

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 92 OF 2018

CHARLES GITONGA KIBAARA.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI PUBLIC SERVICE BOARD.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for unfair termination of employment. The Claimant averred that he was employed on the 21st November 2013 as a chief driver and that he was dismissed on 8th September 2017 without any prior notice, justification and in complete disregard to the procedure expressly set out in the Employment Act 2007. He earned Kshs. 28,323/- a month and was deployed to Tharaka North Sub-county on 10th January 2017. He avers that his employment was confirmed by the 1st Respondent on 5th April 2017. He sought a declaration that his dismissal was unfair, general damages for the unfair dismissal, any other lawful dues and any other relief the court may deem just and fit to grant. The Claimant also sought costs of the suit and interest at court rates on the damages.
2. The Respondent averred in the defence that the Claimant was not entitled to any remedies sought as his claim was in furtherance of an illegal and fraudulent contract. The Respondent averred that in line with the decision in **Macfoy v United Africa Company Ltd (1961) 3 All ER 1179** that if an act is void it is in law a nullity. The Respondent thus sought the dismissal of the claim with costs.
3. The Claimant testified as did the Respondents' witness Mr. Shem Mitugo. The Claimant said that he was employed as a driver from 21st November 2013 and he was confirmed on 5th April 2017. He confirmed receiving the dismissal letter in September 2017. He was cross-examined and he stated that he did not have the letter accepting the offer of employment or his application letter. He stated that his deployment was by Mr. Humphrey Kinyua. The Respondents' witness testified that the contract the Claimant held was illegal as it was not pursuant to an advertisement, interview and appointment by the 2nd Respondent as required. He stated as chairman of the 2nd Respondent he had not seen any record of the Claimant's application, acceptance or interview. He confirmed issuing the dismissal letter. In cross-examination he stated that the Claimant was at the time working in the office of the Governor and was therefore to leave at the same time. He agreed that he had backdated the dismissal to 7th August 2017. He testified that the it was the view of the board that those in the office of the Governor had their term expire with the terms of the former governor.
4. Parties were to file submissions and the Claimant submitted that the termination was unfair as it relied on a principle that was not recognized in the Constitution of Kenya, namely, the pleasure doctrine. The Claimant submitted he was not issued a notice under Section 35 of the Employment Act and therefore he was entitled to recompense. He cited the case of **Jones Munene Mputhia v Tharaka Nithi County Government & Another [2018] eKLR** in support of his submissions. He urged the grant of the prayers in his claim.
5. The Respondents submitted that the Claimant was not an economic advisor and that he did not apply nor was he shortlisted for interview for the position he held at the 1st Respondent. The Respondents submitted that the Claimant was deployed and confirmed by persons who were not members of the 2nd Respondent. The Respondents submitted that the fact he held an illegal contract he was not entitled to the remedies he sought. They cited Section 59 of the County Governments Act as well as the case of **Republic v Secretary County Public Board & Another ex parte Hulbai Gedi Abdille [2015] eKLR**. The Respondents also cited **Chesire, Fifoot & Furmson's Law of Contract, 16th Edition pages 450 - 501** and an extract of a passage on page 462 where the authors state that there is no need to stress the obvious fact that an agreement is illegal and void if its object direct or indirect is the commission of a crime or a tort. The Respondents placed reliance on the **Nabro Properties Limited v Sky Structures Limited (2002) Vol. 2 KLR 299** and **Mapis Investments (K) Ltd v Kenya Railway Corporation [2006] eKLR**. The Respondents submitted that the Claimant was to appeal to the Public Service Commission in terms of Section 77 of the County Governments Act. They cited the case of **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** as well as **Jude Riziki Kariuki v Tharaka Nithi County Government & Another [2019] eKLR** for the proposition that an appeal to PSC was the way to go.. The case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** was cited for the proposition that where a clear statutory imperative is given the procedure should be followed. The Respondents also cite case of **Ridge v Baldwin & Others (1963) 2 All ER 66** where the House of Lords held that the right to a procedural fairness and due process are dependent on the employees' status as an office holder. They thus urge the dismissal of the suit.
6. The law is settled as far as the issue of procedure prescribed by statute. Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. As held in the cases of **James Tinai Murete (supra)** and the case of **Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille (supra)**, the law does not envision a situation where the litigants chose what part of a statute to follow. I need not rehash what has been stated so eloquently by others. The Claimant should have approached the Public Service Commission in terms of Section 77 of the County Governments Act. In my view the suit is only fit for dismissal. I make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 19th day of March 2019

Nzioki wa Makau

JUDGE