



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**E&LRC CAUSE NO. 36 OF 2019**

*(Before Hon. Justice Mathews N. Nduma)*

- LILIAN PURITY NYAJOWI.....1<sup>ST</sup> CLAIMANT
- JANET ALUOCH OYUGI.....2<sup>ND</sup> CLAIMANT
- CAROLINE ADHIAMBO MBAL.....3<sup>RD</sup> CLAIMANT
- WYCLIFFE AMBA ODERO.....4<sup>TH</sup> CLAIMANT
- OCHIENG BOB EVANS.....5<sup>TH</sup> CLAIMANT
- ROSELYDAH AUMA ONYWERA.....6<sup>TH</sup> CLAIMANT

**VERSUS**

- THE COUNTY SECRETARY/CHIEF EXECUTIVE  
OFFICER, HOMA BAY COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT
- THE OFFICE OF THE GOVERNOR, HOMA BAY  
COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT
- THE SECRETARY, HOMA BAY  
COUNTY PUBLIC SERVICE BOARD.....3<sup>RD</sup> RESPONDENT

**RULING**

1. The six (6) Claimants/Applicants pray for the following interim reliefs pending the hearing and determination of the claim:

- (a) That the application be certified as urgent.
- (b) That the application be heard Ex-parte in the first instance and service be dispensed with.
- (c) Pending the hearing and determination of this application or suit the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> claimants be allowed to access and/or continue with their respective duties unrestrained as county directors and assistant civil engineer respectively.
- (d) Pending the hearing and determination of this application or suit the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> claimants be paid their salary arrears or allowances respectively and/or should continue to be paid their salaries in terms of letters of appointment dated 14<sup>th</sup> December 2018.
- (e) The respondent to pay 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> claimants' three months salary with effect from 2<sup>nd</sup> January 2019, Gross salary arrears Kshs. 507,870/=

(f) The respondent to pay the 6<sup>th</sup> claimant's three months with effect from 2<sup>nd</sup> January 2019, Gross salary arrears Kshs. 168,000/=

(g) The respondent to pay 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> claimant's gross salary Kshs. 169,290/= per month, Basic salary Kshs. 118,290/= per month, House allowance Kshs. 25,000/= per month, commuter allowance Kshs. 16,000/= per month, leave allowance Kshs. 10,000/= per month.

(h) The respondent to pay the 6<sup>th</sup> claimants' gross salary Kshs. 56,000/= per month, Basic salary Kshs. 35,400/= per month, House allowance Kshs. 9,600/= per month, commuter allowance Kshs. 5,000/= per month, leave allowance Kshs. 6,000/= per month.

(i) Declaration that the respondents letters of appointments dated 14<sup>th</sup> December 2018 and/or accepted by the claimants on specific dates are valid and enforceable contracts against the respondents.

(j) In the alternative if the claimants are terminated, the defendants be ordered to pay the entire period of the contract from 2<sup>nd</sup> January 2019 to 1<sup>st</sup> January 2022 in terms of gross salary and allowances subject to salary increments.

(k) General damages

(l) Costs and interest of the suit.

2. The application is supported by affidavits of all the applicants sworn to on 5<sup>th</sup> April 2019 and annexures attached.

3. The applicants filed a memorandum of claim in which is sought confirmation of the interim orders and in particular a declaration that the respondents' letters of appointments dated 14<sup>th</sup> December 2018 and/or accepted by the claimants on specific dates are valid and enforceable contracts against the respondents and in the alternative, if the claimants contracts are terminated, the defendants be ordered to pay the entire period of the contracts from 2<sup>nd</sup> January 2019 to 1<sup>st</sup> January 2022 and in addition make an award of general damages.

4. The application was amended on 10<sup>th</sup> May 2019 but the amendment did not change the application substantially except inclusion of a prayer for specific performance and payment of specified arrear salaries.

5. The application is opposed vide a replying affidavit of Isaiah Ogwe, the County Secretary and Head of County Public Service, Homa Bay County in which is admitted that the respondents recruited and appointed the claimants/applicants to the stated positions and issued them with letters of appointment dated 14<sup>th</sup> December 2018 for 3 years contract. The applicants were subsequently deployed to various departments by letters dated 17<sup>th</sup> December 2018.

6. The County Executive by a letter dated 27<sup>th</sup> December 2018 shelved the recruitments until such a time that the financial position of the county government improved following recommendations by the controller of budget in exercise of her powers under *Article 288 of the constitution*. Decision of the County Executive was then conveyed to the Board on 22<sup>nd</sup> January 2019.

7. The deponent states that to proceed with the recruitment would be in contravention of the law and recommendations by the controller of budget.

8. That the application lacks merit and it be dismissed.

#### **Determination**

9. The issue for determination at this stage of the proceedings is whether the applicants have satisfied the requirements of grant of a conservatory order to preserve the employment of the applicants pending the hearing and determination of the suit.

10. The matter is guided by the Supreme Court decision in ***Gitirau Peter Munya vs Dickson Mwenda Githinji and 2 others (2014) eKLR and the case of Giella vs Cassman Brown and Company Limited (1973) E.A 358*** on the prerequisites of grant of interim orders.

11. It is not in dispute that the applicants were employed as County Directors and Assistant Civil Engineers respectively on three year contracts which were still in place as at the time of filing this suit.

12. The appointments followed competitive recruitment publicly and the applicants had satisfied all the requirements of the jobs granted to them by the County Public Serviced board.

13. It is also not in dispute that the claimants had been deployed and commenced rendering service to the respondents until the County Secretary and head of Public Service nullified their appointments by a letter dated 9<sup>th</sup> January 2019.

14. The applicants filed this suit on 12<sup>th</sup> April 2019 after nullification of their positions.

15. The effect of the conservatory order sought by the applicants is to effectively reinstate them to their previous positions before hearing the

suit on the merits.

16. The applicants have not satisfied the court that they are deserving of a mandatory conservative order pending the hearing of the suit on the merits. The Applicants will not suffer irreparable harm incapable of being remedied by either reinstatement and/or award of damages upon hearing and determination of the suit.

17. However, with regard to the prayer for payment of arrear salaries for services rendered which are not in dispute, the claimants have made out a case deserving of a mandatory interim order compelling the respondents to pay all arrear salaries and allowances to the applicants from the date of their appointment to the date their employment was halted.

18. In the final analysis the court makes the following order in favour of the applicants as against the respondents pending the hearing and determination of the suit:

(a) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> claimants/applicants be paid their arrear salary for services rendered from date of appointment on 14<sup>th</sup> December 2018 up to 9<sup>th</sup> January 2019, the date their employment was halted.

(b) The suit be set down for hearing on the merits.

(c) Costs in the cause.

**Ruling Dated, Signed and delivered this 17<sup>th</sup> day of October, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Ayayo for claimants/applicants

Mr. Oregu for Respondents

Chrispo – Court Clerk