



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CASE NO. 74 OF 2018

(Formerly Nyeri ELRC Cause No. 510 of 2017)

LISPER KATHURE MUKURU.....CLAIMANT

VERSUS

1. THARAKA NITHI COUNTY GOVERNMENT

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

JUDGMENT

1. The Claimant sued the Respondents for relief for the issue she framed as the 'unfair, wrongful and illegal termination of employment'. She averred in her claim that she was employed on or about 7th March 2014 and was lawfully discharging her duties as the Principal Information Officer in the office of the Governor Tharaka Nithi County when she was dismissed on 8th September 2017. She averred that the Chairman of the 2nd Respondent one Stephen Mitugo was the author of the termination letter. She asserted that the letter which indicated that on the basis of a regulation that provided for all the staff serving in the Office of the Governor would have their services ending with the term of the sitting Governor in accordance with the pleasure doctrine. She averred that she was not issued with a notice of the termination or taken through a fair hearing prior to the termination. Her term was not for a fixed period of 5 years as purported in the letter of termination but was under pensionable and permanent terms. She averred that the dismissal was thus unlawful and unfair and she was not paid service pay even if the employment was for a fixed term, which was denied. She thus sought a declaration that the termination of the Claimant's employment was unfair, immediate and unconditional reinstatement of the Claimant in her employment and in the alternative, the Claimant sought to be awarded the equivalent of 12 months compensation for unfair and wrongful termination of employment, one month salary in lieu of notice, 2 months' pay for unutilized leave for the 3 years and costs of the suit plus interest at court rates.

2. The Respondents averred that the Claimant's contract was null and void as it was not made by the 2nd Respondent as required both by Section 59 and 63 of the County Governments Act, 2012. The Respondents assert that the claim fell under the rule in **Mapis Investments (K) Ltd v Kenya Railways Corporation, Court of Appeal at Nairobi, Civil Appeal No. 14 of 2005 (unreported)** which forbids the enforcement of illegal contracts when the illegality comes to the attention of the court. The Respondents averred that the Claimant rendered personal services to the Governor and that her contract was to run concurrently with the term of the appointing Governor. The Respondents averred that the pleasure doctrine guided the termination of the Claimant's contract of service owing to the personal nature of the Claimant's services to the Governor. They urged the dismissal of the Claimant's claim with costs.

3. She testified as did the Respondents' witness Stephen Nthiga Mitugo, the chair of the 2nd Respondent. She stated that she expected to continue working for the 1st Respondent carrying out her roles as stipulated in her contract. In cross-exam, she stated that the terms of service were contract and the duration was not specified. She admitted that she did not have proof of her acceptance of the contract as she sent the acceptance and forwarded a copy to the payroll manager. She testified that the appointment was by Governor Ragwa who signed her letter. She stated that she did not apply for the job or get shortlisted and interviewed for the position by the 2nd Respondent. In re-exam she testified that she was not issued with a notice to show cause and that nothing to do with her termination had varied at all. She stated that her termination took place after the general election and that she even covered the functions of the new Governor. She stated that these issues and the termination came after the term of the other Governor.

4. The defence witness testified that the Claimant's letter of appointment was on 7th March 2017 and that the 2nd Respondent was in place at the time. He stated that the Claimant's letter was copied to the payroll manager but not to the 2nd Respondent which was not involved. In cross-examination he testified that the Claimant was on contract and she was not to continue indefinitely. He stated that the office she worked in was that of the Governor and the period of the Governor was known. He said the letter of appointment was written by the Governor because he was the one who had who had appointed her. He stated that the decision was the 2nd Respondent's decision and the letter was backdated to the period of the election. He testified that no notice was issued and that there was no need for a show cause. In re-

exam he stated that the Claimant was appointed by the Governor and that he left office on 8th August after election and the decision to terminate was by the Board. That marked the end of oral testimony.

5. The parties were to file submissions and this was done on 22nd November 2018 by the Claimant and 30th November 2018 by the Respondent after which the file was to be transmitted to Nyeri for the determination by the court upon confirmation of the filing of submissions on 5th December 2018. The Claimant 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 having diligently worked for the 1st Respondent for 4 years and did not voluntarily leave employment.

6. The Respondents submitted that the Claimant was employed by the former Governor and the terms of the appointment were that her services were to be within the office of the Governor. The Respondents submitted that the Governor had no power to appoint the Claimant to such a position. The Respondents submitted that the 2nd Respondent's role was only in communication of the termination of the Claimant's contract which had lapsed by the exit of the Governor after losing his position during the August general elections. The Respondents 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 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 Kajiado & 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 was employed in the Governor's office and her contract was signed by the Governor. She was not hired by the 2nd Respondent but was paid a salary by the 1st Respondent. The Claimant therefore was not a county public service employee in the strict sense of the term and she was therefore not bound by the County Governments Act. Her contract was not impugned during the tenancy of the former Governor in office and was only terminated on account of the perception that her service was under the pleasure doctrine, a creature that courts have pronounced ceased to exist on 27th August 2010 when Kenya promulgated the Constitution now in force. The Respondents therefore fall in error when they assert that the Claimant ought to have sought relief from the Public Service Commission. If indeed this was so, she would therefore have been employed by the 2nd Respondent which in fact did not happen. The Claimant's contract was brought to an abrupt end and given a termination date that was past. That was clearly wrong and she would be entitled to recover from the Respondents. It is not denied that the Respondents could terminate the contract but the manner of the termination is what was improper. Prior to termination of services, some modicum of due process must be established. In the final analysis the Claimant is entitled to payment of the following:-

- a. One month's salary in lieu of notice – Kshs. 73,190/-
- b. Unpaid leave for 2 months – Kshs. 146,380/-
- c. Compensation of 2 months salary under Section 49(1)(c) of the Employment Act – Kshs. 146,380/-
- d. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 23rd day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the original

DEPUTY REGISTRAR