law of Contract 16<sup>th</sup> 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 submitted that Claimant's letter was designed to enable her obtain money by false pretenses from the Respondent. The Respondent asserts that the claim is fraudulent and as held by the Court of Appeal in **Nabro Properties Limited v Sky Structures Limited [2002] Vol. 2 KLR 299** no part is allowed to benefit from its wrong. The Respondents assert that the claim fell under the rule in **Mapis Investments (K) Ltd v Kenya Railways Corporation [2006] eKLR** a Court of Appeal decision which forbids the enforcement of illegal contracts when the illegality comes to the attention of the court. The case of **Macfoy v United Africa Company Limited (1961) 3 All ER 1179** was also cited on the issue of illegal contracts. The Respondents submitted that the Claimant was required to seek relief from the Public Service Commission in terms of Section 77 of the County Governments Act and cited the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**. The Respondents also relied on the case of **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR**. The Respondents urged the dismissal of the Claimant's claim.

7. The Claimant was issued with a letter of appointment by the 2<sup>nd</sup> Respondent's secretary and she was therefore an employee of the county public service even if her appointment is stated to be irregular. The perception that her service was under the pleasure doctrine, a creature that courts have pronounced ceased to exist on 27<sup>th</sup> August 2010 when Kenya promulgated the Constitution is a farce. However, the suit offended the provision of Section 77 of the County Governments Act. The Claimant should have lodged an appeal to the Public Service Commission before coming to court. The Claimant's case was therefore filed before this court prematurely as the mandatory procedure under Section 77 does not give the aggrieved party any discretion as to whether the party will apply the procedure therein or move the court. In my considered view the suit is only fit for dismissal. The suit is therefore dismissed but each party will bear their own costs

It is so ordered.

**Dated and delivered at Nyeri this 24<sup>th</sup> day of January 2019**

**Nzioki wa Makau**

**JUDGE**