



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 13 OF 2017

(Before Hon. Justice Mathews N. Nduma)

SAMUEL LEWIS JOMO NYAKWEBWA

PATRICK NDUBI MAMBOLEO

JACKSON OKERO NYANUMBA

CHARLES NYAKWAMA.....CLAIMANTS

Suing as representative of the 58 applicants

VERSUS

THE SECRETARY PUBLIC SERVICE BOARD NYAMIRA COUNTY

THE CHAIRMAN PUBLIC SERVICE BOARD NYAMIRA COUNTY

PUBLIC SERVICE BOARD

COUNTY SECRETARY NYAMIRA COUNTY

COUNTY GOVERNMENT OF NYAMIRA.....RESPONDENTS

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

1. The suit was brought vide a memorandum of claim dated 19th January 2017 by four claimants namely Samuel Lewis Jomo Nyakwebwa, Patrick Ndubi Mamboleo, Jackson Okero Nyanumba and Charles Nyakwama on behalf of 58 claimants. The suit is against the County Government of Nyamira and the Secretary and Chairman of Nyamira Public Service Board and the Secretary Nyamira County. The Ethics and Anti-corruption commission joined the suit as interested party.

2. The claimants seek the following prayers set out in the memorandum of claim:

- (a) An order to compel the Respondents to remit accumulated salary to all claimants for the months of October 2016 to date.
- (b) Continuity of monthly payments as required by law.
- (c) Prepare and insert the names of the claimants in the payroll and to deduct NSSF, NHIF respectively.
- (d) Costs of the suit.

3. The claim was filed together with a Notice of Motion seeking interim relief pending the hearing and determination of the suit. Hon.

Maureen Onyango granted Exparte interim orders on 26th January 2017 restraining the respondents from “*executing and/or implementing the decision of the Public Service Board Nyamira County nullifying the recruitment of the claimants/applicants or in any other way interfering with the employment contract of the applicants pending the interpartes hearing*”

4. The parties appear to have dispensed with the interpartes hearing of the Application and proceeded to deal with the main suit. Hon. Maureen Onyango did not extend the exparte interim orders granted pending the hearing of the main suit. Hearing of the main suit commenced before the judge on 12th July 2017 when the 1st claimant testified as CW1. CW1 testified that he was with 56 others employed by Nyamira County Government in the Department of Gender, Youth, Culture and Social Services in the position of Deputy Director Control and Licensing of alcoholic drinks. CW1 testified that himself and 56 others had letters of appointment given following advertisement of various positions, shortlisting, interviews conducted and recruitment done by the respondents. CW1’s letter of appointment is dated 30th September 2016 and was signed by one Robert Mochache, Secretary/CEO. CW1 testified that all the 56 claimants received a similar letter on 30th September 2016 and they all accepted the various appointments. The letters were produced before court as exhibits. CW1 had a basic salary of Kshs. 89,749 per month and house allowance of Kshs. 16,800 and commuter allowance of Kshs. 14,000 per month. Respective remuneration of 56 others is indicated in their letters of appointment.

5. CW1 stated that himself and 56 others had not been paid since they started working. CW1 was deployed to his department by a letter written by one Agnes Mokuia, County Chief Officer dated 11th November 2016. That all other claimants were similarly deployed at the same time.

6. That the claimants reported to work since then in the field and office and have had various meetings with Senior Officers of the respondent including one Patrick Mamboleo and Tony Oira. CW1 testified that the claimants had not done much work since deployment. That their work was frustrated by the County Government. CW1 stated that there was to her knowledge a budget to fund their recruitment and payment. CW1 stated that claimants were posted to different stations. CW1 was stationed at Borabu. CW1 could not be specific where each of the claimants was posted but insisted under cross examination that they were all appointed and deployed to various stations under different supervisors. CW1 was not sure if all the claimants were reporting to work daily. CW1 insisted that the recruitment was lawful and proper.

7. CW2 was Patrick Ndubi Mamboleo. He testified that he was the Director for Gender, Youth, sports, Culture and Social Services of the Nyamira County government since 19th January 2017. CW2 stated that the 58 claimants gave consent to CW1 to represent all of them in this suit. That the list of 58 employees was signed by the employees and filed before court. CW2 testified that they all relied on the witness statement of CW1 as their evidence in chief in this matter. CW2 stated that Nyamira County Public Service Board recruited and appointed the claimants. CW2 was not sure how many positions had been advertised. CW2 denied that the letters of appointment presented before court were fraudulent. CW2 stated that all the claimants were working for the respondent lawfully. CW2 stated under cross examination that 8 claimants did not sign the authority list to file suit. CW2 admitted that some of the claimants had withdrawn suit against the respondent. CW2 stated that those who withdrew their suit were confirmed to their positions in order to collapse the case. CW2 stated that though the initial list of positions advertised were 29, a cabinet memo was issued to authorize recruitment of further positions. CW2 stated that he was seconded for the Teachers Service Commission.

8. CW2 stated that he was deployed to the department of alcohol in the licensing board. CW2 added that the department of Gender had six departments. CW2 stated that he was an administrator and formulated strategies for the department. CW2 stated that himself and others were under probation for a period of six (6) months. CW2 stated that himself and others were not confirmed except those that withdrew the suit. CW2 stated that as a supervisor he was in charge of some of the 58 employees recruited. CW2 stated that he was not aware that his secondment had been nullified. CW2 stated that their recruitment was nullified after they had filed suit but they had obtained interim orders on 24th January 2017. CW2 stated that the University denied the genuineness of some of the certificates produced by the claimants. CW2 stated that they did not employ themselves. The Board employed them and had obligation to pay them. CW2 stated that official documents showed that 54 Million Kenya Shillings had been allocated for their recruitment for a period of nine months. CW2 stated that they had not received any salary to the date of filing suit.

9. The respondents and interested party opposed the suit vide a memorandum of response dated 7th March 2017. List of documents marked page 1 to 321 were attached to the memorandum of response.

10. The interested party filed memorandum of response on 3rd April 2017 and further memorandum of response on 12th July 2017 with list of documents marked page 1 to 60.

11. The respondents called RW1 Shem Obuoro Nyangau Director Human Resource of the respondent. RW1 recorded a witness statement dated 20th November 2018 which he adopted as his evidence in chief. He relied on the list of documents filed on 6th July 2017. That according to records available, the Department of Gender, Youths, Sports Culture and Social Services of the respondent recruited 58 officers and the officers were appointed to various positions in the year 2016. However, following controversies that surrounded the recruitment exercise and the appointments, the appointments were nullified by the County Public Service Board through a letter dated 24th January 2017 reference NP513/022-17/011SEC 1&9.

12. RW1 testified further that the appointed officers were not received by the authorized officer nor assigned duty. Consequently the Director of Human Resource could not proceed to request for their personal numbers for the purpose of salary payment. This was communicated in a letter dated 19th and 24th October 2016- reference number GYSC & SS/CCO/Vol. 11/26. RW1 testified that the appointed officers did not assume office nor did they work, hence nonpayment of salary since their employment contracts were nullified. RW2 also relied on a document filed by the interested party on 6th July 2017 and 23rd February 2017. RW1 referred to the letter dated 24th January 2017 written by the Chief Officer and copied to the County Director Human Resource which letter nullified the appointments of 56 officers who had been recruited by the department of Gender. This followed nullification of the appointments by the County Public Service board. The letter of 24th October 2016 had requested the Director Human Resources not to accept the officers until the matter of recruitment had been dealt with by the board. RW1 insisted that the officers were not accepted by the respondents. That procedures were not followed by the County Public Service Board in the recruitment of the officers and therefore they did not assume duty.

13. Under cross examination RW2 stated that as Director Human Resource, he did not work for the board. That letter nullifying the appointments came from the Secretary County Public Service Board and same was directed to the Chief Officer department of gender. The letter had an attachment containing list of officers in respect of which the appointments had been nullified. RW1 stated that no letter was written to the individual officers. RW2 stated that the Department of Gender had authorized recruitment of 21 officers but the Public Service Board recruited 58 officers. The board subsequently nullified recruitment of 56 appointments. RW1 stated that no other recruitment was subsequently done. Only two internal positions of two officers were available and were filled. There was no need to recruit the two. RW2 emphasized that to the best of his knowledge the 56 claimants were not accepted nor were they deployed as alleged or at all. RW1 stated that he could not confirm if attendance register produced in court was a genuine register. RW2 stated that each department had a different attendance register. RW1 stated that he saw the purported letters of deployment for the first time in court. RW2 stated that he could not state if any of the officers reported to any of the departments directly. RW1 stated that the Chief Officer denounced the purported attendance registers.

14. RW2 stated that he had recommended to the Board to nullify the recruitment and appointments since same was done irregularly. RW1 stated that purported register did not show where they originated from. That registers are under the custody of CEC Gender. RW1 stated that he was not aware how the claimants got the purported register.

15. RW1 Peter Omariba Ogwasa told court that he was former executive committee member of the respondent Government. That he had recorded a witness statement dated 15th October 2018. That he adopted the statement as his evidence in chief. That he had left the office of the respondent a year to the date he testified. That the claimants were in office at the time he left office but was not aware if they were still working. That they were recruited by the Public Service Board. RW1 stated that he had no further knowledge of the matter. RW1 did not know if the recruitment was nullified. RW1 said that he had supervised the exercise. That the claimants reported to work at his office. Since he was CEC in-charge of Gender, Youth, Sports and Culture in which department recruitment had taken place.

16. Counsel for the respondent at this point applied to have RW1 declared a hostile witness which prayer was granted by the court and court allowed counsel for the respondent to cross examine RW1. RW1 insisted under cross examination that the claimants were properly recruited. That they reported to work and started working and that he was not aware if their appointment had been nullified. RW1 stated that 54 positions were advertised and not 58 though the document had shown 20 positions to be advertised. RW1 said not all departments had clocking system. RW1 said he was CEC between 2013 to October 2017. RW1 under cross examination by counsel for CEC stated only 20 positions had been requisitioned. That RW1 had however tabled a document to have a phased recruitment of 54 officers at the County Assembly. That 25 positions were advertised on 17th June 2016. RW1 stated that he appointed one Thomas Nyariki as acting Chief Officer, when the Chief Officer was on leave.

17. That Thomas Nyariki was accounting officer. That Thomas Nyariki was given authority to sign deployment letters on behalf of the Chief Officer. RW1 stated that he was unable to reach the Chief Officer at the time. That the substantive chief officer was Ernest Morare. RW1 confirmed that Ernest Morare subsequently denounced the letters purportedly written on his behalf to deploy the claimants in his absence by Thomas Nyariki. RW1 stated that he was pushed to sign a letter recommending to the Board to nullify the appointment of the claimants. RW1 stated some of the recruited 54 employees were on secondment. RW1 stated that he was aware the secondment was revoked in April 2016. RW1 insisted he was not aware that the recruitment was nullified by the secretary public service Board on 24th January 2017.

Determination

18. The issues for determination are:

- (i) Whether the claimants have made out a case for a permanent injunction restraining the respondents from nullifying their appointments.
- (ii) Whether the claimants are entitled to the claimed arrear salaries at all.
- (iii) Whether the claimants are entitled to any other relief as prayed or at all.

Issue (i) and (ii)

19. The claimants seek a mandatory injunction to compel the respondents to:

- (i) Pay arrear salary for the month of October 2016 to date.
- (ii) Prepare and insert the names of the claimants in the payroll of the respondent and deduct NSSF and NHIF.

20. It is common cause that eight (8) named claimants have since withdrawn from the suit and any orders made herein shall not affect them. These include Charles Nyakwama, Jared Mbeka, Mary Moraa Mamboleo, Kennedy Nyachio Nyachoki, Nyariki Peter OKinyi, Jackson Okello Nyanumbe, Jones Gori Ogari and Eucabeth Kerubo Okwara.

21. These officers are said to have lost interest in this suit upon being employed by the respondents.

22. From the testimony before court, it is not in dispute that 25 positions were advertised vide daily nation newspaper of 7th June 2016 by the respondent through the office of the County Public Service Board. The positions were in the department of gender, Youth, sports, Culture and Social Services.

23. Despite the advertisement of 25 positions, evidence before court has established that 58 persons were recruited and received letters of appointment by the Public Service Board dated variously in September and October 2016. There is conflicting evidence whether the 58 officers reported to work at all or whether they were deployed to various departments in the Department of Gender.
24. It is not in dispute that the letters of appointment placed the claimants on six (6) months' probation. There is no evidence before court indicating that any of the claimants discharged any particular service on behalf of the respondents although RW1 stated that the claimants reported to the gender department. RW1 did not provide any tangible evidence that any or all of the claimants performed any specific work.
25. It is not in dispute that following complaints by the Public and eventually by Ethics and Anti-Corruption commission in the manner the recruitment was undertaken, the public service Board nullified the appointment of the claimants by letter dated 24th January 2017.
26. This followed attention drawn to the Governor by the department of human resource of the various complaints by members of the public in the manner the recruitment was done on 25th October 2016. Indeed a letter dated 24th October 2016 by the chief officer Mr. Thomas Ongeru Ceri and directed to the County Director Human Resources directed that the recruited officers should not be accepted by the Human Resource office until the recommendation by the chief officer to nullify the process of recruitment dated 19th October 2016 had been responded to.
27. In the suit the claimants seek payment of salaries for the month of October, November, December 2016 and January 2017 since the suit was filed on 19th January 2017.
28. CW1 and CW2 conceded in their testimony that their work was frustrated by the respondents. There is no evidence that the claimants performed any work for the respondents at all to warrant payment of arrear salaries claimed. What is clear is that an alleged irregular recruitment of the claimants had been nullified three (3) months down the line by the Public Service Board on grounds of irregularity.
29. It has been proved that only 25 positions were advertised. No basis has been placed before court for the eventual recruitment of 58 employees. It is also not in dispute that initial requisition was only for 21 employees. No tangible evidence was placed before court from where the requisition and budgetary allocation for recruitment of 58 employees in the Ministry of Gender came from. RW2 categorically testified that no such requisition or budgetary allocation had been made by the department of Gender. Contradictory evidence adduced by RW1 did not appear credible at all as it was not supported by any documentary evidence.
30. The claimant did not make any prayer in the statement of claim for a declaration that the purported recruitment and appointment was lawful and proper. The claimants only sought mandatory injunction to be included in the payroll, salaries paid and statutory deductions made.
31. The burden of proving that the claimants were recruited by the respondents in terms of the law and procedure in place is on the claimants on a balance of probabilities in terms of Sections 107 and 108 of the Evidence Act Cap 80 Laws of Kenya. The respondents bear the burden of rebutting any cogent and credible evidence placed before court by the claimants to prove that they were lawful employees of the respondent; that they had lawfully discharged their duties but had not been paid their salaries.
32. It is the court's considered finding that CW1 and CW2 did not discharge the onus placed on the claimants to prove on a balance of probabilities that they were lawfully and fairly appointed by the Nyamira County Public Service Board to serve in the respective positions in the department of Gender.
33. CW1 and CW2 also failed to prove that the 58 claimants reported to work and discharged duties for the respondents in the department of Gender between the months of October 2016 and January 2017.
34. To the contrary, RW2 ably demonstrated that the recruitment and appointment of the claimants by the Nyamira County Public service Board was irregular in that it did not follow laid down procedures and no budgetary allocations had been put in place to support appointment of 58 officers in the Department of Gender as at the time the recruitment took place.
35. RW2 also ably demonstrated that the appointments were timeously objected to by members of the public, the county Assembly and CEC Ministry of Gender directed the Director Human Resources not to receive the appointees and recommended to the Board to nullify the appointments.
36. The court is satisfied that the claimants did not provide services to the respondents and are therefore not owed any arrear salaries by the respondents.
37. Furthermore, the irregular appointments were on probatory basis and the respondents were entitled to terminate the appointments at any time and without notice during the six months' probation period. The appointments were subject to confirmation after the six (6) months period which eventually did not take place.
38. The claimants were however placed in limbo between the months of October 2016 to January 2017 and the court would have considered an award of damages for breach of contract had the same been pleaded by the claimants. The claimants have not made any such claim for breach of contract.
39. Grant of mandatory permanent injunction must follow prove of the requisites of such a grant on a balance of probabilities. The aforesaid analysis of evidence shows that the claimants failed to prove that they are entitled to the reliefs prayed for. Such an order would have amounted to unjust enrichment of the claimants to the detriment of the Public contrary to the dictates set out by the Supreme Court in *Giturui Munya* case on the requisites of issuing injunctions in public litigation matters.

40. Therefore, and in answer to issue (i), (ii) and (iii) the suit by the claimants lack merit. The claimants are not entitled to any of the reliefs sought and the entire claim is dismissed.

41. The claimants were inconvenienced by the respondents in circumstances not of their own making. The respondents failed in their statutory and constitutional duty to recruit and appoint the claimants in a lawful and fair manner to their loss and detriment.

42. The court therefore makes no order as to costs in this matter.

Judgment Dated, Signed and delivered this 7th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Sagwe for Claimants

Mr. Ndege for Respondents

M/S Amajong for Interested party

Chrispo – Court Clerk