

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 263A OF 2016

JOHN THOMAS NGUGI MBAU.....CLAIMANT

VERSUS

THE COUNTY PUBLIC SERVICE BOARD OF KIAMBU.....ESPONDENT

JUDGMENT

1. The Claimant sued the Respondent and averred that on 13th November 2014 it advertised the position *inter alia* of Director-County Physical Planning Department. He averred that he applied and was shortlisted for interview and appointed on 26th March 2015 for a term of 3 years effective 1st April 2015. The Claimant averred that the Respondent issued a circular on 13th September 2016 directing all senior county office holders that require statutory professional registration to submit certified copies of their registration with the respective bodies on or before 19th September 2016. The Claimant averred that on 4th October 2016 he wrote to the County Secretary Kiambu who sits on the Board indicating that he was not registered with the Physical Planners Registration Board and offered to regularise the position. The Claimant averred that on 6th October 2016 he was summarily and unlawfully suspended from his position and directed to hand over all the county property to the Chief Officer, Land Housing and Physical Planning with immediate effect followed by a show cause letter on 4th November 2016. He averred that the suspension without affording him an opportunity to defend himself was unlawful, unconstitutional and contrary to the provisions of the Fair Administrative Actions Act 2015 Section 4 and 6 thereof and ultimately in breach of contract. He sought a declaration that the Respondent was in breach of the Claimant's constitutional rights to fair administrative action, lawful procedural action and natural justice; conservatory orders against the Respondent against the Respondent from filling the position of the County Director of Physical Planning until the expiry of the contract between the parties and/or the Claimant's employ be reinstated; in the alternative and without prejudice, payment of all salary and final dues payable to the end of the contractual period; and costs of the suit and interest at court rate.

2. The Respondent in its response to claim averred that the position of Director – County Physical Planning Department was advertised on 13th November 2014 and qualified persons from the public invited to apply. Key qualifications for the position included *inter alia* a Masters Degree in urban and/or regional planning from a recognised university, be a registered planner of five years or more with the Physical Planners Registration Board, must have been a corporate member of a recognised professional society (Kenya Institute of Planners or Architectural Association of Kenya Town Planners Chapter). The Respondent averred that the Claimant was appointed to the position after shortlisting and interview. The Respondent averred that the memo of 13th September 2016 required all senior county office holders to submit certified copies of their registration by their respective statutory professional registration and that the Claimant wrote on 4th October 2016 indicating that he was not registered with the Physical Planning Registration Board and that even at the time of employment he was not registered. The Respondent averred that the Claimant went further to explain that he had made an effort to undertake professional examinations for the next sitting which was tentatively in March 2017. The Respondent averred that from the communication received the Claimant was not qualified and did not fulfil a basic requirement for appointment to the position. The Respondent averred that this was contrary to Section 21 of the Physical Planners Registration Act which required that unregistered persons not to practice as physical planners. The Respondent averred that it was in the public interest that the position of Director County Physical Planning be a person registered with the Physical Planning Registration Board. The Respondent averred the documents prepared by the Claimant while acting as Director County Physical Planning would be considered incompetent or invalid thus placing the Respondent in a vulnerable position. The Respondent averred that the Claimant was suspended on 6th October 2016 and a notice to show cause issued on 4th November 2016. The Respondent averred that the Claimant filed the claim on 18th November 2016 prematurely without the Human Resource Advisory Committee having heard the Claimant. The Respondent averred that the Claimant had not exhausted all the internal mechanisms in place before filing the claim before court. The Respondent averred that on 8th December 2016 the Claimant was invited to appear before the County Human Resource Advisory Committee on 13th December 2016 at 2.00pm. The Respondent averred that the Physical Planning Registration Board wrote to the Respondent on 20th January 2017 and notified it the Claimant was not a registered Physical Planner. The Respondent averred that the Claimant appeared before the County Public Service Board on 27th February 2017 and admitted that he was not a registered physical planner. The Respondent averred that on 16th March 2017 the Claimant received the letter conveying the decision of the County Public Service Board to summarily dismiss the Claimant from the position of Director – County Physical Planning Department. The Respondent averred that the Claimant was allowed 30 days to appeal the decision of the County Public Service Board and that the Claimant wrote to the Respondent on 12th April 2017 seeking that it reviews the decision communicated on 16th March 2017 but the Board upheld the decision. The Respondent averred that the suspension was not summarily or unlawful and that the Claimant moved the court prematurely. The Respondent averred that the claim was an abuse of the court process as the Claimant was given an opportunity to defend himself and make representation when he appeared before the Board. The Respondent averred there was no evidence of any rights of the Claimant that were infringed as to make the court issue the orders sought by the Claimant. The Respondent urged the court to dismiss the claim which lacked merit, was premature and substantially premised on presumptions, apprehensions and conjecture with costs.

3. The Claimant testified reiterating the substance of his claim. He stated that he was not heard before the suspension and that the decision to suspend him was arbitrary and contrary to the rules of natural justice. He sought the relief in his claim. The Respondent did not offer any evidence.

4. The Claimant filed submissions in which he asserts that he wrote indicating that he was a member of the Kenya Institute of Planners but was yet to register with the Physical Planners Registration Board but would regularise the situation in due course. He stated that he was suspended and by letter of 6th October 2016 his employ was summarily terminated. The Claimant submitted that his request for an appeal was totally disregarded. He submitted that due process was not followed by the Respondent. The Claimant submitted that the insistence that the Claimant ought to have been registered with the Physical Planners Registration Board was obviously a variation of the contract of employment already entered into by the parties. He cited Section 10(5) of the Employment Act and submitted that it was a general rule that an employer is barred from unilaterally altering the terms of the contract. He cited the case of **Rose Achieng Mihudhi v Jos Hansen & Soehne (E.A) Limited [2015] eKLR** for this proposition and urged the court to find in his favour.

5. The Respondent submitted that there was no valid contract of employment as the Claimant was not qualified to hold the position he had at the Respondent as the contract had been entered into by the parties on the basis of mistake and non-disclosure of material facts. The Respondent submitted that it rescinded the contract by terminating the said contract in a lawful and procedural manner. The Respondent submitted that it did not vary the contract and that the memo issued was a reinforcement of the law already in place and a compliance mechanism to ensure the County operations were not compromised in any way. The Respondent submitted that it followed due in terminating the Claimant's employment. The Respondent cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** and submitted that due process was followed in terms of Section 41 of the Employment Act. It submitted that under Section 77 of the County Governments Act 2012, the Claimant was required to appeal the decision made to the Public Service Commission. The Respondent submitted that the claim was not merited and it should be dismissed with costs. It cited the decision in **Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR** on the issue of costs as the claim was premature and an abuse of the court process.

6. The Claimant's claim was misconceived and an abuse of the court process. He was not terminated on 6th October 2016 as he asserts in his submissions. In fact his claim was not on termination but the suspension meted out in October 2016. There was merit in the requirement for registration and even in the advert for the position the Claimant was on notice that the Respondent required the certification. The Claimant abused the court process by coming to court prematurely and without any lawful basis. His claim was misplaced as he was heard, his defence considered and termination ensued. He was allowed to appeal but the appeal was for just cause declined. In the court's considered opinion the suit ought not have seen the light of day. The claim is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 26th day of November 2019

Nzioki wa Makau

JUDGE