



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 87 OF 2017

[Formerly Kisumu 386/2015]

(Before Hon. Justice Mathews N. Nduma)

ISAAC SHIVACHI MUTOKA.....CLAIMANT

VERSUS

THE SECRETARY PUBLIC SERVICES COMMISSION1ST RESPONDENT

MINISTRY OF DEVOLUTION TRANSITION/

INTERIOR GOVERNMENT.....2ND RESPONDENT

COORDINATION AUTHORITY.....3RD RESPONDENT

MOMBASA COUNTY.....4TH RESPONDENT

BUNGOMA COUNTY.....5TH RESPONDENT

VIHIGA COUNTY.....6TH RESPONDENT

SIAYA COUNTY.....7TH RESPONDENT

KITUI COUNTY.....8TH RESPONDENT

ATTORNEY GENERAL.....9TH RESPONDENT

JUDGMENT

1. The suit is based on the Amended Claim filed on 11th February 2016. The claimant Isaac Mutoka has sued the secretary Public service commission, Principal Secretary Ministry of Devolution and Planning, Transition/Inter government Coordination Authority and five county governments and the Attorney General.
2. The claimant prays for payment by the County government of Bungoma arrear salary and various emoluments withheld and/or not made from June 1999 to April 2002; County government of Vihiga, arrear salary and allowances not paid from May 2002 to April 2003 and refund of superannuation fund paid and not remitted between the year 2002-April 2003. Ukulima co-operative shares withheld from May 2002 to April 2003; transfer allowance, luggage allowance from Siaya county and salary arrears allowances and cooperative shares withheld.
3. This suit was initially filed as HCCC Cause No. 2 of 2003 and CMCC Cause No. 14 of 2011 and later was filed as E&LRC at Kisumu cause No. 380 of 2015.
4. From the pleadings, the cause of action is failure to pay the emoluments set out; discrimination and inhuman treatment of the claimant by the various county governments and wrongful termination of employment.
5. The suit is defended by various responses filed by the respondents to the original suit and the amended claim. In particular these consist amended response to the claim filed by the 1st, 2nd and 9th respondents on 24th May 2019 and that filed by the 8th respondent to the amended

claim on 15th October 2018 and a defence filed at the High Court on 22nd January 2003 by Kimilili Municipal Council; Vihiga County Council; The permanent Secretary Ministry of local government and the Attorney General.

6. The defendants deny the particulars of claim in the suit in their entirety and pray the suit be dismissed with costs.

7. The claimant testified under oath and adopted a witness statement filed on 11th June 2018 as his evidence in chief.

8. The testimony by the claimant may be summarized as follows:

9. The claimant was employed by Public service commission from 8th February 1990 as a personnel officer in the ministry of Water development. Claimant was promoted later to the position of Principal Administrative Officer in the Ministry of Devolution and planning and was posted to Mombasa County, then Mombasa Municipal council in November 1992.

10. That whilst at Mombasa, his employer began to persecute, discriminate, oppress and unleash degrading and inhuman treatment against the claimant; including physical attacks, rushed transfers, closure and ejection from office; nonpayment of emolument due to him which culminated in the wrongful termination of the employment of the claimant by a letter from the ministry of Devolution and planning dated 15th March 2013. The reason given for the termination of employment was desertion of duty.

11. The claimant states that due to persecution perpetrated against him over time in the various offices he was transferred to, the last straw came when he was transferred back to Bungoma County in July 2005, the place where he had suffered the most persecution; rejection; ejection from office; being labeled foreigner and non-payment of his dues. The claimant did not report to the office as he suffered immense mental anguish and psychological torture. The claimant therefore did not report to work for a period of three (3) years. In April 2008, the claimant wrote to the Ministry to allow the claimant back to his job but received no response until March 2012 from the ministry. The ministry charged the claimant with desertion of duty. The claimant responded to the charges, denying the same on the basis that the treatment he had received overtime had caused him suffering to the extent that he could no longer continue working at Bungoma in July 2005 when he was transferred there. That notwithstanding the Ministry of Devolution and Planning terminated the employment of the claimant.

12. The claimant seeks a declaration that the termination was unlawful and unfair and that he be granted the reliefs sought in the statement of claim.

13. The court has noted the various places the claimant was transferred to between the year 2000 to the year 2005 before he stopped working for three years. The claimant stated that between April 2002 to April 2003 he had no work station and salary and was unable to pay school fees at Moi University and that himself and family suffered great pecuniary embarrassment. That for the period April 2003 to May 2003 he did not earn a salary but was ready and willing to work. The claimant demands the lost fees at Moi University due to inability to pay school fees.

14. Particulars of non-payment by the claimant from November 2000 and June 2001 when Kimilili Municipal council, now under Bungoma County Stopped paying his salary for no good cause. It is then when they stopped funding the training at Moi University.

15. In April 2002, claimant was transferred to Vihiga County which claimant considered a punitive treatment to act in position of County clerk. The then county clerk in Vihiga was not transferred. Vihiga County rejected the claimant and physically ejected him from office when he reported to the county. By the time, the claimant had been ejected with his family from the house he occupied at Bungoma and was not paid transfer allowance. The claimant was left without a work station and salary. The children fell out of school due to lack of school fees. The claimant wrote to the ministry for intervention in vain.

16. In March 2003 the claimant was transferred by the Ministry from Vihiga County where he had no office to Siaya County (then Yala Town council). At Siaya, the claimant was rejected preferring their own Town clerk. The claimant was labeled non-luo. After a one month standoff, the claimant was reluctantly allowed to work at Siaya. The claimant's salary was not paid as it fell due. The superfund pension and cooperative shares were meanwhile deducted from his salary but never remitted. The claimant has set out particulars of deducted amounts not remitted and claims payment of the same. In October 2004, the claimant was transferred from Siaya County to Kitui County (then Mirigi town Council) as town Clerk. At Kitui County, claimant was welcomed but soon persecution started when the claimant refused to cooperate with corrupt ministry officials. By December 2004, meetings were being conducted in Kikamba language and the officials and councilors abused him openly. They demanded removal of the claimant. The ministry succumbed to pressure from persons at Kitui County and transferred the claimant back to Bungoma County where he had been forcefully ejected from his office and house. This is when the claimant broke down and did not report to Bungoma. Instead he reported to the ministry headquarters and appealed to be taken back there in vain. The claimant prays that the suit be allowed and the prayers sought granted accordingly. Under cross examination the claimant explained the basis of all the claims set out in the statement of claim against the specified respondents and insisted that they were all justified.

17. Mr. Joseph Kisidaii Wafula testified for the respondents. RW1 told the court that he was employed by the County government of Bungoma in the position of Head of Human Resource. That he was the custodian of all human resource records of the Bungoma County and had authority to testify on behalf of the County Secretary who is the head of public service at the county. RW1 relied on a witness statement dated 14th December 2018 as his evidence in chief. RW1 also produced list of documents filed on 15th November 2017. The thrust of the defence case by RW1 is that the claimant was never employed by the County Government of Bungoma and therefore, the county is not liable for any of the claims made by the claimant. RW1 testified that the Transitional Authority handed the transition from Municipal Council to the County Government. That any claims against the former Municipal Councils were to be submitted to the Transitional Authority for recommendations on the way forward. That the claims made by the claimant in this suit were never submitted to the transitional Authority. That the Transitional Authority has been sued as the 3rd respondent. That the claimant left Kimillil Municipal Council in the year 2002 and was transferred to Vihiga County Council. That Vihiga County Government has also been sued. That the claimant sub- sequentially worked at Yala County Council and later at Kitui County Council. That Siaya County Government and Kitui County Governments have also been sued.

18. That the claimant was the A.I.E holder being the Chief Executive whilst he worked for Kimilili County Council. He was in charge of payments and cannot be heard to say that the council never paid him. RW1 asked why the claimant failed to pay himself. RW1 stated that Bungoma County Government did not have any records regarding the claimant. That the suit is misconceived and it be dismissed with costs. RW1 was subjected to very close cross examination by the claimant in person. RW1 withstood his ground on the matters he had testified on in chief.

Submissions

19. The claimant, the 5th respondent and he Attorney General filed submissions on behalf of the 1st, 2nd and 9th respondents.

Determination

20. The issues for determinations are:

- a. Whether the termination of the Employment of the claimant was lawful and procedural.
- b. Whether the claimant has proved the claims made against the various respondents on a balance of probabilities.

Issue (a)

21. The claimant was employed by the public service commission in the year 1990. He served in different capacities in different towns in the Republic of Kenya and mostly in the capacity of Town clerk until 2005 in Mombasa, Kimilili, Vihiga, Yala and Kitui town councils.

22. The claimant testified that he was physically harassed, psychologically tortured and discriminated upon on grounds of tribe and for his insistence on accountability until he was disillusioned in the year 2005 when he was taken back to Bungoma and he did not report to Bungoma for a period of three (3) years because he broke down and needed to recuperate. Claimant said he instead urged to be taken back to the ministry headquarters from where he started.

23. It is without doubt that the claimant for about three years deserted work. The claimant has not produced any medical records to support his evidence of physical and psychological torture. The claimant has made varied allegations of harassment that may be true or not. The issue is whether the 1st respondent had a lawful cause to terminate the employment of the claimant on 29th May 2012.

24. The claimant wrote a letter which is not repudiated to the public service commission requesting to be pardoned for the desertion for a period of three years and to be reinstated to his previous job or a different job in the public service.

25. The claimant was asked to show cause why he should not be dismissed from service for desertion of duty without lawful authority.

26. In the response to the show cause letter, the claimant acknowledged his failure to remain in town council of Mwingi. The claimant pleaded psychological depression and loss of mind due to the continuous victimization in the various stations he was transferred to. Claimant stated that this led to his break down under pressure hence the decision to desert work for three (3) years.

27. The court finds it difficult to believe and/or accept the psychological sickness pleaded by the claimant in absence of any medical diagnosis and treatment by a qualified medical doctor. The court also finds it difficult to believe that the claimant would be targeted for harassment, torture, rejection and discrimination by different persons he worked with in the different town councils he served as a town clerk.

28. The claimant prays to be paid salaries and emoluments, without adequate proof that he rendered any service during the periods in respect of which he claims arrear salary.

29. The claimant was during most of the material time a Town Clerk and therefore, a chief accounting officer of the County Councils he served. The claimant was the holder of Authority to incur expenses in those different County Councils. The court does not appreciate how he went without payment of different items he now claims in the amended statement of claim.

30. When the suit was filed on 8th January 2003, by a plaint dated 8th January 2002, the claimant had made a general claim that he had not been paid salary since April 2002 and demanded the same from Kimilili Municipal Council. The claimant at the time sought the claimant's transfer to Vihiga County Council to be declared null and void and an order that the claimant remains at Kimilili Municipal Council as town clerk.

31. It is significant to note that the suit drastically metamorphosed as set out in the amended statement of claim dated 11th February 2016 and filed on the even date and in CMCC No. 14 of 2011. Fresh claims were made as against other County Governments namely Mombasa, Siaya and Kitui. The claims for arrear salary and allowances; refund of monies deducted and not remitted to the superannuation Fund and Ukulima Cooperative and to NHIF relate to the period June 1999 to May 2003. The court notes that these fresh claims were made long after expiry of the three (3) years limitation period for filing of claims based on contract in terms of *Section 4(1) of the limitation of Actions Act Cap 22 Laws of Kenya*.

32. This notwithstanding the list of documents filed by the claimant do not adequately explain the claimed amounts. The court therefore has come to the conclusion that the claims aforesaid have not been proved on a balance of probabilities and the court is unable to find that the claimant is entitled to any and/or all the claims made years later against the specific County Governments; the Public Service Commission;

the Principal Secretary Ministry of Devolution and Planning and against Transitional Interior government Coordination Authority.

33. Indeed, these claims were not submitted for verification to the coordination Authority for relevant review and directives made to the respective County Governments to pay. **See the Decision of Court of Appeal in Interim County Secretary, County Government of Kakamega vs Republic, Exparte Ali Adam and another (2017) eKLR.**

34. Accordingly, upon a careful consideration of the evidence before court and submissions made by the parties, the court finds that the 1st respondent, the public Service Commission had a lawful cause to terminate the employment of the claimant by a letter dated 29th May 2012 it being clear that the claimant had deserted duty, without lawful authority and justification for a period of about three years.

35. In answer to issue (ii) above, following the analysis already made, the court finds that the claimant has not discharged the onus of proof placed on him by *section 107 and 108 of the Evidence Act, Cap 80 laws of Kenya* in that the claimant has not proved any of the claims made against the respondents on a balance of probabilities.

36. The court further finds that, in any event claims which arose between the years 1999 and July 2002 made against Mombasa County, Siaya County, Kitui County and Vihiga County Governments many years upon expiry of the limitation period of three (3) years are bad in law in that the court lacks jurisdiction to entertain them in any event.

37. In conclusion, the termination of the employment of the claimant by the public service commission on 29th May 2012 was lawful and fair the claimant having deserted duty for prolonged period without authority and/or lawful cause.

38. Secondly, the claimant having failed to prove any of the claims set out in the amended claim on a balance of probabilities, the respective claims are dismissed singularly and severally with the result the entire suit by the claimant has failed and is dismissed.

39. The suit is against Public Authorities by an aggrieved employee who served the various authorities for substantive periods. The court does not find this an appropriate case to order payment of costs by the claimant. Therefore, each of the parties herein to meet their own costs of the suit.

Judgment Dated, Signed and delivered this 26th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Claimant in person.

Deborah Were, Litigation Counsel, Attorney General's office for the 1st, 2nd and 9th respondents.

S.O Makali for the 5th respondent.

Joy – Court Clerk