

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 275 OF 2016

PETER MACHARIA MAINA.....CLAIMANT

VERSUS

NYERI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI.....2ND RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent and averred that he was employed by the 2nd Respondent having been transitioned from the defunct Nyeri Municipal Council as a law enforcer. He averred that he worked as a law enforcer, municipal council auditor, municipal council legal clerk/court prosecutor, county public service records officer and that he was deployed to those capacities without any formal letter of employment or a new contract entailing the terms and conditions of those engagements. He averred that he had therefore been engaged in extra duty without pay and that he was entitled to extra pay in lieu of promotion in line with the CBA dated 18th February 2013. He thus sought acting allowance – Kshs. 213,624/-, special duty allowance – Kshs. 180,518.67 and extraneous duty allowance – Kshs. 168,000/- (@7,000 pm x 24 months).

2. The Respondent in its defence averred that the Claimant had remained in the job of a law enforcement officer and that the 1st Respondent was in the process of redesigning jobs for all the employees that were absorbed from the defunct municipal council. The Respondent denied the Claimant worked in all the alleged departments as the Respondent retained prosecutors and the Claimant never served as one. The Respondent averred that the Claimant had to help with the preparation of court cases as an enforcement officer. The Respondent urged the dismissal of the suit with costs.

3. The matter was determined on the basis of documentation in terms of Rule 21 of the Rules of this Court. The Claimant filed submissions in which he asserted that he was redeployed as evidence by his letters from the predecessor municipal council. He referenced the letter of 7th January 2011 in which he applied for the position of legal counsel. He cited the letter of 20th May 2011 which assigned him duties of legal counsel and his letter of 16th June 2011 which confirmed he served as legal counsel. He cited the various memos and letters and communication in relation to his appointments and deployments.

4. The Respondent submitted that the Claimant had not proved that he was entitled to the prayers in his claim. The Respondent cited Sections 107(1) and 109 of the Evidence Act and submitted that the Claimant had a burden of proof that he was entitled to the sums sought as the differential on the various jobs. The Respondent cited the case of **Patrick Lumumba v Prime Fuels (K) Limited [2018] eKLR** and submitted that though it is appreciated that the Employment Act enjoins the employer to keep records, that did not absolve an employee from discharging the burden of proving their claim. The Respondent submitted that the Claimant had not proved he was entitled to the promotion to a higher salary scale. The Respondent submitted that the Claimant had failed to file the suit for extra allowances within 3 years as stipulated under Section 90 of the Employment Act. The Respondent thus urged the dismissal of the suit with costs.

5. The Claimant was at one point in service of the Respondent in all the positions he indicated as shown by the body of correspondence the parties produced. He was a prosecutor not counsel for the Respondent. The Respondent surely could not have engaged external counsel to prosecute petty offenders and as the letters from the Deputy Town Clerk and Town Clerk show, the Claimant worked as a prosecutor and often registered cases for prosecution against petty offenders. He however failed in the task of demonstrating he was not paid for the various extra duties he alleges to have undertaken. The only aspect that finds traction is the Respondent's letter of 25th April 2015 acknowledging the Claimant acted as a records management officer from November 2014 to 24th April 2015. He would be entitled to the acting allowance for the position for the period he served therein. As regards the extraneous duty allowance the Respondent put payment of such allowances on hold and therefore being an allowance at the discretion of the employer it is beyond the purview of the court to grant it where it is unavailable to other employees. It is unfortunate that the staff who were deployed from the defunct municipal councils did not have a clear transition a failure that can be laid at the doorstep of the defunct Transition Authority.

6. In the final analysis only the sum claimed as acting allowance is granted being Kshs. 213,624/- as well as costs of the suit to scale. Judgment is entered for the Claimant against the Respondent for:-

a. Kshs. 213,624/-

b. Costs of the suit to scale

c. Interest on a) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 6th day of November 2019

Nzioki wa Makau

JUDGE