



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.167 OF 2017**

**PAUL EKWOM NABUIN.....CLAIMANT**

**VERSUS**

**TURKANA COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**H.E. JOSPHAT K. NANOK GOVERNOR TURKANA COUNTY.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

THE Memorandum of Claim herein was filed on 20<sup>th</sup> April, 2017 together with an application and Notice of Motion which application was heard and a ruling delivered.

On 10<sup>th</sup> April, 2018 parties attended court for hearing directions with regard to the main claim, no defence had been filed and the respondent's counsel Mr. Munyua indicated to court that the parties were in the process of settling the matter out of court and required 30 days or a defence would be filed. Mention date was allowed for negotiations and or defence be filed by 14<sup>th</sup> May, 2018.

On the due date the respondent was absent and defence had been filed on equal date. A hearing date was allocated for 17<sup>th</sup> July, 2018 and on the due date parties indicated negotiations were on-going and a new hearing date for 18<sup>th</sup> September, 2018 was allocated.

On the due date there was no agreement and a new hearing date was allocated for 19<sup>th</sup> February, 2019.

On the scheduled hearing date, the respondent was absent. The claimant was heard on his case.

**Claim**

The claimant was employed by the 1<sup>st</sup> respondent, a County Government established under the constitution and the 2<sup>nd</sup> respondent being the chief executive officer of the 1<sup>st</sup> respondent. The claimant was appointed at County Executive Committee member for Finance and Planning for the 1<sup>st</sup> respondent earning a monthly gross salary of Ksh.328, 125.00.

The claimant was also appointed the acting County Executive Committee member for Tourism, Trade and Development for the 1<sup>st</sup> respondent.

On 31<sup>st</sup> November, 2016 the claimant resigned from his position with the 1<sup>st</sup> respondent and submitted notice with the 2<sup>nd</sup> respondent.

The claimant signed the transfer of mandate forms for the respondents to effect changes at the Central bank of Kenya (CBK) with regard to the authorised signatories of the County Revenue Fund for the 1<sup>st</sup> respondent but the respondents failed to notify the CBK on the changes made.

Despite the resignation and acceptance by the respondents the claimant was required and directed to discharge his duties for the release of County Funds for the 1<sup>st</sup> respondent. By publication dated 9<sup>th</sup> March, 2017 the respondents indicated that the claimant was still the County Executive Committee Members for Finance and Planning and refused to make any correction.

By letter dated 4<sup>th</sup> April, 2017 the claimant demanded from the 2<sup>nd</sup> respondent to be issued with a Certificate of Service, the payment of unpaid salaries up to March, 2017 and payment in lieu of accumulated leave days.

On 5<sup>th</sup> April, 2017 the 2<sup>nd</sup> respondent confirmed the claimant was an employee of the 1<sup>st</sup> respondent and required the claimant to continue discharging his duties to the 1st respondent. The claimant was entitled to a Certificate of Service and payment of gratuity subject to handing over but declined to pay the owing salaries and accrued leave days. Such action by the respondents was with malice and illegal on the grounds that the respondents were aware the claimant had resigned from his position and had owing salaries and accrued leave pay and failed to issue the due Certificate of Service.

The actions of the respondent were unfair, unlawful and contrary to fair labour relations. The claimant is seeking for the payment of his dues;

- a. Issuance of Certificate of Service;
- b. Unpaid salary from 31<sup>st</sup> November, 2016 to March, 2017 Ksh.1,312,500.00;
- c. Accumulated leave allowances for 180 days Ksh.1,964,750.00;
- d. Due gratuity Ksh.4,679,062.50;
- e. Damages for breach of contract of employment and violation of the right to fair labour practices and fair administrative action;
- f. Costs; and
- g. Interests on the award dues.

The claimant testified in support of his claims and admitted that following the court ruling delivered on 27<sup>th</sup> April, 2017 he was issued with his Certificate of Service albeit after filing suit.

Upon employment by the respondents he worked diligently and was paid a gross salary together with allowances and his contract allowed for the payment of gratuity at 31% of each annual salary.

In November, 2016 the claimant resigned from his employment with the respondent to run for a political position, Member of Parliament Turkana North and had expected to leave employment by end of December, 2016 to focus on his campaigns. This did not materialise as the respondents failed to continue to engage the claimant until the end of March, 2017. Despite handing over his duties and attending to effect bank signatories' changes, the respondent did not discharge him and notified members of the public that the claimant was still serving in his capacity with the 1<sup>st</sup> respondent.

The claimant also testified that in April, 2017 he wrote to the 2<sup>nd</sup> respondent seeking to be issued with a Certificate of Service to facilitate clearance for running for political office and to be paid the owing salaries, the due leave days untaken and gratuity for the years served. The 2<sup>nd</sup> respondent replied on 5<sup>th</sup> April, 2017 stating that the claimant had not cleared under his docket for the payment of his owing dues which was not correct as the claimant had since complied.

The respondent has not denied owing the claimant and such should be confirmed and awarded by the court. The due gratuity has since been gazetted vide Legal Notice No.6518 of 7<sup>th</sup> July, 2017 at the rate of 31% for each annual salary paid.

#### Defence

The respondents have denied the claims made by the claimant save that the articles published in the newspapers on 9<sup>th</sup> March, 2017 were done 8 months before the claimant resigned from his employment and the process of compiling the County Magazine had begun before the resignation and it was by error to caption the claimant as the County Executive Committee Members for Finance and Planning.

The defence is also that the respondents did not refuse to issue the claimant with his Certificate of Service after he resigned from his position as County Executive Committee Members for Finance and Planning and as acting County Committee Member for Tourism, Trade and Development. Upon resignation the claimant was required to hand over and ensure smooth transition which he failed to attend and necessitated the respondents to consult him over time.

The claimant having voluntarily left office he waived his right to claim unpaid salaries, accrued leave allowances. The claims made should be dismissed.

The respondent also filed a witness statement of Chris Kiyana Locheria the Deputy Director Human Resource Services for the 1<sup>st</sup> respondent and who avers that on 31<sup>st</sup> November, 2016 the claimant resigned from his employment with the 1<sup>st</sup> respondent and as common practice he was required to hand over his portfolio to ensure a smooth transition of his office which he failed to attend. The claimant by refusing to hand over essential services and those of authorising the release of county funds from the county revenue, the respondents were forced to consult him to be able to run county functions.

It is common cause, by letter and notice dated 31<sup>st</sup> November, 2016 the claimant resigned from his position with the 1<sup>st</sup> respondent and taking effect end of December, 2016.

In the respondents letter dated 5<sup>th</sup> April, 2017 there is acknowledgement that the claimant resigned from his position with the respondents but

was consulted in terms of ensuring a smooth transition process. The respondents also note that the claimant was owed gratuity but such had been vitiated by failure to properly hand over his duties.

The failures alluded to by the respondents against the claimant are not stated. What he failed to hand over and thus be denied of his due gratuity is not stated. There is no counterclaim for any loss, failures or breaches committed by the claimant upon his resignation and leaving office with the 1<sup>st</sup> respondent.

The claimant left office by resignation and he issued notice as contemplated under the law and in accordance with section 35 of the Employment Act, 2007.

The claimant is seeking payment of his salaries from 31<sup>st</sup> November, 2016 to March, 2017 on the basis that he continued to undertake duties for and on behalf of the respondent despite issuing notice and leave office with effect from end of December, 2016. That he was called upon to process the release of funds to the 1<sup>st</sup> respondent from the CBK on 6<sup>th</sup> January, 2017, proceeded to undertake subsequent approvals in February, 2017 and March and the due salaries should be paid. The claimant is also seeking his due salaries on the grounds that the County Assembly of Turkana required withdrawals facilitated by the claimant to ensure compliance with the office of the Controller of Budgets in allocation of County funds.

The claimant has attached letters and documents dated 6<sup>th</sup> January, 2017 to the Director, banking Department at CBK authorised by Joseph Namuar Emathe and Apalia Ekakoron Anthony. Similar letters are dated 1<sup>st</sup> February, 2017, 10<sup>th</sup> February, 2017, and 24<sup>th</sup> February, 2017.

These letters are all signed by Joseph Namuar Emathe and Apalia Ekakoron Anthony as the *Authorised signatories*. The letters are processed through the office of Executive Committee Member Finance and Planning, Turkana County Government but not executed by the claimant.

Such cannot confirm the claimant remained at work and worked for the respondent after his resignation.

The notice in the newspapers published on 9<sup>th</sup> March, 2017 with information that the claimant was the part of the County Executive for the 1<sup>st</sup> respondent though misleading as he had already left office by his resignation with effect from end of December, 2016 does not confer a benefit in employment. Such cannot in law be said to change the terms of employment subsisting as at end of December, 2016 for the claimant to be paid the due salaries.

Despite the respondents failing to attend at the hearing, the claimant cannot be paid for work not done after the end of December, 2016 when employment terminated. The published information on 9<sup>th</sup> March, 2017 that the claimant remained the employee of the 1<sup>st</sup> respondent cannot confer benefits in employment so as to claim salaries. The misleading information should be addressed differently at before the right court.

In this regard, without any work records as to the claimant having been paid his due salaries up and until end of December, 2016 when employment terminated, such salaries are due to end of December, 2016 at ksh.328, 125.00.

There is no work record to challenge the claim for accumulated leave allowance for 180 days. Such is due and awarded at ksh.1, 968,750.00 as claimed.

Gratuity for state officers in the County Government is addressed vide Legal Notice No. 6518 effective 8<sup>th</sup> August, 2017. A member of the County Executive Committee appointed to a fixed term of office is to be paid service gratuity at the rate of 31% of the basic remuneration package for the term served.

The claimant served the respondents from the June, 2013 to end of December, 2016 a period of 3 years and 6 months. The letter of appointment is not produced by the respondent in accordance with section 10(6) and (7) of the Employment Act, 2007 on the applicable terms save for the Gazette Notice by the Salaries and Remuneration Commission, a constitutional commission with authority to regulate salaries and benefits due to state officers. The gratuity payable for the period served is 31% of the basic pay all assessed at ksh.1, 220,625.00 per year served all being Ksh.3, 661,875.00 for the 3 years of service. Gratuity pay is not pro-rated.

The claimant is seeking the payment of damages for breach of contract of employment and violation of the right to fair labour practice and fair administrative action. However the claimant resigned from his employment with the respondent and though not paid his terminal dues in time and being forced to file suit to recover the same, the case for violation of his rights at work do not suffice.

The owing dues from end of December, 2016 held by the respondent should be paid with interests. Costs are due as the claimant secured his Certificate of Service after filing suit and his terminal dues remain unpaid to date.

**Accordingly, judgement is hereby entered for the claimant against the respondents jointly and severally in the following terms;**

- a. Unpaid salary ksh.328,125.00;**
- b. Accumulated leave allowance for 180 days ksh.1,968,750.00**
- c. Unpaid gratuity Ksh.3,661,875.00;**
- d. Interests at court rates due from (a) and (c) above;**

**e. Costs of the suit.**

**Delivered at Nakuru this 7<sup>th</sup> day of March, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....