



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

SUIT NO. 49 OF 2018

(CONSOLIDATED WITH CAUSE NO. 48 & 60 OF 2018)

1. DAVID BAARIU MWIRABUA

2. MOSES MURIANKI NABEA

3. MARTIN GIKUNDA.....CLAIMANTS

VERSUS

GOVERNOR MERU COUNTY.....1ST RESPONDENT

MERU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. The Claimants were all former chief officers of the 2nd Respondent. They were sent on compulsory leave by the 1st Respondent hence the joinder in the suit. They averred that they were employed for a 5 year term vide the letter of appointment dated 25th September 2013 with effect from 1st October 2013 and their contracts were therefore to end on 1st October 2018. They averred their salary was Kshs. 260,660/- a month and that they were entitled to a benefit being the CPF gratuity/pension scheme to which the Respondents as the employer were to remit an amount equivalent to 31% of the Claimants basic salary and the sum accumulated by June 2017 was Kshs. 1,880,288.97. They aver that by a letter dated 21st August 2017 signed by the 1st Respondent, the Claimants *inter alia* were compelled to go on an indefinite leave promptly, ostensibly pending the completion of the special finance and human resource audits. They averred that the request to proceed on leave was *mala fides* as the positions they held were subsequently advertised and applicants shortlisted for interviews. They averred that the Respondent was liable for the breach of contract and subjecting them to unfair labour practices. They alleged discrimination against them as opposed to the favoured cronies, sympathizers and supporters of the current regime. They stated that they were paid salary up to January 2018 and the salary was stopped without any notice or explanation. They sought a declaration that the Respondents' conduct amounted to breach of contract and a violation of the Claimant's statutory rights to fair labour practices and thus unconstitutional, unfair, unlawful and unjust contrary to the cardinal tenets of natural justice, unprocedural, null and void. They sought payment of their salary for the balance of the contracts from February 2018 till the end of contract on 1st October 2018, exemplary and punitive damages for breach of the employment contract, an order compelling the Respondents to issue the Claimants with a certificate of service, costs of the suits and interest at court rates on the sums due.

2. The Respondents filed a defence in which it averred that the Claimants were employed by the 1st Respondent and they were to hold office only until the end of the term of the erstwhile Governor. The Respondents averred that the Claimants recognized and acquiesced that their terms were tied to that of the former Governor, applied for the positions of chief officer which had been advertised and that they implored the 1st Respondent to renew their contracts. The Respondents averred that subsequently upon the compulsory leave given, the Claimants were permitted to hold office in transitory basis pending the recruitment of new chief officers and foster a smooth transition. The Respondents averred that the cases were actuated by malice and the zeal to settle political scores and thus should be dismissed with costs.

3. The 1st Claimant David Baariu Mwirabua testified as did the Respondents' witness Clare Kagwiria the secretary to the County Public Service Board (CPSB). The 1st Claimant stated that he was terminated from employment and he sought to recover for the sudden and abrupt loss of employment. He testified that they were not to serve to the end of the term of the erstwhile Governor but till 1st October 2018 as the term of the former Governor ended on 8th August 2017. He stated that they were not covered by the advisory to Governors issued in August 2017 as it related to contracts that are for 2022. He stated that they were effectively sacked by the current Governor through the letter that

sent them on compulsory leave. In cross examination he stated that he was a servant of the people and that he was not given a contract to sign. He stated that the responsibility for the preparation of a contract for his execution was that of the employer. He testified that the payslips do not show contract and that he did apply for employment when the jobs for the new county officers were advertised but he was not shortlisted unlike Martin his colleague – the 3rd Claimant herein. He was re-examined and he testified that he was not a ghost worker and that they applied to prove that they were qualified and not ghost workers. He stated that the retirement date of the contract was 1st October 2018. He said the advisory was meant for the new Governors as the term ends in 2022.

4. The Respondents' witness testified that she could not recall the Claimant applying though she did recall Martin applying for the advertised positions. She stated that the employment of the Claimants was pegged on the term of the former Governor and that the Claimants left in January 2018 and the new chief officers reported in February 2018. She stated that the Claimants should have pushed to have their contracts issued and that the Respondent paid their gratuity up till 31st January 2018. In cross-examination she stated that ROD does not mean date of retirement and that the chief officers are the senior most civil servants. She testified that they served under the pleasure of the former Governor and that there was no salary paid after January 2018. She stated that the contract matter was both ways as the employee could push for it as the employer was required to provide one. She testified that the applications for chief officers was open to all qualified persons in the county and the Claimants had a duty to apply.

5. The parties filed submissions. The Claimants sought determination of the issue as to whether they were to serve up to the end of the term of the former Governor or whether they were to serve till the end of the contract in October 2018, whether the sending of the Claimants on compulsory and indefinite leave by the 1st Respondent purportedly to pave way for special finance and human resource audits amounted to constructive dismissal and whether or not the 1st Respondent had authority in law to send the Claimants on compulsory leave. The Claimants also sought to have a determination on whether there were remedies available to them and who was to meet the costs of the claims. The Claimants relied on the case of **Kisumu County Public Service Board & Another v Samuel Okuro & 7 Others [2018] eKLR** and the case of **Janine Buss v Gems Cambridge International School Limited [2016] eKLR** on the mandatory procedures prior to termination of employment. The Claimants submitted that the Governor had no right in law to send the Claimants on compulsory leave. The Claimants submitted that they were chief officers and thus county public officers appointed in the County Public Service by the County Public Service Board and not the Governor by virtue of Section 45 of the County Governments Act. They submitted that the 1st Respondent had no authority in law to send them packing.

6. The Respondents' position was that the Claimants were engaged to serve for a term concomitant with the term of the former Governor and that the Claimants were not on a definite term of service as the tenure if their service was not known. The Respondents submitted that the contracts of service of the Claimants were therefore governed by Section 35 of the Employment Act and were entitled to only one month's notice or salary in lieu of such notice. The Respondents cited the case of **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** where the court held that the termination notice is governed by statute and that of **James Kiburi Mutia v Governor Meru County & Another [2018] eKLR** where the court held that claiming salaries that would have been earned till retirement is reaping where one has not sown as there would be payment yet no services are rendered. The Respondents urged the Court to give the payslips shown in evidence as showing only the pay and deductions made, period. The Respondents called in aid the case of **Eldo City Limited v Corn Products Kenya Ltd & Another [2013] eKLR** on the argument that a court should give the natural interpretation of the purpose and intention of the deed and the conduct of the parties. The Respondents submitted that relying on the case of **Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited [2017] eKLR** asserted that where there is ambiguity in an agreement, it must be construed according to the clear words used by the parties. The Respondents thus urged the court to dismiss the suits with costs to the Respondents.

7. The Claimants were county executives. They each claim they were to serve till 1st October 2018. None of them had a contract of service. Upon the assumption of office by the new Governor after the 2017 general elections, the Claimants were placed on compulsory leave before they were dismissed on 31st January 2018. They thus sought relief for the abrupt dismissal. They exhibited payslips which were proof of payment though not proof of the duration of the contract. No one could reveal authoritatively what ROD on the payslip meant as these were documents generated centrally for all civil servants. The Claimants assert they were employees of the Respondents and were thus civil servants within the County Public Service. They asserted their terms were not tied to the tenure of the erstwhile Governor. As they were county public servants, they had a duty to comply with the provisions of Section 77 of the County Governments Act. 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 provided for in that section. As Nduma J. held in **Shem Okora Onywera v Kisii County Government & Another [2018] eKLR**, where the statute provides a dispute resolution mechanism the same ought to be strictly followed. The learned Judge stated as follows:-

...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.

8. In my considered view, 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. Taken as a whole, the above points to the fact that the suits are only fit for dismissal. The 3 suits are therefore accordingly dismissed but each party will bear their own costs.

It is so ordered.

Dated and delivered at Meru this 7th day of February 2019

Nzioki wa Makau

JUDGE