

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 55 OF 2018

BRIAN WIBO MUGENDI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF THARAKA NITHI.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD,

THARAKA NITHI.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents seeking recompense for his dismissal. He averred that he was employed by the 2nd Respondent on 22nd January 2014 effective 3rd January 2014 as a finance officer ICT support in job group J. He averred that on 27th December 2017 he was admitted at Consolata Hospital Nkubu where he underwent an operation and treatment for asthma. He averred that after the operation he was given 2 weeks sick leave which was extended. The Claimant averred that after the expiry of the sick leave he applied for and was granted annual leave from 5th February 2018 up to 16th March 2018 and upon resumption of duty discharged his duties diligently until 13th April 2018 when he was told that his name had been removed from the 1st Respondent's payroll during biometric registration exercise by all employees working in the establishment of the 1st Respondent. The Claimant averred that he was issued with a notice to show cause on 19th April 2014 purporting that he had absconded duty from 19th December 2017 up to 8th April 2018. He was shocked by the allegations of absconding duty as he initially had been on sick leave and later annual leave in the period he was accused of absconding duty. The Claimant averred that he responded to the notice to show cause and explained that he had been on sick leave and annual leave during the period he was accused of absconding from work. He averred that despite explaining the circumstances of absence from duty the Claimant was not paid his salary from April to May 2018. He averred that he was never called for a hearing of his case despite having responded to the notice to show cause. He thus sought a declaration that the Respondents had violated the Claimant's right to fair labour practices by illegally and unprocedurally and arbitrarily deleting his name from the payroll and that the Respondents unilaterally and without colour of right withheld the Claimant salaries for the month of April and May 2018 and have thereby constructively terminated the Claimant's employment without affording him a fair hearing contrary to Section 41(1) of the Employment Act and Article 41(1) and (2) of the Constitution of Kenya, 2010. The Claimant sought an order compelling the Respondent to pay forthwith the withheld and unpaid salaries from April 2018, an order for reinstatement to his position as ICT support job group J as well as costs of the claim and interest.

2. The Respondents filed a defence in which they averred that the suit was a fraudulent one filed to enforce an illegal contract of employment allegedly entered into by the Claimant and the Respondents. The Respondents averred that the Claimant founded his claim on his appointment letter issued on 22nd January 2014 by Kenneth Kanga who had no legal authority to recruit anybody. The Respondents averred that on 17th November 2015 the Claimant was purportedly confirmed in appointment by H.G. Kinyua Chief Officer, Public Service and Urban Development. The Respondents averred that the said H.G. Kinyua usurped the 2nd Respondent's powers under Section 59 of the County Governments Act. The Respondents further averred that according to the letter of appointment the Claimant was required to sign and return the letter to Kenneth Kanga the acceptance of the offer but did not do so and consequently no contract came into existence. The Respondents averred that the new Governor after election undertook a review of the operations of the Respondents during the stewardship of the previous Governor and discovered that the Claimant was a ghost worker who was claiming salaries from the 1st Respondent. The Respondents contend that the purported contract relied on by the Claimant falls under the rule in **Macfoy v United Africa Company Ltd (1961) 3 All ER 1179** and the rule in **Mapis Investments (K) Ltd v Kenya Railways Corporation Civil Appeal No. 14 of 2005** which forbids the enforcement of an illegal contract when the illegality comes to the attention of the court. The Respondents urged the dismissal of the claim asserting that the Claimant is not entitled to any of the reliefs claimed in the claim.

3. The Claimant and the Respondent's witness Mr. Stephen Nthiga Mitugo the Chairman of Tharaka Nithi Public Service Board testified. The Claimant stated that he was working for the 1st Respondent as ICT support officer of the county. He testified that he had a hernia surgery and communicated this to the office and had one month off duty. He thereafter applied for one month annual leave and resumed work on 19th March 2018 and when he went for the biometric registration on 13th April 2018 he was told his name was not on the payroll by the HR officers conducting the exercise. He stated that he continued to perform his duties until 19th April 2018 when he was given a show cause letter why he had absconded from duty from 18th December 2017. He responded to the show cause and stated that he has not received salary from then to the date of the hearing. He testified that he was not called for the hearing of his case. In cross-examination he stated that he was given an appointment letter dated 22nd January 2014. He stated that the position was advertised in the Nation Newspaper and he applied, was shortlisted and was called for interview and appointed. He stated he could not recall the names of the interview panel. He testified that the requirement was a diploma in computer science. He stated that he had already finished his diploma at Chuka University but graduated in October 2014. He said that he was employed 9 months before he graduated. He stated that he received his provisional transcript the day he received his appointment letter. He testified that he was admitted and after the operation had 2 weeks sick leave and the discharge was on

30th December and he went for review in January 2018. He stated that he sent his colleague David Miriti who worked in finance department to forward the document and also sent a message to Madam Dorothy Koki the CEC. He stated that he applied for leave and that his boss Mr. Mbaka is the one who wrote the letter to show cause. He received the letter in his office when it was handed over to him by director Manduku. He stated that he was granted annual leave. He testified he was in the office in August 2017 and that he participated in the audit and during the biometric exercise was told he was not in the payroll. He stated that he tried to register and followed up with the HR department and payroll to have the issue resolved. He stated that he tried his best to register and that it was not his fault that he was not registered. He was re-examined and stated that he was informed his name was not on the payroll and that he was issued a letter on 10th December 2013 from Chuka University which showed he was awaiting graduation. He testified that he was appointed in January 2014 and that he was qualified and the only thing he awaited was the graduation. He said that he applied for leave and that he was legally on leave. He stated he was not called for disciplinary hearing.

4. The Respondent's witness testified that he was the chair of the 2nd Respondent and adopted his stated which was to the effect that the 2nd Respondent recruits staff for the 1st Respondent. He stated that the Claimant was appointed vide a letter dated 22nd January 2014 initially made by Mr. Kenneth Kanga who is facing criminal charges in Chuka Law Courts for abuse of office which resulted in people appearing in the payroll of the 1st Respondent and being paid salaries. He stated that the said Kenneth Kanga had been found by this court to have issued such letters without authority of the 2nd Respondent and that the said letters were null and void. He stated that on 17th November 2014 the Claimant was purportedly confirmed into employment by Mr. H.G Kinyua who is not a member of the 1st Respondent and had no power to do so. He stated that the Respondents do not hold the purported acceptance of offer from the Claimant. He was cross-examined by counsel for the Respondent stating that the Claimant had not been working since he went on leave and he is still not present hence why he is not paid. He testified that after the audit of all staff they established that the Claimant was irregularly engaged and that the Board never gave him a letter of appointment. He referred to the Claimant's bundle and stated the letter of appointment was from Kenneth Kanga the secretary of the 2nd Respondent. He stated that that it was not a letter of appointment as it emanated from the office of the Governor and that Kanga was not the Chairman but secretary of the Board and that he issued fraudulent letters. He stated that Kanga is before court facing charges of fraud. He testified that the Claimant's letter is fraudulent and that the Claimant was a stranger to the Board. He stated that the Claimant was summoned through the show cause letter through his department for this procedure of discipline. He stated that the Claimant refused to come. He testified that Kinyua was a chief officer and not a member of the Board. He stated that the Claimant will not be paid salary until he responds to the show cause letter and if he responds he will be given a hearing. He stated that the biometric system shows the Claimant is not working. In re-exam he testified that the appointment was by Kanga who had no legal authority to issue the letters and that the letters were null and void. He stated that chief officers are not members of the Board. That marked the end of oral testimony.

5. The Claimant submitted that the Respondents had struck out the Claimant from its payroll. He submitted that the Respondents had yet to call him for a hearing of his case despite having been issued with a show cause. The Respondent was thus stated to have abridged the Claimant's constitutional rights to fair administrative action contrary to Article 47 of the Constitution and Section 41(2) of the Employment Act. He submitted that his removal from the payroll without according him a hearing was unfair labour practices contrary to Article 41(1) of the Constitution which guarantees the Claimant the right to fair labour practices.

6. The Respondents submitted that the Claimant by letter of 22nd January 2014 was appointed to the position of Finance Officer ICT and that the 2nd Respondent did not appoint him. The Respondents submitted that the Claimant had not registered with the Respondents through the biometric registration which commenced in August 2017. The Respondents submitted that the Claimant was issued with a show cause letter on 19th April 2018 and responded on 24th April 2018. The Respondents submitted that the Claimant did not have the requisite qualification at the time he was appointed and that alone was grounds for the dismissal of the Claimant's claim. The Respondents submitted that on the strength of Sections 65 and 66 of the County Governments Act and Article 10 of the Constitution, the Claimant's appointment did not comply with the law. The Respondents submitted that relying on the case of **Republic v Secretary, County Public Service Board & Another Ex parte Hulbai Gedi Abdile [2017] eKLR** the Claimant cannot have a valid contract. The Respondents submitted that only the 2nd Respondent by virtue of its mandate under Section 59(1) of the County Governments Act, 2012 has the authority to appoint a person in the service of the Respondents. The Respondents cited the treatise by **Cheshire, Fifoot & Furmson's Law of Contract, 16th Edition pages 450 - 501** and relied on an extract of a passage at page 462 of the book where the authors state that there is no need to stress the obvious fact that an agreement is illegal and void if its object direct or indirect is the commission of a crime or a tort. The Respondents also relied cases of **Nabro Properties Limited v Sky Structures Limited (2002) Vol. 2 KLR 299** and **Mapis Investments (K) Ltd v Kenya Railway Corporation [2006] eKLR** for the proposition that it is a maxim of law recognized and established that no man shall take advantage of his own wrong. The Respondents submitted that the Claimant was by virtue of the County Governments Act Section 77 required to appeal to the Public Service Commission. They cited the case of **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** as well as the case of **Jude Riziki Kariuki v Tharaka Nithi County Government & Another [2019] eKLR** as well that of **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR** for the proposition that an appeal to the Public Service Commission was the proper course. The Respondents cited the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** for the proposition that where there is a clear statutory imperative given the procedure should be followed. On reinstatement the Respondents submitted that the remedy of reinstatement should be sparingly given as such an order will be difficult to enforce and that it could be plainly wrong to impose an employee on a reluctant employer. The Respondents submitted that on the strength of **Stephen Munene Njagi & Another v Tharaka Nithi County Government & Another [2017] eKLR** that he appointment of the Claimant by the Governor was unlawful. The Respondent urged the dismissal of the Claimant's claim.

7. The court has considered the pleadings, testimony adduced, submissions of parties and the authorities cited in coming to this decision. The law is settled as far as the issue of procedure prescribed by statute as where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. As held in the cases of **James Tinai Murete & Others v County Government of Kajiado & 22 Others (supra)** and the case of **Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille (supra)**, both the High Court decision and the Appeal decision **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille (supra)** the law does not envision a situation where the litigants chose what part of a statute to follow. In the case of **Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille (supra)** the Court of Appeal stated

There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution

mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance. In terms of Republic v National Environment Management Authority (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.

8. The Claimant should have approached the Public Service Commission in terms of Section 77 of the County Governments Act as held. The Claimant's claim fails on one additional score, he joined the employ of the Respondents before he attained the qualification necessary for the position which he held. He was however confirmed in employment by the Respondent and served until the suspension by the Respondents and because he was unprocedurally employed he would be unable to recover even if he had proved his case on the strength of the Latin maxim *ex turpi causa non oritur actio* – from a dishonorable cause an action does not arise. I therefore dismiss his claim but order that each party bears their own costs.

It is so ordered.

Dated and delivered at Nyeri this 19th day of November 2019

Nzioki wa Makau

JUDGE