



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 322 OF 2017

DANIEL JOSE SITOLE.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA.....1ST RESPONDENT

THE GOVERNOR LAIKIPIA COUNTY.....2ND RESPONDENT

LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

COUNTY SECRETARY

COUNTY GOVERNMENT OF LAIKIPIA.....4TH RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for the dismissal from service as a Director Media Services in the County Government of Laikipia vide a letter dated 7th August 2017. He averred that he was appointed a director media services on 20th September 2013 for a 5 year period commencing 1st May 2013. He earned Kshs. 109,089/- per month plus a house allowance of Kshs. 40,000/- subject to statutory deductions. His gratuity was set at 31% of the basic salary per annum for the years served. He averred that on 14th August 2017 he received a letter terminating his services from the 4th Respondent stating that the Claimant's employment was tied to the term of the Governor. He averred the dismissal was contrary to the terms and conditions of service set out in his letter of appointment and therefore was null and void. He sought a declaration that his termination was unlawful and unfair and that he remained the rightful holder of the position of Director Media Services in the office of the Governor Laikipia County. He thus asserted that he was entitled to payment of the balance of his full salary for the month of August 2017 and in the alternative for an order for one month's salary in lieu of notice and 12 months compensation for unfair termination. He also prayed for costs.

2. The Respondents were opposed and filed a defence in which the Respondents averred that the Governor who was elected in the first elections under the 2010 Constitution did not serve a term of 5 years and that the term of the Claimant's service was tied to the term of the Governor. It was averred that the termination was justified in the circumstances. The Respondents denied that the Claimant's position was in the public service and that the position was personal to the former Governor Joshua Irungu. The Respondents averred that the Claimant was not competitively recruited as required for the County Public Service staff and the issuance of the letter by the County Public Service Board was purely administrative in order to facilitate staffing management within the County. The Respondents denied any breach of the Claimant's contract of service and therefore sought the dismissal of the Claimant's suit with costs.

3. The Claimant testified as did the Respondents' witness Charles Nderitu Ndung'u. In brief, the Claimant reiterated that he was employed by the County Government of Laikipia and worked as the head of the Governor's press service. He served until his sudden dismissal after the election of August 2017. He had a contract that was to run for 5 years effective May 2013. The Respondents' witness testified that the Claimant was not a permanent employee of the County Government of Laikipia and that the job description for the job the Claimant held was tied to the office of the Governor though the letter of appointment did not expressly capture this.

4. In the submissions filed, the Claimant submitted that the notice given prior to the dismissal was contrary to the terms and conditions of his service set out in his contract as it was less than one month. In addition, he submitted that the contract was brought to a premature end as it was to expire in May 2018. He cited the Court of Appeal decision in **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** and argued that the provisions of Section 43 of the Employment Act specifically placed a burden on the employer to prove the termination was fair. Reliance was also placed on the case of **Kisumu County Public Service Board & Another v Samuel Okuro & 7 Others [2018] eKLR** where the Court of Appeal held that if the intent was to have the contracts end with the term of the Governor who employed the respondents, the contracts given would have ended with the term of the Governor who employed them. The Claimant submitted that the

remedies available as held in the Kenfreight case were wages which would have been earned had the proper notice period been given, the compensation not exceeding 12 months wages, reinstatement or re-engagement. He urged the court to order payment of the full salary for August 2017 as he had been paid Kshs. 77,067.25 instead of the full salary of Kshs. 138,400.50, one month's salary in lieu of notice, 12 months salary as compensation and costs plus interest.

5. The Respondents submitted that the Claimant was not recruited through a competitive process but was handpicked by the then Governor and that upon the election of the incoming Governor, now the current Governor, there was a new administration and the current Governor did not need the services of the Claimant who was an advisor to the predecessor Governor. The Respondents submitted that the issues for determination were whether the Claimant's employ was in the County Public Service, whether the Claimant's contract was tied to the term of the Governor, whether the decision to terminate the Claimant's services were tied to that of the appointing Governor, whether the Claimant was entitled to damages and costs of the suit. The Respondents submitted that under Section 77 of the County Governments Act, the Claimant should have appealed the decision to dismiss him if he felt the same was unfair. The Respondents cited the case of **Shem Okora Onyvera v Kisii County Government & Another [2018] eKLR** where Nduma J. dismissed the case as the Claimant had failed to first appeal to the Public Service Commission as required under Section 77 of the County Governments Act citing with approval the Court of Appeal decision in the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**. The Respondents relied on the case of **Kenya County Government Workers Union v County Government of Tana River & Another [2018] eKLR** where Rika J. dismissed the suit as premature for similar reasons as above. The Respondents submitted that the Claimant's service was tied to the term of the Governor and that there was joinder of the terms implied in the Claimant's contract of employment. The Respondents submitted that the same was not expressly stated but was judiciously implied as a contract is made within the context of some surrounding circumstances and a court interpreting the contract should look at these surrounding circumstances so as to understand the real intention of the contracting parties. The Court of Appeal decision in the case of **Fidelity Commercial Bank Limited v Kenya Garage Vehicle Industries Limited [2017] eKLR** was cited for this proposition. The Respondents submitted that had the Governor served the entire term of 5 calendar years the Claimant would well have served the 5 years on his contract. The Respondents relied on the case of **Attorney General & Another v Andrew Kiplimo Sang Muge & 2 Others [2017] eKLR** where the Court of Appeal observed that in the making and implementation of a new Constitution there would be many transitional challenges and sacrifices. The Respondents submitted that the Claimant's contract was frustrated which frustration cannot be blamed on the Respondents as it was unrealistic for the Claimant to expect to continue advising and managing press affairs and speeches for an individual who was no longer in office. The Respondents relied on the case of **Joshua Nyangol Onyango & 4 Others v Relief and Missions Logistics Limietd [2017] eKLR** which cited with approval the case of **Kenya Airways Limited v Jatwat Singh & Brothers 2013] eKLR** and submitted that the contract of employment had been frustrated and relying on the principle of frustration where without default of any party the contractual obligations become incapable of being performed, the contract of the Claimant was untenable due to the election date being less than 5 years from the date of appointment. The Respondents submitted that they had proved the reasons for the termination under Section 43 of the Employment Act. The Respondents submitted that the Court of Appeal decision in **Kisumu County Public Services Board & Another v Samuel Okuro & 7 Others (supra)** was distinguishable as it related to the positions of chief officers of a county government, positions created by statute unlike the Claimant's position which was not created under statute. The Respondents, relying on the Court of Appeal decision in the case of **Alex Wainaina t/a John Commercial Agencies v Jackson Mwangi Wanjihia [2018] eKLR** submitted that the court cannot award both the main relief and the relief sought in the alternative. The Respondents urged that the suit was unnecessary and the Claimant thus not entitled to any costs as he had not proved he had been terminated unfairly.

6. I have considered the rival arguments, the pleadings, evidence and the plethora of authorities cited by the parties in making this decision. The Claimant was employed during the tenure of the former Governor of Laikipia County. He served in the press of the said Governor and had a contract for 5 years effective 1st May 2013. By a simple arithmetic the said contract was to expire on 1st May 2018 which was after the general election held in August 2017. The Claimant was issued with a dismissal letter on 14th August 2017 though the letter was dated 7th August 2017. His office was stated to have been held and expected to run concurrent with the term of the appointing Governor. There was a dispute as to whether the Claimant's position was in the County Public Service. This is not difficult to determine as the Claimant's contract though not entered into after a competitive recruitment was in the Governor's office. He was not *strictu sensu* in the Public Service but served at the office of the Governor with the concurrence of the County Public Service Board which issued a letter of appointment. It is clear therefore that the Claimant did not require to seek through an appeal to the Public Service Commission for interposition on the matters before the court. He was dismissed abruptly without being given the requisite notice as his contract had specific clauses on termination. His services could be terminated without notice by the Governor (this did not happen whether through the former or current Governor) or on the giving of a month's notice or payment in lieu of notice. This was not done. He was entitled to such notice as the Respondents could procure the termination of the contract in accordance with the terms of the contract he had. His contract was not frustrated as the current Governor had not even been sworn in by the 14th August 2017 when the dismissal took place. This means that the dismissal could not be without notice as contemplated in the contract as there was no substantive Governor in office on 14th August 2017. In my view, the dismissal could be effected by giving a month's notice or payment in lieu of notice. The Claimant served in the office of the Governor and though the contract was for the duration of 5 years, it could be eclipsed by the efflux of the term of the Governor as he was not employed by the County Public Service Board. In the final analysis I find that the Claimant's employ was terminated contrary to the expectations of the parties and therefore unfair. In the suit he sought various reliefs which would not all be tenable and he is successful in the following regard:-

- a. One month's salary in lieu of notice – Kshs. 138,400.50
- b. 4 month's salary as compensation – Kshs. 553,602/-
- c. Costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 16th day of January 2019

Nzioki wa Makau

JUDGE