



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT MERU

CASE NO. 54 OF 2018

- 1. PATRICK KOOME MUTIGA**
- 2. PATRICK MUTABARI**
- 3. KALATU STEPHEN KABERIA**
- 4. PURITY KAREGI**
- 5. MURITHI ENOCH KILEA**
- 6. LUCY KANORIO**
- 7. BEATRICE KAIRUTHI MUKARIA**
- 8. GITONGA AMOS KINOTI**
- 9. MERCY KAJUJU**
- 10. DOROTHY KENDI THAMBURA**
- 11. MURIIRA JOSPHAT**
- 12. KATHURE LISPER MUCHENA**
- 13. IRENE MWERU KAROKI**
- 14. MERCY KATHURE**
- 15. BENJAMIN KOBIA KILEMI**
- 16. AMOS WAFULA WANYAMA**
- 17. DENNIS MWIRIGI**
- 18. NGIGI PATRICK KIRIMI**
- 19. ANDREW WAMBUGU MWANGI**
- 20. PATRICK NJERU KAMWARA**
- 21. CAROLINE NJOKI WAMBUI**
- 22. ANNAH MUMBI GACAMBA**
- 23. EMILY KAYUYU KALARE.....CLAIMANTS**

VERSUS

1. MERU COUNTY GOVERNMENT

2. MERU PUBLIC SERVICE BOARD.....RESPONDENTS

JUDGMENT

1. The Claimants seek relief for the Respondents failure to deploy them into permanent employment in the 1st Respondent's establishment. The Claimants averred that they were employed in the 1st Respondent's department of health and were interviewed for the positions after applying for various posts emerging successful in the interviews. The Claimants averred that they were issued with appointment letters and were promised deployment on 1st September 2017 but they were not deployed. The Claimant averred that instead, the 1st Respondent had instructed the 2nd Respondent to advertise their positions thus denying them their lawful position communicated to them in their respective letters of appointment as a result of a scheme by the current regime. The Claimants sought a declaration that the refusal to deploy them was unfair labour practice and thus unfair and illegal, an order compelling the Respondents to deploy the Claimants forthwith as per their respective appointment letters, an order that all withheld salaries be paid and backdated to 30th September 2017, costs of the suit plus interest.

2. The Respondent in its response asserts that there was a communiqué that the recruitment would be frozen and this communiqué dated 22nd May 2017 was sent to the pertinent officers of the Respondents vide a letter of the same date. The Respondent averred that the cabinet decision was made due to the impending general elections and to ensure transparency. The Respondent averred that the Claimants did not accept the offer within 14 days as stated in the letters of offer thus fundamentally breaching the contracts. The Respondent averred that the Claimants also petitioned the County Assembly of Meru seeking redress. The Respondent also averred that the 1st Respondent operates on budgets and none had been factored in for the hire of the Claimants hence the inability to absorb or deploy them. The Respondents urged the dismissal of the suit.

3. The Claimants' representative Patrick Koome Mutiga testified that he was interviewed on 22nd May 2017 and on 11th August 2017 got the appointment letter. He stated that they were not deployed and were informed that there was a new chief of staff who informed the Claimants in September 2017 that they were to await deployment letters which did not come prompting the suit. He relied on the documents which showed the advertisement, the shortlisting and application letters as well as the re-advertisement. He testified that they did not lose hope despite not being deployed. He said they were notified of a staff audit and they were to await the outcome by February 2018. In cross-examination he testified that the suit was filed on 19th June 2018 though the appointment was on 17th August 2017. He was referred to the communiqué and confirmed that employment was to be frozen but he maintained that he was properly employed as he was called for an interview and subsequently appointed to the position he was interviewed for. He agreed that there had to be a budget set aside for new employees and confirmed that he was not aware if there was any budget set aside for the hire of new staff. In re-exam he stated that there was no letter issued to terminate his services and that the agent of the Respondent is the CEO and that they could therefore not sue the Respondent then call the CEO to testify. He stated that he received the letter in August and returned it the next day with full compliance. He stated that the letter was dated 26th July 2017 but he received it on 14th August 2017.

4. The Respondent called Samuel Mureithi Mutiria who testified that he was the Acting HR director of the 1st Respondent. He stated that there was a freeze in employment and that the cabinet memo of 22nd May 2017 was the one that indicated the freeze. He testified that all employment was frozen during the electioneering period. He stated that the letters of appointment were drafted a two months after the freeze and the letters issued on 14th August for them to report in September 2017. He stated that there was irregularity because there should have been no employment during the freeze. He stated that there were 2 parallel proceedings – one before the county assembly and the suit before court. He testified that there was no budget for the hire of the staff and that the Claimants had never worked for the Respondents and that if they were paid it would create problems. In cross examination he testified that there was a budgetary ceiling and that there was no evidence there was a budget for the hire of new staff. He stated that the CEO signed on delegated authority and that the expectation was that the Claimants would have been provided with jobs. He stated that the memo spoke of electioneering period and that covered 8th August 2017. When he was told that the memo was vague and could not vitiate the contracts, he answered that the cabinet met and there were cabinet minutes though the minutes were not before the court. He testified that the memo was in May and the advertisement was in February. He stated that there was a date when employment was halted and the advert was long before. In re-examination he testified that the freeze was to abide the elections and that the Claimants did not dispute the existence if the communiqué. He maintained there was no budgetary allocation for the hire of the staff and that the recruitment was after the freeze.

5. Parties were to file submissions and these were filed on 22nd and 29th November 2018 respectively. The Claimant submitted that the Respondents had no valid answer to the claim brought by the Claimants. The Claimants argued that no evidence was adduced to counter their claim and urged the court to grant their request to be deployed as per their letters of appointment. The Respondents on their part submitted that the court should not enforce an illegal contract and cited the case of **Mappis Investments (K) Limited v Kenya Railways Corporation Nairobi Civil Appeal no. 14 of 2005 (unreported)**. The Respondents argued that the Claimants had not controverted the Respondents pleadings such that the Respondents averments should hold sway. The Respondents submitted that the suit offended the provision of Section 77 of the County Governments Act reasoning that the Claimants should have lodged an appeal to the Public Service Commission before coming to court. The Respondents cited the cases of **Kenya County Government Workers Union v County Government of Tana River & Another [2018] eKLR** and **Shem Okora Onyvera v Kisii County Government & Another [2018] eKLR** for the proposition that where the statute provides a dispute resolution mechanism the same ought to be followed. The Respondents urged the court to deem the contracts as frustrated contracts and cited the case of **Simon Mukulo v The County Government of Kakamega [2016] eKLR**. The Claimants were accused of abusing the court process as they had initiated another competent process before the County Assembly. The Respondents cited the case of **Peter Muturi Njuguna v Kenya Wildlife Services [2017] eKLR** on the issue of forum and the case of **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** on the inapplicability of Section 41 of the Employment Act on probationary contracts. The Respondents urged the court to dismiss the claim as unmerited.

6. I have considered the pleadings as well as the testimony adduced herein in coming to the decision and the submissions alongside the authorities cited have been taken into account in reaching the determination herein. The Claimants were aggrieved by the decision not to deploy them after recruitment. They moved this court and the County Assembly of Meru. In the case before me, it became apparent from the testimony and evidence adduced that the hire of the Claimants took place at a time there was a moratorium placed on employment preceding the August 2017 elections. The Claimants were engaged and issued with letters of employment despite the moratorium. They were issued with the appointment letters dated July 2017 but they did not accept the offer till 17th August 2017 ostensibly as they had received the letters only the day before. The Respondent asserts that there was no budgetary allocation to hire the Claimants and because there was no deployment upon engagement the Claimants never served and neither were they entitled to any remedies. The employment of county employees is governed by the County Governments Act 2012. Under Section 77 of the Act, the Claimants who were aggrieved by the decision of the Respondents ought to have appealed to the Public Service Commission. As Nduma J. held in **Onywera v Kisii County** (*supra*),

...the legislature could not have intended to establish a dispute resolution mechanism and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of Section 77 of the County Governments Act evince an intention to have all disputes arising out of appointment by the county service boards dealt with by the Public Service Commission, hence its grant to the Commission of the mandate in mandatory terms by providing that the commission shall entertain appeals in respect of recruitments, selection, appointments and qualifications attached to any office. There is no option given to a party to choose whether or not to file grievances with the Commission.

7. The Claimants case was filed before the court prematurely as the mandatory procedure under Section 77 does not give the aggrieved parties any discretion as to whether they will apply the procedure therein or move the court or any other forum in the alternative. In my considered view the suit is only fit for dismissal. The suit is therefore dismissed but each party will bear their own costs as the comedy of errors perpetuated by the 'appointments' was a creation of the Respondents.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true

copy of the original

DEPUTY REGISTRAR