

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 47 OF 2018

SEVERINO KINGE MANENE.....CLAIMANT

VERSUS

GOVERNOR MERU COUNTY.....1ST RESPONDENT

MERU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. The Claimant was a former chief officer of the 2nd Respondent initially seconded from what is present day Kirinyaga County. He was sent on compulsory leave by the 1st Respondent upon the assumption of office by the new Governor hence the joinder in the suit. The Claimant averred that he was employed for a 5 year term vide the letter of appointment dated 25th September 2013 with effect from 1st October 2013. His contract was therefore to end on 1st October 2018. He averred his salary was Kshs. 260,660/- a month and that he was 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 Claimant's basic salary and the sum accumulated by June 2017 was Kshs. 1,509,809.74. He averred that by a letter dated 21st August 2017 signed by the 1st Respondent, the Claimant was *inter alia* compelled to go on an indefinite leave promptly, ostensibly pending the completion of the special finance and human resource audits ordered by the 1st Respondent. He averred that the request to proceed on leave was *mala fides* as the positions he held were subsequently advertised and applicants shortlisted on 11th October 2017 for interviews. He averred that the Respondent was liable for the breach of his contract and subjecting him to unfair labour practices. He alleged discrimination against him on the erroneous presumption that he was not politically aligned to the current Governor and that his removal was supposed to create jobs for the favoured cronies, sympathizers and supporters of the current regime. He stated that his salary up to January 2018 had been paid but since then the salary was stopped without any notice or explanation. He 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 Claimant 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 Claimant was employed by the 1st Respondent and was to hold office only until the end of the term of the erstwhile Governor. The Respondents averred that the Claimant duly recognized this and acquiesced that his term was tied to that of the former Governor, and that he would be released back to Kirinyaga County from where he was seconded to the 2nd Respondent. The Respondents averred that the Claimant accepted with gladness his dues when the Respondents advised the Claimant these were due. It was averred that the Claimant even implored the 1st Respondent to renew his contract thus showing he knew the contract was at an end. The Respondents averred that upon the end of the tenure of the former Governor, the Claimant was permitted to continue holding office in transitory basis pending the recruitment of new chief officers and foster a smooth transition. The Respondents averred that the case was actuated by malice and the zeal to settle political scores and thus should be dismissed with costs.

3. The Claimant and the Respondent's witness Clare Regina Kagwiria testified. The Claimant testified that he was presently based at Kilimo House as a Principal Agricultural Officer. He stated the last payslip should have been in October 2018. He said the termination at Meru County was illegal and that the letter that sent him on compulsory leave ostensibly to permit the conduct of an audit. He stated that the outcome of the audit was not communicated to him and he was not found culpable as no recoveries were made on his salary and there is no counterclaim against him. He stated that the advisory the council of Governors had issued was in respect of the 2022 transition and could not apply retrospectively to the previous contracts. He testified that his secondment could have been extended and his employer would not have had a problem. In cross examination he stated that there was no express indication of the term of his contract in the letter. He said the payslip showed the date of exit which was 1st October 2018. He rejoined the Ministry of Agriculture in February 2018 after receiving the letter notifying him of the termination. He stated that the second tranche of gratuity was yet to be paid being the period between February 2018 to October 2018.

4. The Respondent's witness testified that the Claimant was released back to the Ministry of Agriculture at Kirinyaga and that he joined the Respondent in the position he served after he had responded to an advert and was successful after the interview. He was employed for 3 years and thereafter received an extension for a further 2 years. She stated that the Claimant requested to be released back to the Ministry after the contract in Meru County expired. She stated that when the positions for chief officers were advertised in the new dispensation the Claimant applied, was shortlisted and interviewed but was unsuccessful. She stated that the payslip did not indicate the tenure and that it mainly communicated the gross earnings, deductions and net pay after deductions. In cross-exam she stated that the Claimant wrote to the legal department and not to the County Public Service Board. She stated that ROD is not the date of retirement but a control date which is not generated by Meru County but by the Integrated Payroll and Personnel Database (IPPD) and that the secondment was not to end on 1st October 2018. She stated that the first advisory sought was in relation to the earlier period and that the Claimant implored the Respondents to

retain him but they released him. She stated that the Claimant's salary was settled till end January 2018 and that when he returned to the Ministry he could not be paid double. In re-exam she stated that the Claimant was paid gratuity as he was not an employee of Meru County but on secondment.

5. The Claimant and Respondent filed submissions. The Claimant sought determination of the issue as to whether he was to serve up to the end of the term of the former Governor or whether he was to serve till the end of the contract in October 2018, whether the sending of the Claimant 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 Claimant on said compulsory leave. The Claimant also sought to have a determination on whether there were remedies available to him on account of the termination and sought to know who was to meet the cost of the suit. The Claimant 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 Claimant submitted that the Governor had no colour of right or backing in law to send him on compulsory leave. The Claimant submitted that he was a chief officer and thus a county public officer appointed in the County Public Service by the County Public Service Board and not a hireling of the Governor. It was submitted that by virtue of Section 45 of the County Governments Act, he was entitled to the safeguard against the action the Governor took. He submitted that the 1st Respondent had no authority in law to send on the compulsory leave he purported to send him on. He urged the court to find in his favour.

6. The Respondents submitted that the contract of service of the Claimant were therefore governed by Section 35 of the Employment Act and the Claimant was only entitled to one month's notice or payment of one month's 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 merely evidence of 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 suit with costs.

7. The Claimant was on secondment from the National Government. He was a civil servant prior to his recruitment at the 2nd Respondent in the capacity of a chief officer agriculture and livestock. He was therefore a person to whom the Public Service Act and the County Governments Act applied in full. The provisions of Section 77 of the County Governments Act thus applies to this case. 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 this 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 Claimant's case was filed before the court prematurely as the mandatory procedure under Section 77 does not give him, the aggrieved party, any discretion as to whether to apply the procedure therein or move the court or any other forum in the alternative. He had to file an appeal with PSC which he failed to do. The remit of Section 77 is not a suggestion but a statutory imperative. The suit is only fit for dismissal as I hereby do. 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