



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 457 OF 2017

HEZRON MWAMBIA KARONG'A.....CLAIMANT

VERSUS

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

THARAKA NITHI PUBLIC SERVICE BOARD.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for his alleged unfair termination. The Claimant averred that he was first competitively recruited by the 1st Respondent effective 14th August 2013 and was issued with a letter of appointment as a cook. He averred that he was deployed on 7th November 2018 as an Acting Procurement Assistant and later he was issued with confirmation in appointment on 26th January 2017 as a Cook Grade III by the 2nd Respondent and on 14th February 2017 was deployed as a Supply Chain Assistant. The Claimant averred that the terms of employment were contractual but later on the contract changed to permanent. He averred that he continued working as a Supply Chain Assistant up to 8th September 2017 when he was served with a termination letter. The Claimant averred that he was not subjected to a fair hearing hence the termination was illegal, null, void and contrary to the rules of natural justice. The Claimant averred that the termination letter indicated that every staff serving in the Governor's office had their services ending with the term of the Governor in accordance with the pleasure doctrine which was against the Public Service policy. The Claimant prays for his immediate and unconditional reinstatement to employment, payment of salaries and allowances arrears at Kshs. 17,870/- per month together with all lawful and due increments which continue to escalate until full payment as well as the costs of this suit.

2. The Respondents filed a joint defence and averred that the Claimant has no cause of action against them hence this suit is an abuse of the court process. The Respondents averred that any employee that was serving the Governor personally was given a contract for 5 years and the same was varied by the operation of law to the Governor's serving period as per the Constitution, the County Governments Act and the letter of appointment dated 14th August 2013. The Respondent averred that following his appointment as a personal cook to the Governor, the Claimant served in terms of his contract until it expired on 8th August 2017 as the Governor he was working for, lost in the 8th August 2017 General Elections and the Claimant's services were not transferable to the newly elected Governor. The Respondents averred that the Claimant was aware that his contractual period would run concurrently with the term of the Governor hence he has no claim against the Respondents. The Respondent was guided by the pleasure doctrine in terminating the services of the Claimant hence due process or fair procedure does not apply to a contract for a fixed period. The Respondents prayed that the suit be dismissed with costs.

3. The Claimant and the Respondent's witness Mr. Stephen Nthiga Mitugo testified. The Claimant adopted his statement as evidence in chief and the list of documents as exhibits. The Claimant stated that the contract was initially for 5 years but he was later confirmed to permanent and pensionable terms through a letter dated 26th January 2017. He testified that on 2nd November 2016 he was deployed to Sub-District Level 4 Hospital working as a procurement assistant where he was involved in tender document preparation, tender opening and tender processing. He said that he did not resume cooking duties as he was terminated while in procurement.

4. The Respondent's witness was Mr. Stephen Nthiga Mitugo the Chairperson of Public Service Board. He adopted his statement and documents as evidence in chief and testified that he is the one who authored the termination letter dated 8th September 2017. He stated that the Claimant was not employed by the Public Service Board and he was not given a hearing and/or notice as his services ended with those of the Governor as was indicated in the County Government Act.

5. The Claimant submitted that his employment was suddenly brought to an end though there was no fault on his part. He submitted that he was issued with a termination date that was past and relied on the case of **Lisper Kathure Mukuru v Tharaka Nithi County Government & Another [2018] eKLR** where the court stated that "*giving a termination date that is past is wrong and the claimant is entitled to compensation from the Respondents.*" The Claimant submitted further that it was confirmed by the Respondent's witness in his testimony that the Claimant's employment in the Governor's office was abrupt and the same was not accorded the due process prior to termination hence the Claimant is entitled to the reliefs sought as was decided in the case of **Lisper Kathure Mukuru v Tharaka Nithi County**

Government & Another (*supra*).

6. The Respondent submitted that the claim was not merited and relied on the case of **Republic v Secretary County Public Board & another Ex parte Hulbai Gedi Abdille [2015] eKLR** where Odunga J held that “*there cannot be a valid contract where such provisions of the County Government ‘s Act as Sections 65 and 66 and Art. 10 of the Constitution are not complied with*” and submitted that since the Claimant was not appointed by the County Public Service Board on 14th August 2013, the letter of appointment, even upon acceptance, does not constitute a valid contract and his case should be dismissed on that ground. The Respondents submitted that the Claimant obtained the purported letter of appointment of 14th August 2013 which was designed to enable him to obtain money from the Respondents by false pretence which is a criminal offence under Section 312 of the Penal Code. The Respondents submitted that the claim before the court was fraudulent as was held by the Court of Appeal in **Nabro Properties Ltd v Sky Structures Ltd (2002) Vol. 2 KLR 299**. The Respondents submitted that no party is allowed to benefit from its wrong. The Respondents submitted further that the Claimant’s contract is illegal and for that reason the claim is bad in and therefore unenforceable by the court and relied on the case of **Mapis Investment (K) Ltd v Kenya Railway Corporation [2006] eKLR**. The Respondents submitted that the decision to dismiss the Claimant was the decision of the County Public Service Board and the suit before the court is premature since according to Section 77 of the County Governments Act and as was decided in the case of **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** the Public Service Commission was the proper forum if the Claimant was dissatisfied with the Respondents’ decision. The Respondents submitted that the Claimant failed to follow the clear procedure as was prescribed and his claim should fail as was held in the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**. The Respondent submitted that reinstatement of an employee is a discretionary one, but no discretion can be exercised in his favour as it was established as a fact that he had procured his employment contract illegally. The Respondents submitted that the Claimant in his evidence disclosed that he was employed on 14th August, 2013 by a person other than the 2nd Respondent which is mandated to do so under the law. The Respondents submitted that the contract he relies on was therefore null and void *ab initio*. The Respondent submitted that by virtue of the rule in **Macfoy v United Africa Company Ltd (1961) 3 All ER 1179**, they are entitled to terminate his illegal employment and for the foregoing reasons the Respondents urged the court to dismiss the claim with costs.

7. The Claimant from the pleadings before the court was a jack of all trades. Be that as it may, by virtue of the County Governments Act and in particular Section 77 thereof, the Claimant ought to have approached the Public Service Commission. Section 77 of the County Governments Act materially provides as follows: -

77. (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) The Commission shall not entertain an appeal more than once in respect to the same decision.

..... (underline for emphasis mine)

The Claimant it would seem was obliged to approach the Public Service Commission if dissatisfied with the decision of the Respondents. The Claimant cannot argue, in the face of the clear provisions of section 77 of the County Government Act, that he could bypass the legislative provision above and come to this Court directly seeking reprieve for matters that were for the Public Service Commission to handle. As held in the case of **Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille** (*supra*) the law does not envision a situation where the litigants chose what part of a statute to follow. The foregoing is proof the suit is unmerited. Suit is dismissed but each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 18th day of December 2019.

Nzioki wa Makau

JUDGE