



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**  
**AT MERU**  
**CAUSE NO. 58 OF 2018**  
**CONSOLIDATED WITH CAUSE NO. 57 OF 2018**  
**AND**  
**CAUSE NO. 56 OF 2018**

- 1. PURITY NJERU KATHENYA**
- 2. DENNIS MUTHOMI KINYUA**
- 3. DAVID GITONGA KAURA.....CLAIMANTS**

**VERSUS**

- THARAKA NITHI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**
- THARAKA NITHI COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The suits by the Claimants were for alleged unfair and unlawful termination from employment. The 1<sup>st</sup> Claimant (Claimant in Cause 58 of 2018) was a senior clerical officer and was employed on 1<sup>st</sup> August 2016. She averred that she was issued with a show cause letter and her salary stopped in November 2017. She averred that the failure to pay her salary amounted to constructive dismissal and she thus sought an order injuncting the 1<sup>st</sup> Respondent from withholding her salaries, immediate and unconditional reinstatement on the 1<sup>st</sup> Respondent's payroll, general damages for pain suffering and anguish for loss of livelihood, costs of the suit plus interest at court rates and any other relief as the court may deem just and fit to grant. The 2<sup>nd</sup> Claimant (Claimant in cause No. 57 of 2018) averred that he was employed as a support staff by the 1<sup>st</sup> Respondent. He averred that his salary had been withheld from November 2017 and that the failure to pay his salary amounted to constructive dismissal. He thus sought the grant of an order injuncting the 1<sup>st</sup> Respondent from withholding his salaries, immediate and unconditional reinstatement on the 1<sup>st</sup> Respondent's payroll, general damages for pain suffering and anguish for loss of livelihood, costs of his suit plus interest at court rates and any other relief as the court may deem just and fit to grant. The 3<sup>rd</sup> Claimant (Claimant in Cause No. 56 of 2018) averred that he was employed as a chief driver in the office of the Governor from 9<sup>th</sup> August 2013 and was deployed on 9<sup>th</sup> September 2013 to serve as a driver to the Governor. He averred that he had not been paid his salary from September 2017 to date and that the failure to pay his salary amounted to constructive dismissal hence his prayers to court for an order injuncting the 1<sup>st</sup> Respondent from withholding his salaries, immediate and unconditional reinstatement on the 1<sup>st</sup> Respondent's payroll, general damages for pain suffering and anguish for loss of livelihood, costs of his suit plus interest at court rates and any other relief as the court may deem just and fit to grant.

2. The Respondents filed a joint defence in which they averred that the Claimants had illegal contracts of employment and that the claims were founded on forged documents purporting to be letters of appointment. The Respondents averred that the letters were issued without the authority of the 2<sup>nd</sup> Respondent and were therefore null and void. The Respondents further assert that the claims fell under the rule in **Mapis Investments (K) Ltd v Kenya Railways Corporation [2006] eKLR** which forbids the enforcement of illegal contracts when the illegality comes to the attention of the court. The Respondents averred that the letters of appointment were in usurpation of the powers of the 2<sup>nd</sup> Respondent under Section 59 of the County Governments Act wherein it established offices and appoints officers to the offices so established. The Respondents averred that the Claimants had no enforceable claims against them and that the forged letters did not accord with the national principles and values under Article 10 of the Constitution as the posts were not competitively filled. The Respondents sought the dismissal of the claims with costs.

3. As the suits raised similar issues and involved the same firms of Advocates for the Claimants and the Respondents, I have issued one judgment in respect of the 3 files.

4. The Claimants all testified as did the Respondents' witness Stephen Nthiga Mitugo the Chair of the 2<sup>nd</sup> Respondent. In short the Claimants asserted they were not paid their dues and upon that occurrence sought relief from Court. The Respondents' witness stated that the Claimants were not entitled to the relief sought as they were not employed properly. He stated that there was a staff audit which found the employees were strangers to the Respondents.

5. The Claimants submitted in support of their claim and assert their employment was terminated without cause. They submitted that they had worked even after being issued with the letters to show cause but were not paid any salary from that point on. The Claimants submitted that though the Respondents assert that the Claimants had obtained their employment through forged letters they had not been called for a hearing of their cases in respect of the forged appointment letter alleged to have been made by Mr. Kanga. They submitted that in light of this the decision to withhold their salaries on the basis of the show cause letters is unfair and illegal as the Respondent have failed to accord the Claimants due process as provided for under Article 47 of the Constitution and Section 41(2) of the Employment Act before withholding the salaries. The Claimants submitted that they were entitled to the grant of the permanent injunction sought as the Respondents labour to continue with the intended disciplinary process against the Claimant.

6. The Respondent submitted that the Claimants claims are founded on a forged document purporting to be a letter of appointment purported to be issued to them by the 2<sup>nd</sup> Respondent. The Respondents submitted that the illegal purported appointment was regularized through a forged letter signed by Mr. Kenneth Kanga. They submitted that the said Mr. Kanga was found by this court to have issued such letters without the authority of the 2<sup>nd</sup> Respondent. It was submitted that Mr. Kanga usurped the 2<sup>nd</sup> Respondent's powers under Section 59 of the County Governments Act. The Respondent submitted that the new Governor undertook a review of the operations of the Respondents during the stewardship of the former Governor S. M. Ragwa and discovered that the Claimants were ghost works claiming salaries from the 1<sup>st</sup> Respondent and appropriate action was taken to stop the Claimants from receiving the moneys by false pretences. The Respondents relied on the case of **Macfroy v United Africa Company Limited (1961) 3 All ER 1179** on the issue of illegal contracts where it was held:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The Respondent further submit that the Claimants' contracts fall under the rule in **Mapis Investments (K) Ltd v Kenya Railways Corporation, Court of Appeal at Nairobi, Civil Appeal No. 14 of 2005** (unreported) which forbids the enforcement of illegal contracts when the illegality comes to the attention of the court. The Respondents submit that the hiring of the Claimants were illegal, null and void. Relying on the case of **Republic v Secretary, County Public Board ex parte Hulbal Gedi Abdille [2015] eKLR** the Respondents submitted that there can be no valid contract where the provisions of the County Governments Act Section 65 and 66 are not complied with. The Respondents submitted that under Section 59(1) of the County Governments Act, 2012 it was only the 2<sup>nd</sup> Respondent which can appoint a person in office in the service of the Respondents. The Respondents cited the treatise by **Cheshire, Fifoot & Furnson's Law of Contract 16th Edition pages 450-501** for the argument that at common law a contract to commit a crime or tort or fraud on a third party is not enforceable. The Claimants, it was submitted could not enforce the contracts they entered into as at common law, a contract to commit a crime or tort or fraud on a third party offends the conscience of the court and/or public policy and is thus unenforceable. The Respondents relied on the case of **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** and submitted that the Claimants ought to have appealed to the Public Service Commission in terms of Section 77 of the County Governments Act instead of coming to court in the first instance. The Respondents argued that failing to take the remedy prescribed in law the Claimants had jumped the gun so to speak and therefore had unfounded claims. The Respondents urged the dismissal of the Claimant's claim.

7. The Claimants' filed suits which are alleged to have been premised on fraudulent contracts of employment. The dispute is one that occurred after the enactment of the County Governments Act. As there was an assertion the Respondents unlawfully terminated the contracts, and provisions of Section 77 of the Act were to kick in. The suits therefore offended the provision of Section 77 of the County Governments Act as the Claimants should all have lodged appeals to the Public Service Commission as prescribed before coming to court. The decision of **James Tinai Murete & Others v County Government of Kajiado & 22 Others (supra)** applies to the 3 cases. In that case Mumbi Ngugi J. (as she then was) held:-

...This can properly only be done by a body hearing the appeal from the decisions made, and in my view, the body best placed to make such enquiries is the Public Service Commission. It is for this reason, I believe, that the legislature placed appeals and disputes with respect to appointments in counties with the Public Service Commission.

In the circumstances, I find that the issues raised in the present petition should have been raised before the Public Service Commission, which has the statutory mandate under section 77 of the County Governments Act to deal with such disputes.

I agree with the learned Judge of Appeal and find that the Claimants' cases before me were filed prematurely as the mandatory procedure under Section 77 does not give the aggrieved party any discretion as to whether the party will apply the procedure therein or move the court. In my considered view the suits are only fit for dismissal and are accordingly dismissed but each party will bear their own costs.

It is so ordered.

**Dated and delivered at Meru this 3<sup>rd</sup> day of October 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true Copy of the original

**Deputy Registrar**