

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 35 OF 2016

SALOME MAINA.....CLAIMANT

VERSUS

CHIEF OFFICER DEPARTMENT OF EDUCATION

LAIKIPIA COUNTY GOVERNMENT.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent alleging wrongful termination and seeking relief for the withholding of wages. The claim commenced under a certificate of urgency and in the Claimant's memorandum of claim attached to the motion and the annexed supporting affidavit of the and her witness statement she averred that she was employed by the Respondent as an ECD teacher at Nyahururu DEB Primary School. She averred that she earned a monthly wage of Kshs. 5,000/-. The Claimant averred that on 3rd May 2016 she received a termination letter from the head teacher of the school who immediately replaced her with another teacher by the name Grace Nungari. She averred that her name was immediately removed from the roll of monthly wages by the Respondent and was replaced with that of Grace Nungari. The Claimant averred that this action by the Respondent was done without affording her a right to be heard and in violation of her right to fair administrative action. The Claimant averred that she was not notified of the reasons for the termination of her services and stoppage of her wages. The Claimant averred that the Respondent's action of discrimination against her is unlawful as it violates Section 5(2) and (3) of the Employment Act, Section 4 and 5 of the Labour Relations Act as well as Article 41(1) of the Constitution. She averred that the Respondent's action against her was meant to deter her from participating in trade union activities in violation of her right under Article 41 of the Constitution as read together with Section 4 of the Labour Relations Act. The Claimant sought an order to compel the Respondent to immediately reinstate her to the payroll backdating to May 2016 when the termination was effected, an order for compensation by way of decree for payment of a sum of Kshs. 500,000/- for loss of income, to compute and pay the Claimant Kshs. 5,000/- a month from May 2016 to November 2017 and Kshs. 10,000/- from December 2016 to date with commensurate interest at court rates considering time value for money. She also prayed for costs of the suit.

2. The Respondent's defence denied that the Respondent is the Claimant's employer and averred that the Claimant was never recruited by the County Government of Laikipia nor inherited from the defunct local authority. The Respondent averred that the Claimant had all along been an employee of the Board of Management of Nyahururu D.E.B Primary School as evinced by the attached payment voucher. The Respondent denied having discriminated against the Claimant and stated that there is no employee-employer relationship between the two parties capable of giving rise to a claim of discrimination. The Respondent denied having withheld the Claimant's wages and or removing her from the role of ECDE teachers and averred that if she indeed was working as an ECDE teacher, she was not doing so as an employee of the County Government of Laikipia. The Respondent denied being in violation of the Constitution and/or statute law. The Respondent denied that this court has jurisdiction as this is not a matter that falls within the ambit of Section 12 of the Employment and Labour Relations Court Act.

3. The Claimant testified that she was a trained ECDE teacher teaching at DEB ECD School Nyahururu. She stated that she was employed by the Board of Nyahururu DEB Nursery school in 2011 and that she was issued with a termination letter without any prior notification on 7th April 2016 by the head teacher who complained that she had joined a union and that she was raising illegal funds from members as the union was not registered. She testified that the matter ended up in court and she was reinstated by the Court on 3rd June 2016. She stated that she went back to the school but realized another teacher had been hired in her place. She stated that prior to termination she used to earn Kshs. 5,000/- which was increased to Kshs. 10,000/- in November 2016. She testified that she was not informed either in writing or orally that she would be removed from the payroll. She stated that she did not get her pay from May 2016 to November 2017 and Kshs. 10,000 from December 2017 to date. She testified that the primary school head teacher manages the ECD center. In cross-examination she confirmed that she did not have a letter of appointment as ECD teacher employed by County Government of Laikipia but she maintained that she was given a token by the County Government like the other teachers. She stated that teachers are employed by parents but the County Government gives a token of Kshs. 10,000/- every month. She testified that she stopped working on 1st June 2018 after her position was occupied. She said that she was a union executive secretary and admitted that there is no recognition agreement with the County Government.

4. The Respondent's witness was Gathiga Kinyua a sub-county ECD Co-ordinator. He testified that the employer of all ECD teaches are the Boards of Management of respective schools and no teachers are employed by Laikipia County. He stated that the Claimant never received payment as ECD teacher. He confirmed there is a stipend of Kshs. 5,000/- paid to ECD care givers to appreciate the teachers but he categorically stated that it is not a salary. He stated that the stipend was stopped once they heard that the Claimant engaged in misconduct and that they did not need to inform her of the decision to stop the stipend. He stated that she cannot claim the stipend as she was not an employee of the County and that she had ceased working. He testified that it is not right for the Claimant to demand any relief from the Respondent as there was no contract or memorandum of understanding for payment. He denied that the Claimant is an employee of the County Government. He stated that he was aware that the Claimant's employment was terminated and she was later reinstated by the court. He stated that however, the County Government was not a party to that suit as she had sued the Nyahururu DEB Primary. In cross-

examination he confirmed that ECD is under County Government but run by BOM. He stated that the Claimant held meetings in the school's boardroom without the head teacher's knowledge as she was the secretary to the union and she was asking for funds from ECD teachers which she could not account for. She was then dismissed by Nyahururu DEB for collection of funds as it was an act amounting to gross misconduct. He testified that the Claimant was reinstated and that said that however, the order for re-instatement was not served upon the County Government as they were not a party to the suit. He stated that after being reinstated the Claimant wrote a letter saying that she did not want the job.

5. The Claimant in dismissing the Respondent's argument that there was no employee-employer relationship relied on Section 5 of the Employment Act which defines an employee to include an applicant of employment and submitted that she qualified for the rights granted under Article 41 of the Constitution which were the right to fair labour practice, fair remuneration, reasonable working hours and right to form, join or participate in the activities of a trade union. She submitted that the Respondent in the instant cause was also the Respondent in Cause No. 216 of 2016 before the ELRC court Nyeri. She submitted that Respondent's representative in Cause 216 of 2016 one Veronica Gakenya swore an affidavit and averred that the Teacher Service Commission officially released the ECDE teachers to Laikipia County Government with effect from 1st July 2015. She submitted that at paragraph 7 of the affidavit it was deponed that Laikipia County Public Board had decided to recruit more ECDE teachers and at Paragraph 12 she deponed that the County Officer of Education decided to pay ECDE teachers teaching in public ECDE centers Kshs. 5,000/-. The Claimant submitted that she was also recruited and was paid Kshs. 5,000/- and that she had a *prima facie* case against the Respondent before this court. The Claimant asserted that the Respondent's witness in his testimony had stated that he relied on the letter from the head teacher to strike out the name of the Claimant from payroll. She submitted that from the letter it is clear that the C.E.C Education warned against any union meetings and that the Respondent clearly admitted to having sacrificed the Claimant's career due to her involvement in union matters contrary to Section 5(2) and (3) of the Employment Act as read with Section 4(1) and Section 5 of the Labour Relations Act. She submitted that the Respondent should be found guilty of an offence and put to defence pursuant to Section 5(5) and (6) of the Employment Act. The Claimant submitted that no reasons for the action taken by the Respondent were communicated to her in order to facilitate an appeal and that her efforts to get some material from the Respondent were thwarted despite the Respondent witness admitting in cross-examination that the same material was in their possession. The Claimant submitted that this amounted to violation of her rights as envisaged under Section 6 of the Fair Administrative Actions Act. The Claimant submitted that the Respondent's preliminary objection was premised on the lack of recognition agreement between the Claimant union and the Respondent. The Claimant relied on Section 54 of the Employment Act and the finding in **ELRC Nyeri Cause No. 222 of 2017 Kenya Plantation and Agricultural Workers Union v KEMU University** (unreported). She submitted that there is no provision for conferment of *locus* as a prerequisite for a union's standing in court. The Claimant submitted that an employee cannot be denied wages for lack of a recognition agreement, proof of employee-employer relationship is key in this case as opposed to a recognition agreement. The Claimant submitted that the Respondent held the position that the court's order reinstating the Claimant was not served upon them. The Claimant submitted that the union wrote a letter and attached the said order and sent to the Respondent as shown by a certificate of posting which was on record. The Claimant submitted that the Respondent is therefore in violation of a valid court order and lied to the court by concealing the truth and obstructing justice with impunity. The Claimant submitted that referring to the evidence being the payroll prepared on 19th June 2017 and the NSSF statement of Njomo Muringi Janet showing the employer as Laikipia County Government. She submitted that the Respondent is in violation of Section 9 of the Employment Act by willfully refusing to cause a contract of service to be drawn to formalize the existing engagement between itself and the Claimant. She prayed that the court grants her the reliefs sought.

6. The Respondent submitted that the Claimant has never been an employee of the County Government of Laikipia as she even admitted that she was an employee of the BOM of Nyahururu DEB primary school. The Respondent submitted that the County Government pays a stipend or token to caregivers working at the ECDE centers within its area of jurisdiction. It submitted that however, the said payment is not based on any agreement with the caregivers. The Respondent submitted that in absence of an employment contract between it and the Claimant, there cannot be any basis for the instant suit. The Respondent relied on the authority of **Agricultural Finance Corporation v Lengetia Limited [1985] KLR 765** where the Court of Appeal held that there existed no direct contract between the first respondent and the appellant and so the first respondent had no cause of action against the appellant. The Respondent submitted that the Claimant cannot enforce a contract to which the Respondent was not a party. It cited the case of **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR** and urged the court to dismiss the claim with costs.

7. Regarding the issue of jurisdiction, this is the appropriate court to handle all disputes relating to the matters set out under Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, 2011. In the premises the veiled rejection of the jurisdiction of the court by the Respondent is misplaced. The Claimant asserts that the dismissal she suffered was on account of trade union affiliation or activity. This was a matter of evidence and none was tendered to show what activities she engaged in for the union. Nevertheless, the Claimant's suit against the Respondent is not one that would result in the relief she seeks. The Claimant sued an office in the County Government of Laikipia. There was no employee-employer relationship between the Claimant and the Respondent named in the suit. As such there being no privity of contract, the Claimant could not succeed in an action for enforcement of her employment rights against a party that is not her employer. In the premises the suit is dismissed and each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 16th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar