



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 245 OF 2018**

**EUPHRASIO GITONGA MBERIA.....CLAIMANT**

**VERSUS**

**COUNTY PUBLIC SERVICE BOARD,**

**THARAKA NITHI.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF THARAKA NITHI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondents for unfair/wrongful and unconstitutional termination of the Claimant's services. The Claimant in his statement of claim averred that he was employed by the 1<sup>st</sup> Respondent as a Personal Assistant to the Deputy Governor of Tharaka Nithi County on 21<sup>st</sup> August 2017 and that he worked till 10<sup>th</sup> July 2018, earning a gross salary of Kshs. 93,390/-. He averred that 1<sup>st</sup> Respondent without cause or valid reason, unfairly, wrongfully, and unconstitutionally terminated his contract of service. The Claimant averred that the 1<sup>st</sup> Respondent in breach of the contract of employment summarily dismissed him vide two letters dated 9<sup>th</sup> and 10<sup>th</sup> July 2018. He contends that the dismissal was wrongful since no grounds warranting a summary dismissal were given and because he was not accorded any opportunity to be heard. He averred that the procedure followed if at all, violated the one prescribe by the Public Service Commission as adopted by the County Governments as the standard practice. He averred more specifically there was no report of an authorized officer submitted to the County Public Service Board clearly stating the grounds and evidence against the Claimant to warrant the issuance of interdiction, notice to show cause and consequential dismissal. He further averred that his rights to fair administrative action under Article 47 of the Constitution were violated and he thus sought for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for a declaration that there was a breach of employment contract and the termination was unlawful, wrongful and unconstitutional; accrued leave of 26 days amounting to Kshs. 80, 938/-, payment in lieu of notice Kshs. 93,390/-, service gratuity for 60 months amounting to Kshs. 1,301,814, 49/- and 12 month's salary amounting to Kshs. 4,622, 805/- as general damages for wrongful dismissal and unlawful termination as well as costs of the suit.

2. The Respondents filed their defence and contended that the Claimant has no cause of action and thus the suit is an abuse of the court process. The Respondent averred that the Claimant entered into a contract with the 2<sup>nd</sup> Respondent and the contract in clause 5 allowed either party to terminate the contract by giving one month's notice or in the alternative paying one month's salary in lieu of notice. The Respondents contended that the Claimant's contract was strictly terminated in accordance with the terms of his contract. The Respondents aver that the Claimant does not have any cause of action against them.

3. The Claimant testified on his own behalf and the Respondents called one witness in support of their claim. In his testimony the Claimant adopted his statement and stated that he was called by the chief of staff on 10<sup>th</sup> July 2018 who handed him two letters being a letter requesting the 1<sup>st</sup> Respondent to terminate the Claimant's services and the second letter from the County Service Board chair terminating the Claimant's services with immediate effect. The Claimant testified that the reason for termination was not indicated in the letters and he was also not issued with a notice to show cause. He also stated that he was not accorded a hearing before termination and was not issued with any verbal or written warning. He said that the termination did not comply with the human resources discipline manual. The Claimant stated that he did not commit any wrongful act in the discharge of his duties and that his supervisor the deputy governor did not have any issue with him and that is why the Deputy Governor signed documents in his favour in support of the suit. On cross-examination the Claimant testified that clause 5 of the contract was not legal and the Respondents ought to give reasons and thus they did not comply with the law in the dismissal. He denied receiving any county government property and divulging any information against the county. He also denied being answerable to the chief of staff and denied being assigned duties by him. He stated that the Deputy Governor and the Governor had differed on allocation of funds but denied being aware of the protests against the Governor. He also denied paying any protestors.

4. The Respondents called a witness, one Nthiga Mitugo the chairman of Tharaka Nithi County Public Service Board. He adopted his statement and stated that he terminated the services of the Claimant on the strength of the letter from the chief of staff who was in a position to explain the reasons for termination. On cross-examination he stated that perhaps the reason was because of non-performance. He also

confirmed that he did not issue the Claimant with a notice to show cause and that the Claimant was also not taken through a hearing before dismissal.

5. The Claimant submitted that on relying on the County Public Service Human Resource Manual, the Public Service Commission of Kenya Discipline Manual 2008, the Constitution of Kenya, the Fair Administrative Actions Act No .4 of 2015, ILO Convention on Termination Of Employment No. 158 Of 1982 and the Employment Act, 2007, he was wrongfully, unlawfully and unfairly terminated. He submitted that the Respondents were in violation of the rules of natural justice and the termination was unconstitutional. He submitted that the conduct of the Respondents was a breach of his legitimate expectations in an employment contract and that his termination from service violated the provisions of Section 45 of the Employment Act. He relied on the authority of **Simiyu Kibengo Godfrey v Private Safaris (E.A) Limited** (industrial court cause no. 1683 of 2011) and **Kenfreight (E.A) Ltd v Benson K. Nguti [2016] eKLR**. He further submitted that the Respondents failed to prove the grounds for termination and that the termination was driven by ulterior motives, founded on no reasons and the procedure almost non-existent.

6. The Respondents' relied on the case of **Republic v Secretary, County Public Board [2016] eKLR**, and submitted that since the Claimant was not appointed in accordance with the provisions of the County Governments Act, 2012, the letter of appointment even upon acceptance did not constitute a valid contract and therefore the Claimant's case should be dismissed. The Respondents submitted that the Claimant had obtained the appointment letter by false pretence and that thus illegal. The Respondents submitted that the Claimant's claim should fail as he is seeking to enforce an illegal contract. The Respondents relied in the case of **Nabro Properties Ltd v Sky Structures Limited (2002) Vol. 2 KLR 299**. The Respondents submitted that the claim is prematurely in this court since the Claimant failed to appeal to the Public Service Commission. They relied on the authority of **James Tinai Murete & Others v County Government of Kajiado & 22 Others ] eKLR** and **Jude Riziki Kariuki v Tharaka Nithi County Government & Another [2019] eKLR**. The Respondents further submitted that the Claimant in his evidence disclosed that the position was not advertised, he did not apply for the same and neither was he shortlisted nor interviewed. The Respondents thus contended that the Claimant has no cause of action against them as his contract was illegal. Reliance was placed on the case of **Macfoy v United Africa Company Ltd (1961) 3 All ER 1179**. The Respondents submitted that the Claimant could not be paid for the period he has not worked and they thus that the suit be dismissed with costs.

7. The issues that fall for determination

- i. Whether this court has jurisdiction to determine this matter.
- ii. Whether the claimant's employment was illegally and unlawfully obtained.
- iii. Whether the claimant was wrongfully, unlawfully and unfairly terminated.
- iv. Whether the Claimant is entitled to the reliefs sought.

8. As to whether this court has jurisdiction to determine this matter, the Respondents in the instant suit contend that the Claimant's case has been brought to this court prematurely since Section 77 of the County Governments Act provides that any person aggrieved by the decision of the County Public Service, may appeal to the Public Service Commission. The Respondents assert that the Claimant in this suit failed to appeal to the Public Service Commission as provided for in law. Section 77of the County Government Act provides thus:-

*77. (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision*

This section is not couched in mandatory terms and as can be discerned from a clear reading of the Section that the person may appeal to the PSC. The Constitution of Kenya under Article 234(2)(i) provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments' public service. Section 77 of the County Governments Act, 2012 does not oust the court's jurisdiction to hear and determine this suit. Jurisdiction of any Court is donated either by the Constitution or a statute. In the case of this court, a specialised court under Article 162(2)(a) of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act, the jurisdiction of the court is spelt out clearly. Per Section 12 of the Employment and Labour Relations Court Act:

*12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –*

*(a) disputes relating to or arising out of employment and an employee.*

....

*(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:*

*(iv) A declaratory order;*

*(v) An award of damages in any circumstances contemplated under this Act or any written law;*

*(vi) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose*

(vii) Any other relief as the Court may deem fit to grant.

The question that naturally arises therefore is whether the suit by the Claimant falls within the range of disputes for determination by this court. In this case the Claimant argues that his employment was wrongfully, unlawfully and unfairly terminated by the Respondents. The dispute is within the jurisdiction of this court. The intertwined issues of Constitutional infringements asserted take this case out of the reach of **Jude Riziki Kariuki v Tharaka Nithi County Government & Another** (*supra*) as it is distinguishable from the cited decision. In the case of **Abdikadir Suleiman v County Government of Isiolo & Another [2015] eKLR** the court held that:

*“In the instant case, looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it is difficult to find that the cited alternative procedure and remedy under section 77 of the Act was available to the claimant. Even if it is said that it was a case of mixed jurisdiction of the Commission and the court, it is the court’s opinion that the legitimate path was to invoke the court’s jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute.*

*In the circumstances of this case, the court returns that the provisions of section 77 of the County Government Act, 2012 did not oust or restrict the jurisdiction of the court for want of exhaustion of the procedure and remedies envisaged under the section”.*

9. As to whether the Claimant’s employment was illegally and unlawfully obtained, the Respondents contended that the did not apply for the said position and neither was he shortlisted nor interviewed by the 1<sup>st</sup> Respondent. They argued therefore that the Claimant’s contract of employment was not valid as it was illegally obtained. From the record the Claimant testified that he applied for the job, was interviewed by the Chairman of the Board and the Deputy Governor and was issued with an appointment letter. The letter terminating the Claimant’s contract was written and signed by the chairman of the 1<sup>st</sup> Respondent as confirmed in testimony. The Respondents relied on clause 5 of the contract of employment to terminate the services of the Claimant. It is not plausible that they relied on an illegal contract to terminate the services of the Claimant. If indeed the contract was illegal it had no function in law and could not be the foundation for the termination of the impugned contract. Applying the logic the Respondents espouse, they cannot rely on this contract to justify the reason as to why they terminated the services of the Claimant. The issue of illegality and false pretence in obtaining the contract of employment was neither raised in the Respondents’ pleadings nor subject of criminal investigations thus placing the assertions in doubt. In their response to the Claimant’s claim the Respondent averred that the Claimant and the 2<sup>nd</sup> Respondent entered into a contract which, vide clause 5, was terminable by either party giving the other a month’s notice of intention to terminate it or in the alternative paying one month’s salary in lieu of notice (see paragraph 3 of the Respondents’ defence). It should also be noted that the Respondents attached the letter of appointment, the job application of the Claimant and his academic documents in their bundle of documents relied on in court. The letter of appointment is also signed by the chairman of the Board who gave evidence and produced it in court. The Respondents have not given this court any explanation on how they obtained the Claimant’s documents if at all he was employed illegally. Similarly, they have also not explained why they signed and issued a letter of employment to the Claimant if at all it was fraudulent as they allege. The Respondents failed to give the reasons for the termination of employment. The Respondents’ witness stated that perhaps the reason was non-performance. This cannot be fly. The Respondents failed to justify their reasons of termination and from the foregoing it is clear that the answer as to whether the Claimant was wrongfully, unlawfully and unfairly terminated, the answer would be in the affirmative. Under Section 45(2), the Employment Act classifies unfair termination to include failure to prove that the reason for termination is valid, that the reason for termination is a fair reason and that the employment was terminated in accordance with fair procedure. Prior to dismissal, an employer has to give an employee the safeguards of Section 41 of the Employment Act. It is agreed that an employer has the statutory right to dismiss an employee by summary action under the provisions of Section 44 of the Employment Act and such summary action may arise following a fundamental breach of the contract of employment or following gross misconduct. The employer is however required to abide by the procedural requirements of the law set out under Section 41(2) of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to a hearing. In the instant case the Claimant was neither issued with a notice to show cause nor was he accorded a hearing before termination. Similarly, the letters issued to him did not bear a reason for dismissal. It is also clear from the evidence adduced in court that the Respondents failed to identify the reason for termination. As Section 41 of Employment Act is couched in mandatory terms, where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or a fellow employee of their own choice. The court finds that the Claimant was never accorded any fair hearing as laid down in the Employment Act, the County Public Service HR Manual, the Public Service Commission of Kenya Discipline Manual, or at all. Accordingly, the Claimant was wrongfully, unlawfully and unfairly terminated and thus entitled to compensation. As to the reliefs the Claimant is entitled to, the Claimant is entitled to:-

- a. accrued leave of 26 days amounting to Kshs. 80,938/-
- b. payment of one month’s salary in lieu of notice - Kshs. 93,390/-
- c. 3 month’s salary as compensation for wrongful dismissal and unlawful termination amounting to Kshs. 280,170/-
- d. costs of the suit.

It is so ordered.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**